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LOS ANGELES GAS & ELECTRIC CO. v. AMALGAMATED OIL CO. (L. A. 2,387.)

(Supreme Court of California. Dec. 16, 1909.)

1. CONTRACTS (§ 335*)—ENTIRE CONTRACTS—ACTION FOR BREACH—PLEADING AND PROOF.

In an action for breach of an entire contract containing mutually dependent covenants, plaintiff must aver and prove that he has performed his covenants, or give a sufficient excuse for his nonperformance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1664–1676; Dec. Dig. § 335.*]

2. CONTRACTS (§ 171*) — CONSTRUCTION — ENTIRE OR SEVERABLE.

Whether a contract is entire or severable is a question of interpretation; the intent of the parties to be ascertained from the language employed and the subject-matter of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 754–757; Dec. Dig. § 171.*]

3. SALES (§ 62*)—CONSTRUCTION OF CONTRACT—WHEN SEVERABLE.

When the price of goods is expressly apportioned by the contract, or the apportionment may be implied by law to each item to be performed, the contract will generally be held to be severable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 175; Dec. Dig. § 62.*]

4. SALES (§ 62*)—CONSTRUCTION OF CONTRACT—WHEN ENTIRE.

A contract will be treated as entire even when the obligation of the one party consists of different acts to be separately paid for, where the nature and character of the agreement shows that it was intended to be entire.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 175; Dec. Dig. § 62.*]

5. SALES (§ 62*)—CONSTRUCTION OF CONTRACT—DEPENDENT COVENANTS.

An oil company agreed to sell and deliver to a gas company and the latter agreed to purchase and receive from the former, a sufficient quantity of crude oil to operate all plants operated by the gas company, except as otherwise then contracted for from other parties, during the term of the contract, on certain terms at a fixed price per barrel, payments to be made on the 15th of each month for all oil delivered during the preceding month. *Held*, that the covenants to sell and to receive were mutually dependent, and that the contract was entire.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171–175; Dec. Dig. § 62.*]

6. Sales (§ 62*)—Construction of Contract—Entire and Severable.

Held, also, that, though the contract was entire as to the mutually dependent covenants to buy and sell, it was severable as to the payments due for the oil actually received.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171–175; Dec. Dig. § 62.*]

7. Sales (§ 62*)—Construction of Contract—Entire or Severable—Effect of Terms of Contract.

The construction of the contract as entire would not be affected by the fact that no fixed quantity of oil was contracted for, as the oil company had the right to insist that all the oil needed would be taken by the gas company.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171–175; Dec. Dig. § 62.*]

8. Sales (§ 98*)—Rescission of Contract—Mutually Dependent Covenants.

Under a contract containing mutually dependent covenants to buy all the oil needed in running a gas plant, and to furnish all such oil needed, a failure to demand all the oil needed to run the plant justified a rescission of the contract by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 263; Dec. Dig. § 98.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Los Angeles Gas & Electric Company against the Amalgamated Oil Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Herbert J. Goudge, Wm. A. Cheney, Thomas E. Gibbons, and J. Frank Thomas, for appellant. Ward Chapman, Warren E. Lloyd, and O'Melveny, Stevens & Milliken, for respondent.

SLOSS, J. Action to recover damages for an alleged breach of contract. At the trial the defendant's motion for nonsuit was granted and a judgment of dismissal entered. From this judgment plaintiff appeals.

The contract involved was in writing, and was executed by the Associated Oil Company, as party of the first part, and the Los Angeles Gas & Electric Company, the plaintiff herein, as party of the second part. The defendant Amalgamated Oil Company succeeded to all the rights and obligations of the Associated Oil Company under the contract, and may, for the purposes of this discussion, be considered as having in the first instance entered into said contract with plaintiff. In the interest of brevity, we shall herein designate the plaintiff as the "gas company" and the defendant as the "oil company."

By the terms of the contract, which is dated the 1st day of February, 1905, the oil company agrees to sell and deliver to the gas company, and the latter agrees to purchase and receive from the former, a sufficient quantity of crude oil to operate all plants now or hereafter to be operated by the gas company in its business of manufacturing gas and electricity in the city of Los Angeles over and above the amounts heretofore contracted for to be delivered to the gas company by others than the oil company during the term of the contract. The term of the agreement is declared to be from February 1, 1905, to December 31, 1910, inclusive. In addition to various provisions regarding the character of oil to be furnished, the manner of delivery, and deductions for impurities, the contract provides that the gas company shall give three days' notice of its requirements, and fixes the purchase price at 45 cents per barrel, payments to be made on the 15th day of each month for all oil delivered during the preceding calendar month.

The complaint alleges that, after making various deliveries during the years 1905 and 1906, the defendant on December 31, 1906, notified the plaintiff that it no longer considered itself bound by the contract. On several occasions during January and February, 1907, the gas company, plaintiff, requested and demanded of the defendant oil company that it furnish and deliver to plaintiff a quantity of crude oil aggregating 24,700 barrels. Of this amount 11,616 barrels was the quantity of oil sufficient (over and above the oil otherwise contracted for as provided in the aforesaid contract) to operate plaintiff's plants. The plaintiff, it is alleged, has duly performed all the obligations imposed on it under the contract; but defendant has refused to deliver any of the oil demanded during said months of January and February, 1907. The lowest market value of oil of the quality described in the contract since the 1st day of January, 1907, was 75 cents per barrel. The prayer of the complaint is for $3,484.80, being the difference between the contract price and the market value of the 11,616 barrels, which, as plaintiff claims, the defendant should have delivered.

Of the answer it will be sufficient to say that it denies that "plaintiff has duly, or at all, performed all, or any, of the obligations imposed on it under the said contract."

At the trial there was no dispute about the terms of the contract, the refusal to deliver on demand as alleged, or the market value of oil at and after the refusal. The gas company did not, however, make any attempt to show that it had during the period prior to January, 1907, demanded or received from the oil company a quantity of oil (over and above amounts otherwise contracted for) sufficient to operate its plants. The motion for a nonsuit was based on the failure to produce evidence on this point, and, stating the same proposition in more general terms, that plaintiff had failed to prove its allegation that it had duly performed all the obligations imposed on it under said contract.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

By the agreement the gas company agreed to take of the oil company, and pay for, all the oil required by it over and above specified exceptions. The oil company agreed to deliver, as called for, all such oil at a given price. If the contract is to be construed as entire with respect to these covenants—in other words, if such covenants were mutually dependent—the court below was clearly right in holding that plaintiff could not recover for a failure to deliver without alleging and showing either performance, or a sufficient excuse for the nonperformance, of its obligation to take of defendant all oil required to operate its gas and electric plants. Daley v. Russ, 86 Cal. 115, 24 Pac. 867; Easton v. Montgomery, 90 Cal. 307, 318, 27 Pac. 280, 25 Am. St. Rep. 123; Marchant v. Hayes, 117 Cal. 670, 49 Pac. 840.

The appellant's contention is that the contract was severable into as many distinct agreements of sale as there were months in the term during which deliveries were to be made. We do not regard this position as tenable. Whether a contract is entire or severable is a question of interpretation. The intent of the parties is to be ascertained from a consideration of the language employed and the subject-matter of the contract. 2 Parsons' Contracts (9th Ed.) 672; Sterling v. Gregory, 149 Cal. 120, 85 Pac. 305. It is, no doubt, well settled, as has been repeatedly declared by this court, that "when the price is expressly apportioned by the contract, or the apportionment may be implied by law, to each item to be performed, the contract will generally be held to be severable." More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27; Sterling v. Gregory, supra. But this rule is not universal. It is subject to the limitation that a contract will be treated as entire, even when the obligations of the one party consist of different acts to be separately paid for, where the nature and character of the agreement show that it was intended to be entire. Thus, in Norris v. Harris, 15 Cal. 227, Field, C. J., said: "But a contract, made at the same time for different articles at different prices is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties. * * *" Similarly, in Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736, cited by this court in Sterling v. Gregory, supra, the "more reasonable rule" is said to be that, "where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties."

In the case of the contract before us, we have no doubt that the subject-matter and the stipulations of the parties were such as to make the taking of the oil contracted for essential to the right to demand further deliveries. The seller undertakes to hold itself in readiness to meet all the requirements of the buyer and to fill these requirements at a given price. In return it has the privilege of supplying at that price all oil that the buyer may require for its plant. These provisions—the obligation to furnish and the obligation to take all oil needed—are necessarily reciprocal. Each goes to the essence of the agreement. It is not to be supposed that the oil company would have been willing to bind itself to furnish oil for a term of years at 45 cents a barrel, regardless of the actual state of the market, unless it had been assured a continuous outlet for a large quantity at that figure. And, on the other hand, the gas company was, as must be assumed, undertaking to buy oil of the oil company at a fixed price in view of the fact that it was by the agreement securing a steady supply which would be sufficient for all its needs. To hold such a contract severable would open the way to great hardship and injustice. Either party could refuse compliance with the agreement when it desired, and still hold the other when conditions made such course advantageous. The one in default would, to be sure, be liable in damages for its breaches of the several contracts, but such liability would be far from an adequate protection to the other party. Let us suppose, for example, that for a period of two years after the making of the contract the market value of oil should be less than the contract price, and that during that time the gas company should find it to its interest to fill its requirements by purchasing of others than the defendant. In such event, the oil company would, under appellant's contention, be bound to continue to hold itself in readiness, during the entire term of the contract, to furnish oil if called for, and to seek its only relief for past breaches by actions for damages. While it could not know whether its future output would or would not be taken by the gas company, it could not safely enter into any contract to dispose of that output to others. Such construction of the contract would produce great confusion and uncertainty and would, to a great extent, deprive the parties of the substantial benefit of the respective covenants to take and to furnish all oil required.

The fact that the gas company does not agree to take any specified quantity of oil is of no consequence. It agrees to take all that may be needed in the operation of its plants. The exact quantity is subject to fluctuation with the conditions of its business, but the seller does not thereby forfeit the right to insist on furnishing all that shall be actually required. The agreement does not, in respect to the point under discussion, differ from one for the purchase and sale of a fixed quantity to be delivered and paid for in installments. While there is some conflict among the decided cases, the great weight of authority, at least in the United States, supports the proposition that such agreements are entire, and that a refusal without sufficient cause by the seller to furnish, or by the buyer to take or pay for, any installment, justifies a repudiation of the contract by the party not in default. 2 Mechem on Sales, §§ 1144–1148. The rule has been applied alike to contracts for the sale of fixed quantities and to those calling for the delivery of amounts to be fixed by the requirements of the buyer's plant or business. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Williams Cooperage Co. v. Scofield, 115 Fed. 119, 53 C. C. A. 23; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402; Kokomo Strawboard Co. v. Inman, 134 N. Y. 92, 31 N. E. 248; George H. Hess Co. v. Dawson, 149 Ill. 138, 36 N. E. 557; King Phillip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Providence Coal Co. v. Coxe, 19 R. I. 380, 35 Atl. 210; Fullam v. Wright, etc., Co., 196 Mass. 474, 82 N. E. 711; Pacific Lumber Co. v. Iowa W. & P. Co., 35 Iowa, 308, 112 N. W. 771; Ross Meehan F. Co. v. Royer Wheel Co., 113 Tenn. 370, 83 S. W. 167, 68 L. R. A. 829. The same conclusion has been reached by this court in two cases. In Twomey v. People's Ice Co., 66 Cal. 233, 5 Pac. 158, the defendant agreed to furnish ice to plaintiffs for one year at the rate of $5 a ton; the vendor agreeing to sell ice to plaintiffs alone, and the plaintiffs agreeing to take ice from the defendant alone during the term of the contract. The plaintiffs having broken the contract by purchasing ice from third parties, it was held that this breach released defendant from any further performance. To the same effect, substantially, is Dunn v. Daley, 78 Cal. 640, 21 Pac. 377.

The holding that the contract is entire with respect to the covenants we have been discussing is in no wise inconsistent with the view that it is apportionable with respect to payments for oil actually delivered. 2 Parsons' Contracts (9th Ed.) 673, note. An action could be maintained for the price of any delivery as soon as it became due. This is the holding, and the extent of the holding, in Veerkamp v. Hulburd, etc., Co., 58 Cal. 229, 41 Am. Rep. 265. But, as we have said, the contract may be entire with regard to the obligations to buy and sell the whole amount contracted for, notwithstanding the fact that payment for installments actually delivered may be enforced separately. Dunn v. Daley, supra; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; Milske v. Mantel Co., 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. Rep. 354.

For these reasons it must be held that the motion for nonsuit was rightly granted.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

156 Cal. 804

In re HANCOCK'S ESTATE. (L. A. 2,425.)

(Supreme Court of California. Dec. 17, 1909.)

1. Divorce (§ 326*) — Presumption as to Judgment of Court of Record.

The judgment of a court of record of another state in a divorce case is entitled to the presumption that it was authorized by law, provided jurisdiction of the subject-matter may be assumed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 827; Dec. Dig. § 326.*]

2. Judgment (§ 818*)—Foreign Judgment of Court of Record—Conclusiveness.

A judgment of a court of record of another state differs in its conclusive effect from a judgment of a court of record of this state, in that it is always open to one against whom it it attempted to be used to show, by evidence other than its record, and even opposed to its recitals, that the court was without jurisdiction either of the cause or parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1471–1481; Dec. Dig. § 818.*]

3. Judgment (§ 822*)—Foreign Judgment of Court of Record—Collateral Attack.

If lack of jurisdiction, either of the cause or parties, is not made to appear, a judgment of a court of record of another state is as final and conclusive on collateral attack as would be a judgment of one of the superior courts of this state; but, if it is made to appear, the judgment must be regarded as a nullity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1496; Dec. Dig. § 822.*]

4. Judgment (§ 818*)—Foreign Judgment—Service by Publication—Insufficiency of Affidavit.

An affidavit for publication, stating merely affiant's belief that plaintiff has a cause of action, does not comply with a Colorado statute requiring that such fact shall appear thereby, and so service based thereon was ineffectual for any purpose, and the court never acquired jurisdiction as to the nonresident defendant, and the judgment is subject to collateral attack in this state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1459, 1460; Dec. Dig. § 818.*]

5. Evidence (§ 80*) — Presumptions — Laws of Other State.

In absence of contrary evidence, the laws of another state are presumed to be the same as the laws of the forum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

6. Judgment (§ 489*)—Prematurity as Defect Going to Jurisdiction.

If a premature judgment is given after the court has acquired jurisdiction by a valid service, the defect does not go to the jurisdiction so as to render the judgment open to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 924; Dec. Dig. § 489.*]

7. HOMESTEAD (§ 150*)—CONCLUSIVENESS OF ORDER SETTING APART HOMESTEAD.

An order not appealed from, setting apart a homestead for use of a decedent's family, made on an application as to which there was no adverse appearance or contest, or controversy as to the question of widowhood, is conclusive as to the property so set apart, but not as a judicial determination of widowhood binding in all future proceedings in the estate.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 294–305; Dec. Dig. § 150.*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Milton Taylor Hancock. Proceeding to determine the heirship to the deceased. From the decree and an order denying a new trial, Mollie Hancock McNatt and another appeal. Reversed.

Powers & Holland, for appellants. Tom C. Thornton, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment and an order denying a new trial in a proceeding instituted under the provisions of section 1664, Code Civ. Proc., in the matter of the estate of Milton Taylor Hancock, deceased, to determine the "heirship to said deceased." By the decree it was determined that the heirs at law of deceased are his surviving wife and three minor children of said deceased and said surviving wife, all born prior to the year 1902, and Mollie Hancock McNatt and John Philip Hancock, children of said deceased and Nancy Hancock, a former wife of deceased. This appeal is taken by the last two named heirs; their claim being that the deceased and the surviving wife were never husband and wife.

The deceased and Nancy Hiers Hancock were married in the state of Georgia in December, 1877. The issue of this marriage consisted of four children, the appellants, and two children who died in infancy. The husband and wife resided together in the state of Georgia for several years next succeeding the marriage. Mrs. Hancock resided in that state until the time of her death, June 18, 1902. The deceased left that state some time in the eighties. On June 22, 1886, deceased instituted an action for divorce from his wife in the county court of Bent county, state of Colorado, and this action resulted in a decree made by said court on August 19, 1886, purporting to dissolve the marriage. On August 31, 1886, deceased and the respondent surviving wife obtained a license to intermarry, and under this license their marriage was thereupon solemnized by a clergyman in Prescott, state of Arkansas. They lived together as husband and wife at various places of residence from that time until deceased died. His death occurred on July 20, 1905, at which time he was residing in the county of Los Angeles, in this state, with his surviving wife and their three children.

Appellants' claim is that the Colorado divorce decree was void and ineffectual for any purpose, with the result that Nancy Hiers Hancock continued to be the wife of deceased to the time of her death in the year 1902. It is not claimed by counsel for appellants that this condition in any way affected the legitimacy of the children of deceased and the second wife (see section 84, Civ. Code), but simply that it excludes the alleged surviving wife from participating in the estate of deceased. The trial court found that the deceased and his wife "were divorced" by said decree of the Colorado county court. The findings do not show the date of death of the first wife or that she died before deceased. In the present condition of the record, we deem the finding that the deceased and Nancy Hancock were divorced by the Colorado decree essential to the judgment, and if it be not sustained by the evidence, as is claimed by appellants, the judgment must be reversed.

The county court of Bent county, Colo., was, under the express terms of the Constitution of Colorado, a court of record, and any judgment given by it is entitled to the benefit of the presumption that it was authorized by law (see 2 Freeman on Judg. § 565), provided, however, it may be assumed, the jurisdiction of the court in matters of divorce is shown (1 Nelson on Marriage & Divorce, § 19). A judgment of a court of record of another state differs in its conclusive effect from a judgment of a court of record of this state in one material respect, viz., that it is always open to the person against whom the judgment is attempted to be used to show by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. If such lack of jurisdiction in one or the other of these respects is not made to appear, the judgment is as final and conclusive on collateral attack as would be a judgment of one of our own superior courts; but, if such lack of jurisdiction is made to appear, the judgment must be regarded as a nullity. See 2 Freeman on Judg. § 563; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; In re James, 99 Cal. 377, 33 Pac. 1122, 37 Am. St. Rep. 60; Greenzweig v. Strelinger, 103 Cal. 278, 37 Pac. 398; Code Civ. Proc. § 1916. It was said in the James Case, cited above: "We agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed did not exist; and this is true although the record sought to be impeached may recite the existence of such jurisdictional facts."

The question before us, then, is whether or not it was affirmatively made to appear that the Colorado court was without jurisdiction of the cause or the parties.

By the laws of the state of Colorado, the county courts were given jurisdiction concurrent with that of the district courts, in certain classes of actions for divorce, and we shall assume for the purposes of this decision that the record of the divorce action instituted by deceased against his first wife showed that the action was one which, under the terms of the statute, was within the jurisdiction of a county court. We shall further assume for the purposes of this decision that the trial court was sufficiently warranted in concluding, in accord with the allegation in the divorce complaint and the finding of the Colorado court, that deceased was a resident of the state of Colorado at the time of the commencement of his action and had been such a resident for one year prior to that time as required by the laws of that state, though it must be conceded that the evidence introduced in the superior court on the trial of this contest (see In re James, 99 Cal. 377, 33 Pac. 1122, 37 Am. St. Rep. 60) indicates very strongly that deceased was never a resident of that state.

Assuming all this, we are nevertheless unable to see how, in view of the evidence introduced on this trial, it can be held that the Colorado court ever obtained jurisdiction as to the defendant in the divorce action.

An exemplified record of the divorce proceedings was introduced in evidence by the appellants, with the express consent of respondents, duly certified to be "a true, perfect, and complete copy of all records, papers, and files in said cause." It appears therefrom that the complaint was unverified, and that the judgment rests entirely upon an attempted constructive service by publication of summons. The statute of Colorado authorized service of summons by publication "when the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state or conceals himself to avoid the service of summons, and *the fact shall appear by affidavit filed in the office of the clerk of the court in which the action is pending, and it shall in like manner appear that a cause of action exists* against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action."[1] (The italics are ours.) It will be observed that this statute is practically the same as ours, except that the filed affidavit is required by the Colorado law to show the essential facts, while our statute allows the verified complaint on file to show the existence of a cause of action. The evidence shows that the only affidavit for publication was one filed at the time of filing the complaint, and which was as follows: "State of Colorado, County of Bent. In County Court. Milton T. Hancock v. Nancy Hancock. John W. Jay, being duly sworn on oath says that as he is informed and verily believes the plaintiff on the above-entitled cause has good cause of action and that the defendant is a nonresident of the state of Colorado and that her last known place of residence was Boston, Georgia, and that he makes this affidavit for the reason that the plaintiff is absent from the county at the present time. John W. Jay, Atty. for Plaintiff. Subscribed and sworn to before me this 22d day of June, A. D. 1886. Joseph Bradford, Judge."

An order that service be made by publication of summons was made on the same day, and the affidavit of publication shows publication of a summons not purporting to be signed by the clerk of the court or under seal of the court, as was required by the Colorado law, but only signed by plaintiff's attorney, and not complying with the requirements of the Colorado law in its statement of the time within which the defendant must appear, in the Los Animas Leader, a weekly newspaper, on June 25, July 2, 9, and 16, 1886. On August 17, 1886, the defendant's default for not answering was entered, and on August 19, 1886, judgment of divorce, based on said default, was entered.

There can be no doubt under our decisions that the affidavit for publication hereinbefore set forth, which upon the record before us must be taken as being the only affidavit presented in support of the order of publication, was insufficient to give the county court of Bent county, Colo., jurisdiction to order service on the nonresident defendant by publication, and it does not appear that the Colorado Supreme Court has been less mindful than this court of the necessity of requiring compliance with every material requirement of the statute of Colorado relative to such service. In O'Rear v. Lazarus, 8 Colo. 608, 9 Pac. 621, that court, speaking of an attempted constructive service by publication, said: "This method of obtaining service is in derogation of the common law; consequently the proposition is universally recognized that every material requirement of the statute in relation thereto must be strictly complied with." Speaking of our own law as to publication of summons, this court said, in Ricketson v. Richardson, 23 Cal. 152: "Those sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the person of defendant. A failure to comply with the rule thus prescribed in any particular is fatal where it is not cured by an appearance." It is established by our decisions that it must be made to appear by the affidavit for publication or by the verified complaint on file that a cause of action exists in favor of the plaintiff, and that if this is not so made to appear the court is without jurisdiction to make any order for publication, and any order made under such circumstances is ineffectual for any purpose, and any attempted service made thereunder is insufficient to give the court jurisdiction over the person of the defendant. As we have seen, the Colorado statute required this to be shown exclusively by the affidavit filed with the clerk of the court. It is further established that a statement such as that the plaintiff "has good cause of action" is not sufficient. Such a statement is nothing more than the mere opinion of the party as to the effect of the facts upon which he relies as constituting a cause of action. As said in Forbes v. Hyde, 31 Cal. 353: "It is merely the statement of the opinion of the witness in relation to a point upon which the judge is required to form his own opinion upon facts which must appear by affidavit. * * * Facts are the proper and only proper subjects to be set out in affidavits under the provisions of the statute to serve as the basis of judicial action. The affiant's general expression of opinion or belief, without the facts upon which it is founded, is in no sense legal evidence, and does not tend in any degree to prove the jurisdictional facts without which the judge had no authority to make the order." Upon the propositions we have stated, the following cases are in point: Ricketson v. Richardson, 26 Cal. 149; Braly v. Seaman, 30 Cal. 610; Forbes v. Hyde, 31 Cal. 342; County of Yolo v. Knight, 70 Cal. 431, 11 Pac. 662; Columbia, etc., Co. v. Warner, etc., Co., 138 Cal. 445, 71 Pac. 498. In some of these cases the attack on the judgment was direct, being made on appeal from the judgment, but in all the defect was recognized as jurisdictional. In two, Braly v. Seaman and Forbes v. Hyde, the attack was collateral. In Ricketson v. Richardson, Forbes v. Hyde, and County of Yolo v. Knight, it is expressly held that an affidavit which merely repeats the language or substance of the statute as to the existence of a cause of action is not sufficient, and in Columbia, etc., Co. v. Warner, etc., Co., the rule as to the essentials in the matter of a showing of a cause of action is clearly set forth.

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[1] Code Civ. Proc. § 44.

Ae we have seen, all that the affiant in this case said in this regard was that, as he was informed and verily believes, the plaintiff "has good cause of action," and upon this statement of opinion and without the sworn testimony of any one, in complaint or elsewhere, as to a single fact essential to a cause of action, the order for publication was made. We do not believe that a decision can anywhere be found sustaining a judgment against a nonresident defendant based upon such a constructive service by publication, where the defect in the showing for publication was legally made to appear. Were we dealing with the judgment of a court of record of this state, such a defect could be legally made to appear, of course, only on the face of the record, the judgment roll, as is fully shown by such cases as Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, People v. Davis, 143 Cal. 673, 77 Pac. 651, and Estate of McNeil, 100 Pac. 1086, and as shown in such cases recital in such a judgment of due service is sometimes effectual as against an affidavit contained in the judgment roll showing an ineffectual attempt at service; the presumption consistently obtaining in favor of the recital in the judgment that other showing of proper service had been made to the court. It is also true that, were this a judgment of a court of this state, it could not be held by us to be void on its face because of the insufficiency of the affidavit for publication, for the reason that at the time it was rendered the affidavit for publication constituted no part of the judgment roll (see Estate of McNeil, supra), and in the absence of evidence to the contrary, this was presumably the law of Colorado at that time. We are not dealing, however, with a judgment of one of our own courts, but with a judgment of a court of another state, and this, as we have seen, makes a material difference. It was open to any party assailing the judgment collaterally to show by evidence aliunde the record of the judgment, and even in direct contradiction of recitals therein contained, facts establishing the want of jurisdiction of the court rendering it. Whether the affidavit for publication was a part of the Colorado judgment roll or not, the evidence received without objection and by express consent of respondents established that the only affidavit for publication filed in the cause was the one that we have discussed. The record so received was certified to be "a true, perfect, and complete copy of all records, papers, and files in said cause heretofore tried," etc. We are forced to conclude that the service of summons by publication based on this affidavit was ineffectual for any purpose, and that the Colorado court never acquired jurisdiction as to the defendant. It follows that the finding of the trial court in this proceeding to the effect that the parties were divorced by the Colorado decree was not sustained by the evidence.

Other points are made by appellant against the validity of this decree. The summons published did not comply with the Colorado law in some very material respects, but it is not necessary to determine whether the defects were such as to render the judgment void on collateral attack. The judgment was prematurely given; but it was given after the court would have acquired jurisdiction had the service been valid, and the defect in this respect was consequently one that does not go to the jurisdiction. In view of our conclusion as to the insufficiency of the affidavit, it is unnecessary to determine definitely as to any of the other points made against the judgment.

The record on this appeal does not show that the question who is the surviving wife of deceased was adjudicated by the superior court in granting letters of administration in this estate, and the question as to the effect of such an adjudication in subsequent proceedings in the matter of the estate is therefore not presented. It is shown that the alleged surviving wife was appointed administratrix, but it nowhere appears that she based her claim to letters on the ground that she was the surviving wife, or that any such issue was ever tendered or presented to the court for determination. It is admitted by the pleadings that she subsequently presented her petition for the setting apart of a homestead for the use of herself, as surviving wife, and her children, and that the probate court granted such application and set apart certain real property as a homestead for the use of the family of the deceased; but it does not appear that there was any adverse appearance or contest on this application, or that the question of widowhood was ever controverted. The conclusive effect of this order, which was not appealed from, may be conceded as to the property so set apart; but we do not see how it can be held to operate, if the question of widowhood was never controverted, as a judicial determination as to widowhood binding in all future proceedings in the estate. See Est. of Harrington, 147 Cal. 124, 81 Pac. 546, 109 Am. St. Rep. 118; Est. of Nolan, 145 Cal. 559, 79 Pac. 428; Howell v. Budd, 91 Cal. 342, 27 Pac. 747.

It has been assumed by respective counsel that appellants, the surviving children of the first wife, are entitled to assail collaterally the Colorado decree of divorce after the death of both of the parties thereto, notwithstanding that the validity of the second marriage was never questioned by either of the parties thereto or by the first wife, and that the first wife died prior to the death of deceased, and we have here accepted that assumption as well founded, as, indeed, it may be. As that question has not been discussed, and as there may be some doubt of the right of appellants under the circumstances stated to now assert the invalidity of the second marriage, we deem it proper to declare that this opinion shall not be taken as establishing the law of the case thereon. As we have seen, this question is not squarely presented by the findings, as it does not appear therefrom that the first wife died prior to the death of deceased.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; SLOSS, J.

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156 Cal. 752

LARSEN v. BLOEMER et al. (S. F. 5,012.)

(Supreme Court of California. Dec. 15, 1909.)

1. Master and Servant (§ 108*)—Master's Duty—Machinery—Safety Appliances.

That an accident to a laundry worker's hand, by catching it in a mangle roller, occurred at a part of the mangle which could not be protected would not excuse the employer from fitting the machine with the usual appliances for minimizing the injury, such as a proper lever for quickly stopping the mangle.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 203; Dec. Dig. § 108.*]

2. Master and Servant (§ 127*)—Injury to Servant—Machinery—Repair.

Even if a mangle, in which a laundry employé caught her hand, could not have been guarded at that point, the employer was negligent where he permitted the lever controlling the mangle to get out of repair so as to prevent stopping the machine sooner to avoid serious injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 252; Dec. Dig. § 127.*]

3. Master and Servant (§ 264*)—Injuries to Servant—Actions—Issues.

In an action for injury to a laundry worker, by catching her hand between the mangle rollers, allegations in the complaint that at the time of the accident plaintiff was a minor, inexperienced in working about a mangle, and had not been instructed that it was unsafe and defective, as stated, and that while working, she being uninstructed, her fingers were caught between the rollers and injured, raised the issues of plaintiff's minority and lack of instructions as to the danger of her employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 863, 865; Dec. Dig. § 264.*]

4. Appeal and Error (§ 1002*)—Harmless Error—Findings—Conclusiveness — Conflicting Evidence.

The Supreme Court will not review a finding upon conflicting evidence, if there is any evidence legitimately tending to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

5. Master and Servant (§ 278*)—Injuries to Servant — Sufficiency of Evidence — Inexperience—Instruction.

In an action for injuries to a laundry worker by catching her hand in mangle rollers, evidence *held* to sustain a finding that plaintiff was ignorant of machinery and lacked instruction as to the dangers of her work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. § 278.*]

6. Master and Servant (§ 289*) — Injuries to Servant — Jury Questions—Contributory Negligence.

In an action for injuries to a laundry worker by catching her hand in mangle rollers, whether plaintiff was negligent *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

7. Appeal and Error (§ 1024*) — Review — Findings of Trial Court—Amendments.

The Supreme Court will not disturb the trial court's finding that an amendment was allowed at the trial, and not thereafter as claimed, where a full hearing was given the parties in the trial court on their respective contentions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4020; Dec. Dig. § 1024.*]

Department 2. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Bertha Larsen, by John Larsen, her guardian ad litem, against John H. Bloemer and May E. Bloemer. From a judgment for plaintiff against the first-named defendant, he appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. A. Cutler and F. R. Sweasey, for appellant. H. L. Ford and T. Crowley, for respondent.

MELVIN, J. Plaintiff, by her guardian ad litem, sued to recover damages for injuries to her hand and wrist, received while she was working at a machine known as a "mangle." The case was tried before a jury. A motion for nonsuit was granted in favor of May E. Bloemer, but judgment was given in favor of plaintiff against John H. Bloemer for $2,250. From this judgment he appeals.

There were two causes of action pleaded. In the first it was alleged that at the time of the accident Bertha Larsen was a minor, inexperienced in working about a mangle, and that she had never been instructed in the dangers or hazards of employment on or near said machine; that "the said mangle of the said defendant upon which the plaintiff was put to work was unsafe, defective, unsuitable, and dangerous for such use, for the reason that the said mangle when once set in motion could not readily be stopped, there being no lever near the hand of the operator for that purpose; that the said lever had become broken or out of repair, so that the mechanism for starting the mangle had to be put on by the operator stooping down and with great force pushing or pulling it in place, and then, in order to keep it in place, was obliged to securely tie the same with a rope or string, and, in order to stop the said mangle while in motion or in operation, was obliged to untie the said rope or string, and with great force release the machinery and thereby stop the running of the mangle, which defective, unsafe, and dangerous condition of said mangle and the apparatus and machinery thereof was unknown to the plaintiff, and was well known to the said defendants"; that while working at said mangle, in the course of her occupation, and without fault on her part, she being inexperienced and uninstructed in the dangers of said machine, her fingers were caught between the heavy rollers used for the ironing of clothes, and, owing to the condition of the mangle, the operators thereon were unable to stop the machinery until the plaintiff's hand was so badly injured that amputation was made necessary. The second cause of action is based upon allegations to the effect that defendants provided Bertha Larsen an unsafe and dangerous place in which to work: that while busy at said mangle, and while attempting to smooth the cloth on the rollers thereof, and without fault on her part, "her fingers were caught between the rollers of the said mangle as aforesaid, which said mangle, by the carelessness and negligence of the said defendants as aforesaid, could not be readily stopped, and by the reason of the facts of the dangerous, defective, and unsafe condition of the said machinery and appliances of the said mangle the operators thereon were unable to stop the running of the said mangle until the same had crushed, cooked, and burned the right hand of the said plaintiff, Bertha Larsen, and crushed the bones and flesh thereof, and greatly bruised and wounded the said plaintiff, Bertha Larsen."

According to appellant, as there is no allegation that the mangle was inherently dangerous, or that its use or danger were unknown to Bertha Larsen, she must have been guilty of contributory negligence in getting her fingers caught at all, and "plaintiff seeks to recover for that portion of the injury occasioned to her hand by the alleged negligence of defendant in maintaining the mangle in a condition so that it could not be readily stopped after the fingers were caught therein." Appellant's counsel assert that the courts of this state do not recognize the doctrine of comparative negligence, and that plaintiff cannot recover for the portion of the injury caused by defendant's fault, citing Hatch v. McCloud River Lumber Co., 150 Cal. 111, 88 Pac. 355; Sego v. S. F. Co., 137 Cal. 407, 70 Pac. 279. But in neither of the cases cited did the obligation of an employer to his servant exist. Here the jury determined in effect that, owing to the youth and inexperience of Bertha Larsen and defendant's failure to warn her, she did not appreciate the dangers attendant upon her occupation, and was therefore not guilty of contributory negligence in putting her hand into a place where it might be caught by the rollers. While the accident occurred at that part of the mangle which is not, and, in the nature of things cannot be, protected by a guard, this does not excuse the defendant from the obligation of fitting his machinery with the usual modern appliances for preventing or minimizing injury.

In Quinn v. Electric Laundry Co., 101 Pac. 795, defendant and appellant advanced the theory that as no guard could make the mangle absolutely safe, it was not negligent in failing, through its servants, to keep a certain guard properly adjusted. But we there held as follows: "If it was the duty of defendant to keep this guard in proper position in order that the danger might not be obviated entirely, but materially lessened, then the failure to perform such duty would be as reprehensible as the neglect with reference to some safety appliance which might be attached to a piece of mechanism in such a manner as to exclude all danger of accident. It is certain that one's fingers would pass more easily through a space one inch wide than through an aperture but one-fourth of an inch in width." So here it might be said with equal force that one is less apt to lose a hand in a mangle which may be quickly stopped than in a machine not fitted with modern appliances for throwing off the belt by an easily accessible lever. There was abundant evidence that for a long time prior to the accident the lever, by which the belt had formerly been thrown easily and quickly off the pulley controlling the operation of the mangle, had been out of order, and that the machinery was stopped or started by a cord fastened to a portion of the mechanism, and leading, not to a place near the front of the machine, but to a location near that part of the mangle where the clothes were folded after passing between the rollers. It was necessary to stoop down in order to reach this cord, and several of the girls who had worked in the laundry testified that at times it was difficult to stop the machinery by the method in use after the lever was out of order. There was testimony by Bertha Larsen and other employés in the laundry that after the girl screamed for help considerable time elapsed before the machine was stopped. One of the girls who saw the accident testified: "If the machine could have been stopped when she holloed, I should not think it would have mangled or hurt any more than the ends of her fingers."

This case in its facts is much like that of Sibbert v. Scotland Cotton Mills, 145 N. C. 308, 59 S. E. 79. There the "shifter" for throwing the belt on and off the pulley was out of order. Plaintiff, while working about the machinery, was caught by the sleeve, and his arm was drawn into certain cogs, and injured by reason of the fact that the belt could not be quickly moved. There the learned court used the following language: "It may be conceded that the frames at which plaintiff was put to work were of proper construction and in good condition; that there was no evidence on the part of defendant, either in respect to the frames or the travis gear; that defendant was guilty of no negligence in failing to instruct plaintiff in his work. It may be further conceded that his sleeve getting caught in the travis gear was an accident for which defendant was not responsible, or that plaintiff did not exercise due care to avoid the danger of getting caught in the cogs. The question arises whether there was negligence in permitting the levers of the shifters, provided for the purpose of starting and stopping the frames, to be 'out of fix,' and whether such negligence was the proximate cause of the injury. It appears that the wheels, upon which were the cogs of the travis gear, move slowly, and that, if the shifters had been in good repair, and had performed the office for which they were intended, the frames could easily have been stopped by pushing the lever, throwing the belt from the tight to the loose pulley, and plaintiff would not have sustained any injury further than tearing his shirt sleeve. The plaintiff, assuming, as we must do, the truth of his testimony, was pursuing instructions—working as directed by the 'head boss.' There is always more or less danger that employés working in mills, even when the machinery is in proper repair, will become entangled in the wheels, cogs, etc. This is one of the dangers incident to the employment. Where there is no negligence in respect to the construction, repair of machinery, or in failing to give instruction as to the manner of operating the machine, an injury sustained by the employé is attributed either to accident or the negligence of the employés. The risk of such injury is assumed. Recognizing the danger of such accidents, employers use such safety appliances as are in general use, either to avert the danger or to stop the machine in the event that an injury is imminent. Defendant had attached to the frames upon which plaintiff was employed shifters controlled by levers, easily operated, by which, in an emergency, the frames could be stopped. It was the duty of defendant to use reasonable care, by proper construction and frequent inspection, to have and keep them in working order. If it failed to do so, there was a breach of duty to plaintiff." We thoroughly agree with the doctrine so clearly expressed by the learned Supreme Court of North Carolina, and regard the case at bar entirely within the principles above announced.

In this case the court submitted to the jury (and we think properly) the questions of Bertha Larsen's minority and her lack of instruction regarding the dangers of her employment. This was within the pleadings previously quoted. There was a conflict of evidence both as to her instruction or lack of it, and in reference to her knowledge of the dangers of putting her hand upon the rollers on the "receiving" side of the mangle where the clothes were taken out and folded after they had been ironed. With such conflict we have nothing to do if there is any evidence tending legitimately to sustain the plaintiff's theories on these points. Bertha Larsen testified that she had received no warning or instruction with reference to the dangers to be encountered in working about the machine. At the time of the accident she had been employed by defendant just four weeks. She testified in part as follows: "I never paid any particular attention to the machine on the folding side because I did not realize there was any danger there where the clothes came out. The machine had just started up before I was injured, and the rollers were turning very slowly. The rollers were covered with a canvas or cloth. That cloth would sometimes become wrinkled, and they were straightened out by our hands. If it was running we would do it while the machine was in operation." Speaking of the manner in which her fingers were caught, she said: "I don't know exactly how I got them in that day unless I was smoothing the cloth." She was corroborated in many of her statements by other witnesses. We cannot, therefore, disturb the conclusions of the court and jury regarding her minority, her ignorance of machinery, and her lack of instruction with reference to the dangers of her work at the mangle. But appellant contends that the peril was so obvious that she must be presumed to have been fully cognizant of it. With the record in this case are photographs of the mangle, accompanied by an explanation of its mechanism. From this it appears that while she must have observed the cloth-covered rollers from her station at the folding bench or shelf, she could not see the heated cylinder which produced so much of the damage suffered by her. As was said by this department in Quinn v. Electric Laundry Co., supra, referring to a hidden roller: "It would seem that the position and function of this roller at least should have been fully explained by defendant to any person who was directed to guide clothes into this ponderous machine." Whether or not, under all of the circumstances revealed by the evidence, plaintiff was negligent is a question peculiarly for the jury. Buchel v. Gray Brothers, 115 Cal. 421, 47 Pac. 112.

We have carefully examined the instructions, and find no errors therein.

There was some controversy with reference to an amendment to the complaint which, according to appellant's counsel, was inserted in the record after the trial. Appellant filed an affidavit by the county clerk that said amendment was not permitted during or before the trial. This was met by a counter-affidavit by respondent's attorney to the effect that the amendment in question had been allowed at the trial, but had not been copied into the pleading by the clerk, as ordered by the court. This matter was heard by the judge of the superior court at a time when counsel for all the parties were present, and determined adversely to appellant's contention. When and under what circumstances an order permitting an amendment to a pleading is made, and the substance of such amendment, are matters peculiarly "within the breast of the court." We will not disturb the correction in diminution of the record thus made.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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156 Cal. 720

PEOPLE v. ARGENTOS. (Cr. 1,498.)

(Supreme Court of California. Dec. 13, 1909. Rehearing Denied Jan. 12, 1910.)

1. Criminal Law (§ 369*)—Evidence—Other Offenses.

On a trial for a particular crime, evidence which shows, or tends to show, the commission of another distinct offense by accused, is, in general, inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

2. Criminal Law (§ 371*)—Evidence—Other Offenses.

Where, in a prosecution for homicide, it was claimed that defendant had falsely represented to deceased that he had mining claims, which he would convey to induce deceased to sign a bail bond for him, and that he killed deceased to prevent his withdrawal from the bond on his discovery of the falsity of the representations, evidence of conversations between defendant and deceased immediately prior to their departure to examine the claims after deceased had signed defendant's bond, and deceased's statement that unless defendant showed him the claims and carried out his agreement he would withdraw from the bond and surrender defendant to the authorities, was not objectionable as evidence of defendant's commission of another crime; the evidence being within the exception that, where evidence has a direct bearing on the question of guilt, it is admissible, though it tends to show the commission of another offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

3. Criminal Law (§ 369*)—Evidence—Other Offenses—Accusation.

The rule that evidence showing a distinct offense other than that for which accused is being tried is inadmissible extends to proof of an accusation of another crime, as well as to evidence of its actual commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

4. Criminal Law (§ 371*)—Evidence—Other Offenses—Motive.

Evidence showing that defendant was accused of another offense for which he had given bail with deceased as surety was admissible to show motive, where it was claimed that defendant killed deceased in order to prevent the withdrawal from the bail bond and surrender of defendant on ascertaining the falsity of defendant's representations as to his ownership of mining claims which he had agreed to transfer to deceased as security.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

5. Homicide (§ 166*)—Evidence—Identity—Motive.

Where, in a prosecution for homicide, defendant's identity was attempted to be established by circumstantial evidence, evidence showing that he had a motive for killing deceased was material and could be proved by any testimony reasonably having a tendency to establish it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320–331; Dec. Dig. § 166.*]

6. Criminal Law (§ 815*)—Instructions—Assumed Facts.

In a prosecution for homicide, the court charged that failure to show any motive was a circumstance in favor of defendant which the jury should consider. The court also fully instructed on the presumption of innocence, reasonable doubt, the necessity of proof of every fact essential to guilt beyond a reasonable doubt, or, failing this, that defendant should be acquitted, and requiring that circumstantial evidence relied on for a conviction must exclude to a moral certainty any other hypothesis except defendant's guilt. The court also told the jury that they should not understand that the court expressed any opinion on the weight of the evidence, or any part of it, or on the truth or falsity of any witness' testimony, or that any alleged fact in the case was or was not proved, that the questions of fact, weight of evidence, etc., were solely for the jury to determine. *Held*, that an instruction, after declaring that direct affirmative proof of motive need not be given, assigning as one of the reasons therefor that the individual whose motive is sought might remain silent, or if he spoke might speak untruly, and that resort must therefore be had to actual physical manifestations of motive, exhibited by the results, as the safest, if not the only, proof of motive, was not erroneous as impliedly charging the jury to disregard defendant's testimony, and as authorizing them to infer that robbery was the motive for the homicide from evidence that accused had decedent's property in his possession shortly after the killing.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

7. CRIMINAL LAW (§ 822*) — INSTRUCTIONS — CONSIDERATION.

In determining whether a jury has been correctly instructed, the charge must be considered as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

In Bank. Appeal from Superior Court, Inyo County; Walter L. Lamar, Judge.

Thomas R. Argentos was convicted of murder, and he appeals. Affirmed.

P. B. Forbes and Wm. J. Clark, for appellant. U. S. Webb, Atty. Gen., and George Beebe and J. Charles Jones, Deputy Attys. Gen., for the People.

LORIGAN, J. The appellant was charged with the crime of murder, convicted of murder in the first degree, sentenced to imprisonment for life, and appeals from the judgment and order denying his motion for a new trial. Reliance for reversal is based exclusively on certain rulings of the court, on the admission of testimony, and the giving of a particular instruction asked by the people, with respect to all of which it is claimed the trial court erred. No point is made as to the sufficiency of the evidence to sustain the verdict, so that only a summary of the evidence need be given.

The defendant and the deceased, John Pavlovich, friends and engaged in the occupation of prospecting for mines, were together in Goldfield, Nev., and in the early part of July, 1907, departed together for Inyo county in this state, apparently for the purpose of visiting certain mining claims of which defendant claimed to be the owner. Some time prior to their departure the defendant had been arrested for an offense, the nature of which the record does not disclose, and, as security for his appearance, the deceased had gone on his bond under an arrangement between them that the defendant should convey to the deceased some mining claims which he asserted he owned in Death Valley; that it was for the purpose of examining these claims that the defendant and the deceased left Goldfield for Inyo county, the deceased having stated to the defendant that if he could not show him these claims as agreed he would bring him back to Goldfield and withdraw from his bond. The two left Goldfield on a freight train on the 9th or 10th of July, getting off at a place called Bonnie Claire, or Montana station, where they remained all night. They had breakfast the next morning at a hotel kept by Mrs. Mitchell and, having borrowed a mule and cart from her, proceeded to a place called the "Steininger ranch," in a lease of which the defendant appears to have been interested. They sent back the mule and cart borrowed from Mrs. Mitchell and remained all night at the Steininger ranch with a relative of the defendant. The next day about noon, having obtained another mule and cart from the Steininger ranch and provided themselves with provisions, they started apparently on a prospecting trip in the direction of Scotty's camp, located on the edge of Death Valley. About 5 o'clock the next morning one of the men on the Steininger ranch, from which the mule and cart had been procured, found the mule attached to the cart standing outside the ranch corral with no one in charge. Neither the defendant nor Pavlovich returned to the ranch, and the latter was not again seen alive. On July 12, 1907, between 11 and 12 o'clock, John Astley, the keeper of a hotel on the desert about a mile from Bonnie Claire or Montana station, saw the defendant coming alone and on foot towards the hotel from the direction of Death Valley. He stopped at the hotel for a short time, where he exhibited two revolvers and pledged one of them—a 38-caliber Colt's—to Astley for the loan of $15. The evidence showed that when the deceased left Goldfield with the defendant he carried on his person a 38-caliber Colt's revolver. From Astley's the defendant walked to Mrs. Mitchell's hotel at Montana station, where he lunched. Mrs. Mitchell, who had known defendant and deceased for a long time, inquired of the defendant where he had left Pavlovich, to which he replied that the latter had gone prospecting for three or four days. The defendant while eating his lunch was nervous and uneasy to such an extent as to be particularly noticed by Mrs. Mitchell. That evening the defendant left Montana station for Goldfield. On the 19th or 20th of July, 1907, a cousin of the deceased, accompanied by a friend, left Goldfield for the purpose of looking for the deceased and found his dead body on the desert near Scotty's camp at the edge of Death Valley, and some six or seven miles from the Steininger ranch. The body, with two bullet holes in the head and wrapped with blankets, was found a short distance from the road. It was attired only in undergarments. The outer clothing and hat of deceased, together with his pistol holster, were found at different places and some distance from the body, thrust under clusters of bushes. His pistol could not be found. In fact, without further detailing all the circumstances leading to that conclusion, it was quite evident that the deceased had been murdered apparently while he slept. A short time after the discovery of the body, the defendant was arrested in Goldfield and charged with the murder of the deceased. There was no evidence that the defendant owned any mining claims in Inyo county or elsewhere. Many additional incriminatory circumstances might be stated; but, as no point was made of the sufficiency of the evidence to sustain the verdict, the above statement of the main facts is all that is necessary.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The evidence against the defendant was entirely circumstantial, and the theory of the prosecution was: That the defendant, to induce the deceased to go upon his bond in the undisclosed criminal charge against him, falsely represented to the deceased that he owned certain mining claims in Inyo county which, in consideration of his becoming surety for him, he would deed to the deceased; that the deceased was importuning him to show him the claims and carry out his agreement, and was threatening that unless he did so he would withdraw from his bond; that in response to such importunity of deceased both he and defendant started from Goldfield for the purpose of having the defendant show the deceased these claims; that the defendant had no claims as represented, and his knowledge that deceased would withdraw from his bond on the discovery of the falseness of his representations was the motive which actuated the defendant to kill the deceased. In support of this theory the court permitted the prosecution to show certain conversations between the defendant and the deceased immediately prior to their departure from Goldfield with reference to mining claims claimed by the defendant; the fact that deceased was on the bond of the defendant for his appearance to answer some criminal charge; that defendant had agreed to convey said claims to the deceased in consideration of his having become a surety on said bond; and that the purpose of their leaving Goldfield together was to visit the defendant's claims. The principal point made by appellant is that it was error to admit this evidence in as far, at least, as it tended to prove the commission by defendant of some other offense than the one for which he was being tried; but this evidence was not admitted with a view merely of proving that defendant had been charged with another offense. It was offered, and we think properly admitted, as bearing on the question of motive. The general rule, undoubtedly, is that, upon a trial of a particular crime, evidence which shows, or tends to show, the commission of another and distinct crime by a defendant, is inadmissible, and it is prejudicial error to let it go before the jury. This rule, however, has its exception, and, where it appears that evidence of the commission of such other crime has a direct and logical bearing upon the question of the guilt of the accused as to the crime with which he is charged, evidence of the commission of such other offense is admissible.

In the case at bar it is to be observed that there was no evidence that the defendant had committed any crime other than the one with which he was charged. The evidence only was that he had given bail on an accusation made against him for some offense, the nature of which is undisclosed by the record. The principle contended for by the appellant would, however, apply even to proof of an accusation of crime as well as proof of its actual commission, because the injury to an accused lies in the fact that proof of either actual commission, or accusation of another crime, is calculated to prejudice the defendant in the minds of the jury; but, while the general rule is as contended for by appellant, still it is not inflexible. It is equally the established rule that on the trial of criminal cases any fact or circumstance which in any degree is relevant to any material fact in issue is admissible, and it is none the less admissible because such evidence has a tendency to show him guilty of an offense other than the one of which he is charged, and hence may serve to raise a prejudice against him before the jury. "Proof of the commission of another crime may be given where it tends to show motive for the homicide in question." Wharton on Homicide, § 596. The admission of such evidence is sanctioned by the authorities in this state. People v. Suesser, 142 Cal. 363, 75 Pac. 1093; People v. Cook, 148 Cal. 341, 83 Pac. 43; People v. Soeder, 150 Cal. 15, 87 Pac. 1016. Within the limitation to the general rule, the evidence that some offense had been charged against defendant, and that deceased had gone upon his bond, given in connection with the other evidence relative to the mining claims, his agreement to convey them to deceased, the threat of the deceased to withdraw from his bond and redeliver him to the authorities, their departure from Goldfield for Inyo county, and the nonexistence of such mining claims, was all admissible as bearing upon the question of motive upon the part of the defendant actuating him to slay the deceased. In a case where the identity of a person who commits a crime is attempted to be proven by circumstantial evidence, such as in the case at bar, evidence of a motive on the part of a defendant charged is always a subject of proof, and the fact of motive particularly material. In proof of motive, the prosecution has a right to offer any testimony which reasonably and fairly has a tendency to establish it, and we are satisfied that the evidence which was admitted by the court, and of which appellant complains, was relevant to, and had a logical bearing upon, the subject. What weight that evidence might have was a question for the jury; but that it was admissible, notwithstanding it showed the defendant was charged with some other offense than the one for which he was being tried, and though its tendency might have been to prejudice him in the minds of the jury, is not, under the authorities, open to question. People v. Sanders, 114 Cal. 216, 46 Pac. 153.

With respect to the only other point made as to the admission of testimony: A witness was permitted to testify, over the objection of defendant, that the pistol pawned by the defendant to Astley resembled one which he saw in the possession of deceased just before his departure with defendant from Goldfield, and he further testified that he could point it out if placed among 50 others. The evidence elicited in these replies went to the proof of the identity of the pistol, and that there was no impropriety in asking the questions appears so plain that it would be idle to discuss the subject.

As to the instruction complained of: The court instructed the jury on the subject of motive partially as follows: "You are instructed that, with regard to the grounds from which motive may be inferred, the law has never limited them. Therefore it is immaterial whether the motive be hatred, wealth, or in gratification of desires or passions, or arising from any other cause, so long as the motive exists. You must bear in mind that motive, being an auxiliary fact from which, if established, in connection with other necessary facts, the main or primary fact of guilt may be inferred, it may be established by circumstantial evidence the same as any other fact in the case. If the motive of a party in committing a crime has been declared by him, or direct evidence can be given of it by the prosecution, then such proof would be admissible; but the law does not require at the hands of the prosecution any direct affirmative proof of the motive of any person committing crime, and one of the reasons for this rule, among others, is that the individual whose motive is sought to be ascertained may remain silent, or if he speaks, and has a crime to conceal, may speak untruly, and thus our minds are compelled from necessity to revert to the actual physical manifestations of the motive exhibited by the results produced, as the safest, if not the only, proof of motive. Therefore, in determining the question of presence or absence of motive in the commission of crime, it is in accordance with our general observation and experience to infer motive by reference to the laws which have been generally and usually found to control human conduct. This rule is based on sound reason and universal experience."

Taking this instruction on the subject of motive as standing alone, the appellant contends that in giving it the court violated section 19, art. 6, of the Constitution, prohibiting judges from charging juries as to matter of fact, the specific claim being: That it is in effect an instruction to the jury to disregard the testimony of the defendant; that it directly assumes the agency of defendant in the death of Pavlovich, and tells the jury to infer robbery as a motive to account for that fact; that it informs the jury that the body of Pavlovich is actual physical manifestation of the motive of defendant and a result produced thereby. It is proper to state here, as bearing on the claim of the appellant that this instruction tells the jury to infer robbery as a motive for the killing, that there was evidence in the case that about the time Pavlovich and defendant left Goldfield together the former was in possession of some money—not a very large amount—none of which was found in his clothing or about him when his dead body was discovered, and, inferentially, it appeared from the evidence that defendant, when they started from Goldfield, had no money. Aside from this, there was evidence that deceased was in possession of a Colt's revolver when he left Goldfield, which could not be found when his body was discovered.

Recurring now to the instruction: The particular portion of the instruction which appellant criticises is that part where the court, after declaring that direct affirmative proof of motive need not be given, proceeds to assign as one of the reasons for this that the individual, whose motive is sought to be ascertained, may remain silent, or, if he speaks, may speak untruly, and hence resort must be had to the actual physical manifestations of motive exhibited by the results produced as the safest, if not the only, proof of motive. The defendant was sworn as a witness in his own behalf, and testified that he left the Steininger ranch about 3 o'clock on the morning of the second day after the arrival of deceased and himself there to go to Goldfield to bring another man to the ranch, that he did this at the request of deceased, and left the latter at the ranch when he departed for Goldfield. In the light of this evidence, and the further proof of the disappearance of the revolver and money of deceased, it is insisted by appellant that the giving of this portion of the instruction was erroneous and highly prejudicial to the defendant. The argument is that the question whether the deceased was killed by defendant was to be determined from circumstantial evidence alone, and under such a condition of the evidence the absence of any motive on his part for the killing was a circumstance in favor of his innocence; that the presence or absence of motive and the circumstances from which it was to be determined were matters exclusively for the consideration of the jury; that the court in instructing the jury that an individual whose motive is sought to be ascertained may remain silent, or, if he speaks, being accused of crime, may speak untruly, told them in effect that they were to discredit the testimony of defendant in his denial of responsibility for the death of the deceased, and were to look to the actual physical manifestations of motive exhibited by the results produced. As to this latter part of the instruction, it is insisted by appellant that the jury were told by it that there was in fact a physical manifestation of motive on the part of defendant exhibited by results produced proven in the case—a matter exclusively for the jury to determine—and was in effect an instruction that these physical manifestations exhibited by results produced showed that the defendant killed the deceased in order to rob him.

We are not particularly impressed with the reasoning whereby the appellant reaches the conclusion that the constitutional provision against the court charging a jury as to matters of fact has been violated by the giving of this particular instruction. As we look upon it, and as the jury must have understood it, it was entirely impersonal. It was a general instruction—not as lucid as it might be when addressed to "actual physical manifestations" and "results produced"—in which the court was defining the method whereby motive might be arrived at in cases of homicide where the evidence was purely circumstantial. In reality a fair view of what the court was endeavoring to impress upon the jury is that there was no fixed rule by which the presence or absence of motive could be ascertained, but it was to be determined by a consideration of those laws which generally influence or control human conduct; in other words, a jury in considering the matter should be governed by the results of experience and the application of common sense. It is true the court in the instruction refers somewhat to the reasons why, in the end, motive or want of motive must be settled by a reference to the rules of human conduct, and in that respect may be open to the criticism that it is argumentative; but we do not think its character as laying down a general rule on the question of motive is open to the objection that it assumes any fact exclusively for the determination of the jury, or that it is directed to any particular circumstance in the case, or that any inference could be drawn by the jury from it prejudicial to the defendant. It was proper for the court to instruct the jury on the subject of motive, and the instruction appears to us to have been but an abstract declaration on the subject, without reference to or comment on any particular circumstance in the case. It does not assume that there was a motive, nor does it assume the existence of any fact from which motive may be inferred. As an element in the crime of murder proper for consideration by the jury, it suggested a rule which might be adopted for ascertaining the existence or nonexistence of motive, and, while a statement of the general rule to the jury would have sufficed, we cannot perceive how, with any plausibility, the incorporation of the reasons for the rule in the instruction can be said to have amounted to a discrediting of the testimony of the defendant by the court, or an assumption on its part of the existence of any fact, the existence of which was to be determined exclusively by the jury.

In support of his attack on this instruction, counsel for appellant relies particularly on the cases of People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111, and People v. Enwright, 134 Cal. 527, 66 Pac. 726, both cases where it was held that an instruction given relative to motive was erroneous. It is claimed by appellant that there is no difference between the instruction now under consideration and the instructions held erroneous in the cases cited. There is, however, this radical difference: In both the cases cited the instruction was substantially the same, and practically informed the jury that they would be warranted in finding a motive for the conduct of the defendant without any proof whatever, which was clearly pointed out in the cases to be erroneous. In the instruction at bar the jury are not so informed. They are instructed that motive may be established by direct affirmative proof or inferred from circumstantial evidence, and that in inferring motive they may take into consideration those rules which are found to usually influence human conduct.

But, assuming that the instruction standing alone might be open to the objection which appellant urges against it, still it is quite evident, when all the instructions given to the jury are considered, that the court in the instruction criticised did not intend to imply that the testimony of defendant should be disregarded by the jury, nor did it assume that defendant had killed the deceased, and that his motive for doing so was robbery, or that by reason of the language used in the instruction the jury could have understood the court as intimating a belief as to any of these matters or in any other respect. In determining whether a jury has been correctly instructed, it is not proper to take into consideration an isolated portion of an instruction or a single instruction alone, but resort must be had to the entire charge. It is to be assumed that the jury in considering a case have in mind the instructions of the court as a whole, and if, examined as a whole, they correctly state the law and are sufficiently explicit so that a jury of ordinary intelligence would not be misled by them, or become impressed with the view that the court was intimating that it believed any fact to be established by the evidence, then the instructions are not susceptible to criticism.

Now, while appellant directs his complaint against that portion of the instruction which we have been examining, he does not give due consideration to this rule which requires an examination of the entire charge, and overlooks the fact that immediately following the instruction which he attacks the court gave a further instruction as to motive which in reality was a continuation of the instruction criticised. The court said: "When the evidence fails to show any motive to commit the crime charged on the part of the accused, it is a circumstance in favor of his innocence;

and in this case, if the jury finds by careful examination of all the evidence that it fails to show any motive on the part of the accused to commit the crime charged against him, then this is a circumstance which the jury ought to consider in connection with all the other evidence in the case in making up their verdict." It is clear, when the two instructions are read together, that the court was not assuming anything as to motive, or giving any intimation as to its belief of the agency of the defendant in the killing of deceased or the existence on his part of any motive for his doing so. It is apparent, when this last instruction is taken into consideration with the criticised instruction of which it is a part, the jury could have understood nothing else therefrom than that the court was instructing them on the subject of motive as an element in the crime of murder, leaving to them exclusively the determination from the evidence whether it was proved in the case or not.

Aside from this, the court, among other instructions, further instructed the jury fully, as is customary, on the presumption of innocence; the doctrine of reasonable doubt; the necessity of the prosecution proving every fact essential to establish guilt beyond a reasonable doubt, or, failing this, that defendant was entitled to an acquittal; on the subject of direct and circumstantial evidence; and that where the latter is relied on for a conviction it must exclude to a moral certainty, beyond a reasonable doubt, any other hypothesis except the guilt of defendant, or the jury must acquit him. The jury were also told at the request of defendant that the defendant had a right to testify in his own behalf or not, or to testify so far and to such facts as he saw fit, and any omission or failure on his part to testify to any facts, or particular fact, must not be considered as a circumstance against him, or be considered by the jury at all. At the very beginning of the charge the jury were told that the duty of the court was simply to instruct them on the general principles of law, and that they were to distinctly understand "that the court in no manner or form was expressing, or desires to express, any opinion on the weight of the evidence, or any part of it, or on the truth or falsity of any witness' testimony, or that any alleged fact in the case is, or is not, proved. With questions of fact, the weight of the evidence, the credit you should give to any witness sworn, the court has nothing to do. These are matters entirely within your province, and which you as jurors, under your oaths, must determine for yourselves." This principle of the exclusive right of the jury to determine what facts were or were not proven, the weight of the evidence, and the credibility of witnesses, was subsequently reiterated during the giving of the charge. Taking into consideration the entire charge of the court on the subject of motive, coupled with the other instructions, particularly the one we have last quoted, where the court announces the rule as to the respective duties of the court and the jury, and it appears quite clear that no intelligent juror could have understood the court in the face of its express denial of any right, or intention to do so, as implying in the instruction on motive that the testimony of the defendant was to be discredited, or that the court was assuming that defendant had feloniously killed the deceased, or that motive on his part for doing so was proven, or that any motive had at all been proven.

This case, in its general features as to instructions, is similar to the case of People v. Besold, 154 Cal. 363, 97 Pac. 871. The particular instruction there criticised was one given on the matter of intent; it being claimed that as given the court assumed that defendant, who was being prosecuted for murder, had killed the deceased. It was held that on an examination and consideration of the entire charge given to them the jury could not so have understood the court as intimating. The rule is there fully discussed and clearly declared (the authorities in support of it being collated) to the effect that, in determining whether the law has been properly declared to a jury in any particular case, the charge as a whole must be considered. Applying this rule to the case at bar as it is declared in the Besold and other cases, we are satisfied that the claim of defendant that the court was assuming any fact as proven in its instruction on motive, if the instruction itself examined alone was susceptible of such criticism, is plainly untenable upon a consideration of the entire charge of the court.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

(156 Cal. 769)

SMITH et al. v. McNUTT et al. (L. A. 2,363.)

(Supreme Court of California. Dec. 15, 1909. Rehearing Denied Jan. 13, 1910.)

MORTGAGES (§ 148*)—TERMINATION OF TRUST — NONPERFORMANCE OF CONDITIONS BY BENEFICIARIES.

The T. Company owned lots subject to a mortgage to a bank and was indebted to W. and H. and a firm of which complainants and cross-complainant were members, and, to provide for the payment of such indebtedness, conveyed the lands to cross-complainant, subject to certain trusts declared by him, first, in favor of W. of $10 an acre, second, in favor of H. of the same amount, and, third, in favor of the firm for the residue for which the lands might sell, but the declaration provided that the rents and income were insufficient to pay interest on the mortgage to the bank and the taxes, and that W., H., and the firm should each pay one-third of the interest and taxes, to be repaid after discharging the mortgage debt before the proceeds of the sale of the land were applied to the other trusts declared. The beneficiaries failed to pay the interest on the mortgage debt, and the mortgage was foreclosed, and the land purchased by the bank, and thereafter defendant purchased from W. and H. their interest in the trust and obtained from the bank an assignment of its certificate of purchase. Complainants, who have acquired cross-complainant's interest in the trust, seek to have the land sold free from any claim under the mortgage sale, and the proceeds distributed as provided in the trust declaration upon their paying one-third of the taxes and interest on the mortgage debt, and a fair proportion of the principal, and cross-complainant, the trustee, asks the same judgment. *Held*, that under the trust any sales of the lands were to be made prior to foreclosure of the mortgage, and, as complainants were equally at fault with W. and H. in failing to pay interest and taxes, they thereby abandoned the trust, and the foreclosure of the mortgage ended all relationship between the beneficiaries except that between them and the T. Company as creditors, so that complainants were entitled to the lands or the proceeds only after satisfaction of all prior claims, including those of W. and H.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 293–301; Dec. Dig. § 148.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by George H. Smith and another against Cyrus F. McNutt, as trustee, and others, in which defendant named filed a cross-complaint. From a judgment sustaining demurrer to complaint and cross-complaint, plaintiffs and cross-complainant appeal. Affirmed.

George H. Smith and Joseph E. Hannon, for appellants. C. F. McNutt and John J. North, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment entered upon sustaining demurrers to an amended complaint and to a cross-complaint, in an action wherein plaintiffs and cross-complainant McNutt seek the same judgment.

On May 17, 1901, the Lake View Town Company, a corporation, hereinafter designated the "town company," was the owner of the lands involved in this proceeding, being lots in Riverside county aggregating 1,000 acres scattered throughout the extent of a larger body of arable lands, comprising some 6,000 acres. The land of the town company was subject to a mortgage held by the San Gabriel Valley Bank, hereinafter designated as the "bank," securing the payment of $5,000, with interest. The town company was also indebted to John Wolfskill and to L. P. Hansen, and to the law firm of Smith, McNutt & Hannon (composed of the plaintiffs and cross-complainant). To provide for the payment of such indebtedness, it conveyed the land on May 17, 1901, to McNutt, by deed of grant, bargain, and sale, subject to the mortgage held by the bank, and also 1,000 shares of water stock supposed to be appurtenant to the land. McNutt accepted the conveyance with the understanding in parol between him and the town company that he would take, hold, and dispose of the land on certain trusts which he should thereafter declare in writing. On October 10, 1903, he made such written declaration. It recited the conveyance to him, and also the adoption of resolutions by the town company intended to fix certain trusts on the property, being: First, a trust in favor of John Wolfskill of $10 per acre; second, a trust in favor of L. P. Hansen of $10 per acre; and, third, a trust in favor of Smith, McNutt & Hannon for the whole amount of the residue for which said lands and water stock might be sold by him after paying and discharging from the proceeds of such sales the debt of the bank and interest thereon, the taxes on said lands, the expenses of sale, $10 per acre to Wolfskill, and $10 per acre to Hansen, and declared that he held the lands subject to said trust. This was followed by this preamble and condition, viz.: "But, whereas, the said debt to the said San Gabriel Valley Bank, together with accumulations of interest thereon and certain taxes against the said lands, remain unpaid and are a first lien against the said lands in my hands; and, whereas, the rents and income from the said lands have not hitherto been sufficient to keep down such interest and taxes; and, whereas, the same must be kept down to prevent the foreclosure of the said mortgage and the sale of such lands for such taxes: I hereby make it a condition in the declaration of the said trusts in favor of the said Wolfskill, the said Hansen and the said Smith, McNutt & Hannon, that they shall, from time to time as the same is needed for the purpose of keeping down said interests and taxes, pay to me, or to said bank, and upon such taxes, sums of money sufficient to keep the same fully paid, as they shall respectively from time to time, become due and payable, that is to say, the said Wolfskill shall furnish one-third of such sums of money, the said Hansen one-third and the said Smith, McNutt & Hannon one-third, the said sums of money to be reimbursed to the several parties, with interest, next after the payment of said mortgage and of all taxes due, before any of the proceeds of the sales of said lands shall be applied to the other trusts herein declared; and if at any time there is sufficient income from the rents of said lands to pay said taxes and interest and to reimburse the said parties for moneys advanced upon that account, the same shall be used as soon as received for such purposes."

McNutt delivered this written declaration to Hansen, who received it on behalf of himself and the other beneficiaries, all of whom agreed thereto, and it was duly recorded in the office of the county recorder of Riverside county. The beneficiaries failed to furnish the trustee with money wherewith to pay the interest on the indebtedness secured by the mortgage held by the bank, and such interest was therefore not paid. The mortgage falling due by reason of such nonpayment, the bank brought its action to foreclose the same, and this action resulted in a judgment fixing the amount due, directing a sale by defendant Harvey Potter, appointed commissioner for that purpose, and "foreclosing the equity of redemption" of McNutt as successor of the town company. The judgment was affirmed by this court. On April 3, 1907, the commissioner duly sold the mortgaged property, the bank being the purchaser, for the sum of $7,806.31, which was the amount then due under the judgment. The commissioner thereupon executed and issued a certificate of sale to the bank, as such purchaser. Thereafter and prior to July 18, 1907, one A. B. Miller, acting for defendant the "Nuevo Land Company," a corporation, hereinafter designated as the "land company," purchased from Wolfskill and Hansen their respective interests in said trust, and on July 18, 1907, for a recited consideration of $9,050, obtained from the bank an assignment of the certificate of purchase executed by the commissioner. On July 24, 1907, Miller assigned said certificate and the claims or interests of Wolfskill and Hansen to the land company. The property is now of such value that it could be sold in parcels, "and, as contemplated by the scheme of said trust," for enough to pay all the "trust debts."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiffs Smith and Hannon, who have acquired all of the interest of McNutt, claim the right against the land company, as the successor in interest of their alleged co-beneficiaries, Wolfskill and Hansen, to be admitted to a participation in all rights acquired by such land company by reason of its purchase of the certificate of sale, and insist that, upon payment by them to the land company "of their just share to reimburse the said defendant of its necessary outlay to relieve and release the said land and said water stock from the lien and burden of the said mortgage and sale made under the decree foreclosing the same," the trustee should be required to execute his trust by selling the property free of any claim under the mortgage and sale thereunder, and to distribute the proceeds of such sales in the manner provided by the declaration of trust. They have made no offer to the land company to do anything more than pay one-third of the interest that has accrued on the mortgage debt and one-third of any taxes "that should have been paid by the debtor in the said mortgage," and "a fair proportion of the principal." The land company denies the right of plaintiffs to become entitled to the benefit of its act in taking over the certificate of purchase from the bank, by contribution of any portion of the expenses incurred in so doing, and claims to hold said certificate of purchase just as any purchaser who had no interest in the trust would hold the same.

Plaintiffs seek by this action an accounting on the part of the land company as to the amounts expended by it in acquiring its certificate of purchase, and a determination of the amount of the portion thereof which they shall pay, by way of contribution, to extinguish the lien of such certificate, and also an injunction preventing the commissioner from executing any deed on such certificate, and further a decree providing for the execution of the trust by the trustee. As we have before stated, the trustee asks practically the same judgment.

The foregoing constitutes substantially the case made by the amended complaint and the cross-complaint to which demurrers were sustained.

It may be conceded for the purposes of this decision that plaintiffs had such an interest in this land as would have given them the right to obtain such relief as would practically constitute a redemption thereof, even though they may not have been entitled to redeem under the statutory provisions relating to redemption. It may be that it could be held that they were substantially the owners thereof, subject to the prior claims of the bank, Wolfskill, and Hansen, and that a court of equity might be warranted in requiring a conveyance to them by the land company upon payment of the amounts due on such prior claims. However this may be, plaintiffs are seeking no such relief by this action, and their amended complaint does not state a cause of action in that behalf. The same equitable principles that might authorize the granting of such relief to plaintiffs would put Wolfskill and Hansen in the position of creditors having superior claims to plaintiffs, who were entitled to redeem for the protection of those claims, and would require, as a condition of such redemption by plaintiffs, the payment by them of the whole amount properly paid in making the purchase, with interest, and also the amounts due on account of the Wolfskill and Hansen claims.

We are of the opinion that at the time of the purchase of the certificate by the land company, successor of Wolfskill and Hansen, there was no such relation existing between it and plaintiffs as would give plaintiffs the right to have the purchase held to be one made for the benefit of the so-called "trust." The general principles relied on by plaintiffs in this regard, applicable in such cases as those of joint tenants, tenants in common, and generally persons placed in a situation of trust or confidence with respect to the subject of its purchase, may be freely conceded to be correctly stated by them in their briefs. If there is such a relationship that, in the language of Chancellor Kent in Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 407, "it is not consistent with good faith, nor with the duty which the connection of the parties, as claimants, of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title and appropriate the whole subject to himself and thus undermine and oust his companion," the one acquiring such outstanding title will not be allowed to retain it for his own exclusive benefit. But, of course, this principle can have no application in the absence of the relationship which constitutes the whole reason for its existence. In the case at bar it appears clear to us that whatever obligations of this nature may have existed as to Wolfskill and Hansen prior to the foreclosure of the mortgage, if any, such obligations were absolutely terminated by such foreclosure and the sale thereunder. The declaration of trust makes it apparent that it was the intention of all the parties that, so far as any sales of the lands by the trustee were concerned, such sales were to be made prior to any foreclosure of the mortgage. Such sales were to be primarily for the purpose of paying the mortgage claim, and the beneficiaries were not to be called upon to advance any portion of the principal due thereon. It was expressly made a condition of the declaration in favor of the three beneficiaries that they should each advance one-third of such sums as should be necessary to pay interest on the mortgage debt and taxes, in order to prevent the foreclosure of the mortgage and the sale of the land for taxes. This they did not do as to amounts necessary to pay interest on the mortgage debt, and the mortgage was consequently foreclosed. Plaintiffs failed in this behalf, as well as Wolfskill and Hansen. No reason whatever is assigned for such default on plaintiffs' part. It is simply alleged that the beneficiaries failed to furnish the money wherewith to pay such interest. It cannot be assumed that Wolfskill and Hansen were unwilling to furnish their portion of this money had plaintiffs been willing to furnish theirs, and of course they could not be held derelict in failing to pay their portion if plaintiffs were unwilling to pay their own one-third. So far as appears by the complaint and cross-complaint, plaintiffs entirely abandoned their part of the arrangement in a most essential particular, and Wolfskill and Hansen in failing to make the necessary advances were not guilty of any bad faith or of any act inconsistent with any duty devolving on them by reason of the arrangement between the parties. Under these circumstances, the consequent foreclosure of the mortgage, which renders it impracticable to execute the trust in the manner designed, terminated all relationship between the various beneficiaries except the relationship that may have existed between Wolfskill and Hansen, on the one hand, as creditors of the town company having a lien on the land involved here for the amounts due them respectively, subject to the claim of the bank, and plaintiffs, on the other hand, as being entitled to the land or its proceeds after full satisfaction of all prior claims, including those of Wolfskill and Hansen. We know of no equitable considerations that would warrant the granting of any greater relief to plaintiffs than to permit them to take this land upon payment by them of all prior claims. As already said, they have shown no disposition to do this, and the complaint and cross-complaint make no case in this behalf. We are therefore of the opinion that the ruling of the court sustaining the demurrers was correct.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

156 Cal. 718

DEMPSEY v. UNDERHILL et al. (DESERT MINING CO., Intervener). (L. A. 2,400.)

(Supreme Court of California. Dec. 11, 1909. Rehearing Denied Jan. 10, 1910.)

1. Appeal and Error (§ 78*)—Appealable Orders — Finality of Decision — Dismissal.

An order dismissing an action for delay in prosecution is appealable as a final disposition of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 471; Dec. Dig. § 78.*]

2. Appeal and Error (§ 1061*) — Harmless Error—Ruling on Motion to Dismiss.

Any error in denying plaintiff's motion to dismiss a complaint of intervention for delay in prosecution is harmless, where the court on its own motion dismissed the entire action on the same ground, and plaintiff did not appeal from the latter order.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1061.*]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. F. Dempsey against J. H. Underhill and others, in which the Desert Mining Company, a corporation, intervened. From a judgment dismissing the action for delay in prosecution, plaintiff appeals. Affirmed.

Campbell, Metson & Campbell and F. E Barton, for appellant. M. W. Conkling and C. W. Pendleton, for respondent and intervener.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment dismissing an action for the reason that the same was not brought to trial within five years after issue joined by answer between the intervener and plaintiff.

The action was one commenced September 24, 1900, to quiet plaintiff's title to an undivided interest in certain mining claims as against certain persons named as defendants. The defaults of all these persons were entered in the year 1901, the last of such defaults having been entered on October 15, 1901; but no judgment has ever been given as against any of said defendants. By leave of the court the Desert Mining Company filed its complaint in intervention on October 26, 1900, claiming all of the property as against both plaintiff and defendants. Plaintiff's demurrer to this complaint in intervention was overruled, and he filed his answer thereto on November 24, 1900. On September 25, 1906, plaintiff gave notice of a motion to be made for an order dismissing the action in intervention on the ground that the issues tendered by the intervener had not been brought to trial within five years after the plaintiff had filed his answer, and that such neglect had not been due to any stipulation of the parties in writing or otherwise. Code Civ. Proc. § 583. This motion was heard on November 26, 1906, and the facts stated as grounds therefor shown to exist. On December 6, 1906, the lower court made its order denying plaintiff's motion to dismiss the action in intervention, and adjudging that "the said action and the whole thereof be and the same is hereby dismissed, for the reason that the same was not brought on for trial within five years." This order, which constituted a final judgment within the meaning of the provisions of the Code touching appeals, and which finally and entirely disposed of the whole case (see Marks v. Keenan, 140 Cal. 33, 73 Pac. 751), was entered June 6, 1907, and plaintiff appealed therefrom within six months thereafter.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It may be seriously questioned whether the lower court was warranted by the facts stated in dismissing plaintiff's action as to the defaulting defendants. But plaintiff makes no complaint in his briefs on this score. The sole points are: (1) That the intervener never perfected its intervention as provided by the law and therefore has no standing in the litigation; (2) that the complaint in intervention did not state a cause of action; and (3) that the court erred in denying plaintiff's motion to dismiss the action in intervention. Solely for the purposes of this appeal we may concede that all of these points are well made, but we are nevertheless utterly unable to see why a reversal of the judgment of dismissal should be had on account thereof. The effect of the judgment of dismissal was necessarily to dismiss the intervener's action, the very thing plaintiff was seeking to have done by his motion. While denying plaintiff's motion, the court on its own motion made an order which granted all that plaintiff asked in regard to the intervener. So far as the disposition of the intervention is concerned, plaintiff has nothing substantial to complain of. If the court erred in denying his motion, it was error without prejudice.

If plaintiff has any ground of complaint whatever, it is that the lower court by its order made on its own motion erroneously prevented him from obtaining a judgment against the defaulting defendants. But, as we have said, he makes no complaint as to this in his briefs. His points relate solely to his rights as against the intervener.

None of the points made warrant a reversal.

The judgment of dismissal is affirmed.

We concur: SHAW, J.; SLOSS, J.

156 Cal. 733

PEOPLE v. OPPENHEIMER. (Cr. 1,493.)

(Supreme Court of California. Dec. 13, 1909. Rehearing Denied Jan. 12, 1910.)

1. CRIMINAL LAW (§ 1213*)—"CRUEL OR UNUSUAL PUNISHMENT"—CONSTITUTIONALITY OF STATUTE.

Pen. Code, § 246, providing that every person undergoing a life sentence in a state prison, who with malice aforethought commits an assault with a deadly weapon, or by any means or force likely to produce great bodily injury, is punishable with death, is not violative of Const. art. 1, § 6, prohibiting "cruel or unusual punishment," as the infliction of the death penalty by any methods ordinarily adopted by civilized people is neither a cruel nor unusual punishment, unless it be so disproportionate to the offense for which it is inflicted as to shock the moral sense of the people.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304–3309; Dec. Dig. § 1213.*

For other definitions, see Words and Phrases, vol. 2, pp. 1765–1767; vol. 8, p. 7624.]

2. CONVICTS (§ 5*)—CRIMES—TRIAL—READING INFORMATION TO JURY—EVIDENCE.

Pen. Code, § 1093, subd. 1, providing that where the information charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction, and section 1025, providing that when a defendant is charged with a previous conviction, and pleads not guilty and admits the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial, refer only to the trial of offenses where the prior conviction is alleged to enable the court to impose a greater punishment than when there is no prior conviction, and do not apply to trial of a person who, while undergoing a life sentence, commits an assault, and which is made punishable by death by Pen. Code, § 246; and, where a person prosecuted under the latter section enters a general plea of not guilty, it puts in issue the question of his conviction upon which judgment of life imprisonment was given, and his admission of that fact in his arraignment will not relieve the district attorney from necessity of proving it on the trial.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

On the trial of a person who, while undergoing a life sentence, committed an assault which under Pen. Code, § 246, is punishable by death, the admission in evidence to show the former conviction, in addition to the certified copy of the judgment of former conviction, of the judgment roll, including, in addition to a copy of the judgment, the information, a copy of the minutes of the plea or demurrer, and a copy of the minutes of the trial, if unnecessary to prove the former conviction, the certified copy of the judgment being in evidence, did not prejudice defendant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

4. Convicts (§ 5*)—Crimes—Trial—Admissibility of Evidence.

On the trial of a person who, while undergoing a life sentence, committed an assault, which under Pen. Code, § 246, is punishable by death, the record of the former commitment is admissible.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

5. Convicts (§ 5*)—Crimes—Information—Description of Weapon.

In a prosecution under Pen. Code, § 246, providing that every person undergoing a life sentence in a state prison who, with malice aforethought, commits an assault "with a deadly weapon or instrument" is punishable with death, an allegation in the information that the assault was with a deadly weapon is sufficient, without specifying the nature of the weapon.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

6. Criminal Law (§ 373*)—Assault with Deadly Weapon—Evidence—Information—Admissibility.

In a prosecution under Pen. Code, § 246, making an assault with a deadly weapon, by a person undergoing a life sentence, punishable by death, evidence is admissible to show the use of two weapons, and is not objectionable as tending to show the commission of two offenses, where the evidence showed only one assault in which both weapons were used.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 373.*]

7. Criminal Law (§ 678*)—Trial—Election as to Offense.

Where, in a prosecution for assault with a deadly weapon, the evidence tends to show one assault in which two weapons were used, such evidence does not tend to show two or more distinct offenses for each of which defendant might be prosecuted, and therefore the district attorney need not elect which of two offenses he would rely on as constituting the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580–1583; Dec. Dig. § 678;* Indictment and Information, Cent. Dig. §§ 425–437.]

8. Criminal Law (§ 1167*)—Appeal and Error—Harmless Error—Variance.

In a prosecution under an information charging assault with a deadly weapon, evidence that the assault was committed with two weapons is not prejudicial variance.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1167.*]

9. Witnesses (§ 268*)—Cross-Examination.

In the prosecution of a person who, while undergoing a life sentence, committed an assault, one defense was insanity at the time of the alleged assault, and the warden of the prison in which defendant was confined testified as to the conditions surrounding defendant while the witness was warden; the object being to show such conditions as might produce insanity. He testified that during all of the time during which he was warden defendant was kept in solitary confinement in the incorrigible ward, and prohibited from communicating with others, and not permitted to receive visitors, that during a portion of the time he was deprived of his mattress, and at one time the permission to have reading matter was revoked. *Held*, that questions on cross-examination as to his reasons for depriving him of reading matter and his mattress, as well as for putting him on bread and water, were improper, as the state had no right to show by specific acts that defendant was incorrigible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 948; Dec. Dig. § 268.*]

10. Criminal Law (§ 1170½*)—Appeal—Harmless Error—Admission of Evidence.

In a prosecution for assault with a deadly weapon by one who was undergoing a sentence of life imprisonment, it was admitted that defendant had been kept in solitary confinement in the incorrigible ward for more than eight years before committing the assault. *Held*, that improper cross-examination by the state of the warden of the penitentiary as to his reasons for depriving defendant of some of his privileges was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. § 1170½.*]

11. Witnesses (§ 269*)—Cross-Examination.

In a prosecution for assault with a deadly weapon by one who was undergoing a life sentence, in which the defense was insanity, an employé at the prison, examined as a witness for defendant, testified that defendant was confined in the dungeon for a time, having been put there on the day of the assault, and subsequently was carried back to the incorrigible cells and put in a strait-jacket. *Held*, that testimony elicited on cross-examination that defendant had been placed in the dungeon shortly after his arrival at the prison, and remained there about a month or six weeks, and that subsequently he was again confined in the dungeon, was improper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949–954; Dec. Dig. § 269.*]

12. Criminal Law (§ 1169*)—Appeal—Harmless Error—Admissibility of Evidence.

In a prosecution for an assault with a deadly weapon by one who was undergoing a life sentence, in which the defense was insanity, an employé of the prison testified on direct examination by defendant that defendant was confined in the dungeon on the day of the assault, and subsequently carried back to the incorrigible cells and put in a strait-jacket. *Held*, that the error in allowing the witness to testify on cross-examination that defendant had been placed in the dungeon after his arrival at the prison, and that on a subsequent occasion he had been placed in the dungeon for a month or six weeks, and on a third occasion was also placed in the dungeon, was harmless; it being admitted that defendant had been kept in solitary confinement in the incorrigible ward for more than eight years prior to the assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

13. Criminal Law (§ 1170*)—Harmless Error—Rejection of Evidence.

Where, in a criminal prosecution of a convict for assault with a deadly weapon, the defense was insanity, and defendant's counsel was allowed full latitude in showing conversations between defendant and others, sustaining an objection to a question to a witness who testified to many conversations as to one conversation, which was not shown or claimed to be important, is not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

14. Criminal Law (§ 354*)—Insanity—Evidence.

In a prosecution in which the defense was insanity, an employé of the state prison in which defendant was incarcerated at the time he committed the offense testified that after the commission of the offense defendant was put in a strait-jacket. *Held*, that an objection was properly sustained to a subsequent question as to how long he remained in the strait-jacket, as evidence as to confinement subsequent to the commission of the assault is not evidence of the condition of defendant's mind at the time of the assault.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354.*]

15. CRIMINAL LAW (§ 354*)—INSANITY—EVIDENCE.

In a prosecution for assault with a deadly weapon by defendant while undergoing a life sentence, in which the defense was insanity, there being evidence to show that defendant had been confined for a long time in the incorrigible cells, evidence by nonexperts as to whether some persons confined in the incorrigible cells had not become insane while so confined was inadmissible, as it was not intended to show by such witnesses anything more than the fact that one or two individuals became, in their opinion, insane while confined in those cells.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354.*]

16. CRIMINAL LAW (§ 570*)—EVIDENCE—INSANITY—SUFFICIENCY.

Defendant, in order to show insanity, must show such insanity by a preponderance of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285–1288; Dec. Dig. § 570.*]

17. CONVICTS (§ 5*)—CRIMES—INSTRUCTIONS AS TO VERDICT—DEGREE OF OFFENSE.

In a prosecution under Pen. Code, § 246, making it an offense punishable with death for a person undergoing a life sentence in a state prison to commit an assault with a deadly weapon, it is not error for the court to refuse to charge that, if the evidence warranted it, other verdicts might be found than those of guilty of the offense charged and not guilty, and particularly of the verdict of guilty of the lessor offense, defined by section 245, of assault with a deadly weapon.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

18. ASSAULT AND BATTERY (§ 96*)—ASSAULT WITH DEADLY WEAPON—INSTRUCTIONS.

Where the evidence showed that the assault was committed with a window weight and a knife, a requested instruction that the jury must acquit if there was a reasonable hypothesis deducible from the evidence that the person assaulted was struck by accident or mischance or inadvertence, without the intention of defendant, accompanying the act, was properly refused, as under such instruction, if the jury believed that the assault with the window weight was intentional, but were in doubt whether the cutting with the knife was intentional, they must acquit.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 96.*]

19. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS ALREADY GIVEN.

Where the court has given clear and explicit instructions what the jury must find in the way of intention and malice before it could convict, a requested instruction that if the jury believed from the testimony that the person assaulted was injured by accident, and without evil design or intention or malice aforethought, they must acquit was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

20. CRIMINAL LAW (§ 829*)—TRIAL—REPETITION OF INSTRUCTIONS.

Where the subject-matter of requested instructions relating to the impeachment of witnesses and the powers and functions of the jury in the consideration of testimony are fully covered by the charge of the court, it is not error to refuse to give the requested instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

21. CRIMINAL LAW (§ 945*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where the showing as to newly discovered evidence is not sufficiently strong to render a different result of a new trial probable, the trial court did not err in refusing to grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324–2327, 2336; Dec. Dig. § 945.*]

22. CRIMINAL LAW (§ 1158*)—SUSPENDING JUDGMENT—INSANITY OF ACCUSED.

Where the evidence of the insanity of accused at the time judgment is pronounced is not sufficiently strong to enable the appellate court to say that the conclusion of the trial court that he was sane was not fully warranted by the evidence, the refusal to suspend judgment until the question of his sanity could be submitted to a jury will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158.*]

23. CONSTITUTIONAL LAW (§ 70*)—DISTRIBUTION OF POWERS—ENCROACHMENT OF JUDICIARY ON LEGISLATURE.

The question whether the infliction of a punishment prescribed by a statute is too severe is a matter with which the trial courts have no concern.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 131; Dec. Dig. § 70.*]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Jacob Oppenheimer was convicted of assault with a deadly weapon while undergoing a life sentence in the state prison, and appeals. Affirmed.

G. C. Ringolsky, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was informed against for committing an assault with a deadly weapon, with malice aforethought, while undergoing a life sentence in the California state prison at San Quentin, upon the person of one J. Wilson, a human being, being the crime defined by section 246 of the Penal Code, enacted in the year 1901. He was found guilty of the offense charged and adjudged to suffer death, as the section requires in such cases. He appeals from the judgment and from the order denying his motion for a new trial, and also from an order denying his motion to suspend judgment on the ground that he is insane. The last-named order was made prior to judgment, and is not an appealable order, but the action of the trial court in such matter is reviewable on the appeal from the judgment.

The defendant was undergoing a life sentence in the California state prison at San

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Quentin. He succeeded in escaping from the cell in which he had been incarcerated in solitary confinement for over eight years, and armed with a portion of an iron window weight, described as being one-half of such a weight, made his way to the general dining room of the prison. There he found Wilson, a fellow convict, one of whose duties was the cutting of bread for the prisoners. The knife used by Wilson was lying on the "bread counter" at the end of which he was standing. Defendant struck Wilson on the forehead with the window weight and immediately reached past him and picked up the knife. Wilson immediately grappled with him, and in the scuffle which ensued Wilson was cut in several places by the knife in defendant's hand. The defendant was finally overpowered and the weapon taken from him.

1. It is earnestly contended that section 246 of the Penal Code is unconstitutional. The validity of this statute has already been affirmed in three decisions of this court. People v. Finley, 153 Cal. 58, 94 Pac. 248; People v. Quijada, 154 Cal. 243, 97 Pac. 689, and People v. Carson, 155 Cal. 164, 99 Pac. 970. Counsel for defendant presents no additional ground for holding it to be violative of any provision of our state Constitution to those presented in the earlier cases that appears to us to be well based. The reasons for the previous rulings that persons undergoing life sentences constitute a class as to which the Legislature is authorized to make this particular provision are fully stated in People v. Finley, supra. It is urged here for the first time that the section is violative of section 6, art. 1, of our Constitution, prohibiting "cruel or unusual punishments." Whatever may be our views as to the policy of this section of the Penal Code, we are not warranted in saying as matter of law that the punishment of death for an assault with a deadly weapon with malice aforethought, by one undergoing a life sentence in a state prison is either "cruel" or "unusual" within the meaning of those terms as used in our Constitution. The infliction of the death penalty by any of the methods ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither a cruel nor unusual punishment (see Re Kemmler, 136 U. S. 447, 10 Sup. Ct. 930, 34 L. Ed. 519), unless, perhaps, it be so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally, "as to shock the moral sense of the people" (People v. Morris, 80 Mich. 634, 45 N. W. 591, 8 L. R. A. 685). In view of what is said in People v. Finley, supra, as to the reasons for such provision as to the class of persons affected thereby, we are of the opinion that no such conclusion can be reached in regard to the statute under consideration. The objection that the statute is violative of the fourteenth amendment of the Constitution of the United States, which has been held to be without foundation so far as this court is concerned, is involved in the Finley Case, which is now pending in the United States Supreme Court on writ of error. Pending the determination of that case by that court, the execution of other judgments pronounced under this section should and doubtless will be deferred, so that if this court is in error in its views as to the merits of this objection, the defendant will not be prejudiced thereby.

2. For the purpose of showing that the defendant was guilty of the offense defined by section 246 of the Penal Code, it was alleged in the information that at the time of the alleged assault he was undergoing a life sentence in the California state prison at San Quentin under and by virtue of a certain described judgment of the superior court of Sacramento county. It was essential, of course, to allege facts showing that defendant was then undergoing a life sentence, in order to state the public offense intended to be charged. On his arraignment he was allowed, at his own request, in addition to pleading not guilty of the offense charged, to admit that he had suffered the conviction alleged in the information. He now claims that, having admitted such "previous conviction" on his arraignment, the clerk of the court, in reading the information to the jury on the trial, should have omitted therefrom all that related thereto (subdivision 1, § 1093, Pen. Code), and that no evidence relating to the same should have been received on the trial. (section 1025, Pen. Code). The provisions of the Penal Code thus relied on by him have reference exclusively to those cases where a previous conviction of some other and distinct offense is alleged for the purpose of enabling the court to impose a greater punishment than is authorized for the offense charged when there is no prior conviction (see sections 666, 667, and 668, Pen. Code), and can have no application where the fact of the prior conviction is an essential element of the offense charged. By his general plea of not guilty in this case defendant necessarily put in issue all the allegations of facts essential to the offense, including the conviction upon which the judgment of life imprisonment was given, and his admission of that fact on his arraignment did not relieve the district attorney from the necessity of proving it on the trial. The record shows that he expressly refused to make any such admission on the trial.

3. The trial court allowed the district attorney to put in evidence for the purpose of showing this fact, not only the commitment of the defendant to the state prison, which is a certified copy of the judgment (Pen. Code, § 1213), but also the judgment roll in the action resulting in such judgment, except the instructions and charge of the court, thus including, in addition to a copy of the judgment, the information, a copy of the minutes of the plea or demurrer, and a copy of the minutes of the trial (Pen. Code, § 1207). This evidence was declared to be received solely

for the purpose of showing a valid judgment under which defendant was undergoing a life sentence. Counsel for defendant claimed that the commitment alone was sufficient proof, and that the other papers were unnecessary. Assuming this to be true, we are at a loss to see how any of the other records admitted could have prejudiced defendant's cause. The commitment showed that he was informed against for the crime of murder, pleaded not guilty, was tried and convicted of murder of the second degree, and thereupon sentenced to imprisonment for his natural life. The other records admitted showed precisely the same thing and no more. There was absolutely nothing therein that could by any possibility have unfavorably affected his cause in the minds of the jurors, who were acquainted with the contents of the commitment. That the record of the commitment is admissible cannot be doubted. See People v. Finley, 153 Cal. 63, 94 Pac. 248.

4. The information failed to specify the nature of the deadly weapon with which the assault was alleged to have been committed, alleging simply that it was done with a "deadly weapon," which is the language of the statute. This was a sufficient allegation. People v. Perales, 141 Cal. 583, 75 Pac. 170. As we have seen, the evidence showed the use of two weapons by defendant, a window weight and a knife. Defendant objected to the evidence tending to show the use of two weapons, upon the ground that the district attorney was endeavoring to show two offenses, that he could prove only one, and that he must elect which he relied on for a conviction. We think it is manifest that there was but a single assault shown by this evidence, even though two weapons were used. The mere fact that two weapons are used does not necessarily show two assaults. If one unlawfully assails another with his two hands, first striking at him with one hand and immediately thereafter with the other, no one would say that there were two offenses. The offense would be the one unlawful attempt, coupled with a present ability, to commit a violent injury upon the other's person, and each effort, made in what constituted only the same attempt to accomplish this result, would constitute only a single element of that attempt. The same thing may be true where the assailant uses two or more weapons instead of only his two hands. In State v. McDonald, 67 Mo. 13, the assault was alleged to have been made with a pair of tongs, a hammer, and an axe, all of which were alleged to be deadly weapons, and the court very properly said that this was not charging two or more assaults in one count, but one continuous assault with several weapons, which was neither impossible nor improbable. See, also, 1 Wharton, Cr. Law, § 644. The evidence offered and received in this case tended to show one continuous transaction, one assault in which two weapons were used. It was not, therefore, a case where the evidence offered showed two or more distinct offenses for each of which the defendant might be prosecuted and suffer a conviction, as was the situation in People v. Williams, 133 Cal. 165, 65 Pac. 323, and People v. Castro, 133 Cal. 11, 65 Pac. 13, and, consequently, it was not a case for election by the district attorney as to which of two offenses against the law he would rely on as constituting the offense charged in the information. He was showing simply a single assault. Defendant's real ground of complaint, if he had one, was that there was a variance between the charge and the proof, in that by the charge the assault was one made with "a" deadly weapon, while by the proof it was one made with two deadly weapons. If the district attorney had alleged the assault to have been committed with the two weapons, there could have been no ground of complaint whatever. State v. McDonald, supra. But the variance was clearly not of such a nature as to mislead or prejudice the defendant in the slightest degree in making his defense, and is one of those mere technicalities not affecting any substantial right that we must disregard. Possibly the defendant, if requesting it, would have been entitled to an instruction that the jury before they could convict must all agree upon at least one specific weapon of the two as constituting a "deadly weapon" with which defendant assaulted Wilson, but no such instruction was requested, and we need not definitely decide the point. It does not appear to have been questioned that the iron window weight was a deadly weapon, and there could hardly be a question, in view of the evidence, that defendant was guilty of an assault with that weapon, if he was not incapable of committing an assault by reason of insanity.

The case of People v. Garcia, 58 Cal. 102, is not at all in point. The information in that case had been made to charge two separate assaults as clearly as could be, and it was very properly held that the demurrer on that ground should have been sustained.

5. One of the defenses was that the defendant was insane at the time of the alleged assault. Mr. John W. Tompkins, warden of the prison from September 1, 1903, to February 1, 1906, was called as a witness for defendant, and testified solely to the condition of life surrounding defendant during his incumbency of the office of warden, the object clearly being to show such conditions as might produce insanity. He testified that during all of said time defendant was kept in solitary confinement in one of the small cells in the incorrigible ward, the purpose of which was to incarcerate men supposed to be beyond control, that he was prohibited from communicating with others, and not permitted to receive visitors. He further said that during a portion of the time defendant had a mattress to sleep on, but by his order he was deprived of it for a few months, and also that at one time he allowed him to have reading

matter, and then revoked that permission. On cross-examination he was required to testify as to statements made by him to defendant as to his reasons for depriving him of reading matter and mattress, as well as for punishing him by putting him on bread and water for a time, those statements being in substance that he had used the leaves of magazines for the purpose of injuring jail property, that he had used the mattress for the purpose of secreting implements that he had no business to have, and that he had cut a hole through the partition in his cell into the adjoining cell. All this was clearly improper cross-examination. There was nothing in the direct examination warranting any such inquiry. The theory of the learned Attorney General that the tendency of the evidence given on direct examination was to show that defendant had been deprived of mattress and reading matter because it was thought he was insane, and it was feared that he might harm himself by means thereof, and it was therefore proper to show on cross-examination that he was deprived of these privileges by way of punishment, and thus rebut the inference that the officers believed him to be insane, is very farfetched and obviously unsound. What the theory of the district attorney was in asking these questions we do not know. Of course, under elementary principles, he had no right to show that the defendant had been guilty of specific acts of misconduct which showed him to be incorrigible. But under the peculiar circumstances of this case we cannot assume that defendant may have been prejudiced by this evidence. It was one of the admitted facts of this case, in truth the very basis of the defense of insanity, that defendant had been kept in solitary confinement in the incorrigible ward for more than eight years, and there could not have been any more convincing evidence than this as to the opinion of the prison officials that he was incorrigible and absolutely beyond control. The objectionable testimony given by Warden Tompkins could not in the nature of things have added one iota to the knowledge of the jury in this respect. Its admission must be regarded, therefore, as error without prejudice.

6. Captain of the Guard Randolph was examined as a witness for defendant, and on his direct examination testified that defendant was confined in the dungeon for a time, having been put there the day of the assault on Wilson, and subsequently was carried back to the incorrigible cells and put in a strait-jacket. On cross-examination he was allowed, without objection, to testify that defendant had been placed in the dungeon shortly after his arrival at the prison, February 1, 1899. A question asked the witness why defendant was placed in the dungeon on that occasion was not answered, the witness having no actual knowledge of the reason. Further, without objection, Captain Randolph testified that defendant remained in the dungeon on that occasion about a month or six weeks. Over objection, he was allowed to testify that in June of the same year he was again confined in the dungeon for a brief period, but the court very properly struck out the statement of the witness that defendant at that time "got in trouble again." We are of the opinion that the whole of this cross-examination was improper, but for the reasons given in discussing the cross-examination of Mr. Tompkins, we are satisfied that so much of it as was objected to was in no way prejudicial.

7. The trial court allowed defendant's counsel full latitude in the matter of showing conversations between defendant and others for the purpose of showing insanity, and there can be no question, in the light of the record, that counsel fully understood that the ruling of the court was that he was at liberty to introduce in evidence any conversation upon which he relied in that behalf. Testimony of conversations given by witnesses for defendant take up many pages of the record. But the court did sustain an objection to a question asked the witness Hammel, who had already testified to numerous conversations and subsequently testified to many more, as to a conversation with defendant relative to the probable disposition of his case by the board of prison directors, and this is urged as prejudicial error. There was no specific claim made in the trial court that this particular proposed evidence was important as tending to show any insanity, and counsel was allowed at once to proceed with his examination as to all conversations claimed by him to tend to show delusions or insanity of any kind. He fully understood the views of the trial court in that behalf, and that he would be allowed to show any conversation he relied on in that regard. The record warrants us in assuming that this particular conversation was of no importance.

8. Captain Randolph, having testified on his direct examination by defendant that, after the assault on Wilson, defendant was put in a strait-jacket, was asked by defendant, "How long did he remain in the strait-jacket?" The trial court sustained an objection to this question. The ruling was correct. It is true, as urged by counsel for defendant, that acts and declarations of a person subsequent to a certain time are admissible on the question of his sanity at such time, but that was not what the question called for. The fact that he was confined by others in a strait-jacket prior to the assault might be legitimate evidence tending to show insanity at the time of the subsequent assault, but such confinement subsequent to the assault could shed no light upon the question of his condition of mind at the time of such prior assault.

9. Warden Tompkins and Mr. McGuire, called as witnesses for defendant, were both asked questions as to whether some persons

confined in the incorrigible cells had not become insane while so confined. Objections to these questions were properly sustained. Defendant was allowed to show very fully the condition and mode of life of those so confined, and to introduce the evidence of experts as to the probable effect on the mind as to such conditions and mode of life. There was no pretense that it was intended to show by these nonexpert witnesses anything more than the mere fact that one or two individuals became, in their opinion, insane while so confined. This was clearly irrelevant and immaterial on the issue of defendant's sanity.

10. Read in connection with the context, the instruction to the jury that, "if upon the whole testimony there results to you nothing more than a mere doubt as to whether or not he was insane, you must, in that event, resolve such doubt upon the question of his insanity against him" could not have been misleading, though it might well have been omitted, for taken by itself it is, perhaps not strictly and literally correct. But what it clearly meant, and what the jury would necessarily understand it as meaning, in the light of the context, was that, under the rule in force in this state the defendant, in order to show insanity, must do something more than create a mere doubt as to his sanity, viz., must show such insanity by a preponderance of evidence. People v. Willard, 150 Cal. 543, 89 Pac. 124. The jury was very clearly and explicitly instructed as to what was meant by the term "preponderance of evidence," and also that if, on the whole case, a preponderance of evidence was that he was insane at the time of the alleged assault, they must find him not guilty by reason of insanity.

11. Complaint is made of the refusal of the court to instruct the jury that they might if the evidence warranted it, find other verdicts than those of guilty of the offense charged and not guilty, and particularly of a verdict of guilty of the lesser offense defined by section 245 of the Penal Code, the ordinary offense of an assault with a deadly weapon. A similar complaint was made in People v. Carson, supra, and held untenable. The matter was learnedly and elaborately discussed in that case. We see no reason to recede from the views there expressed.

12. Complaint is made of the refusal of the trial court to give two requested instructions, numbered 9 and 23. Requested instruction 9 was clearly erroneous, in that it would have advised the jury that they must acquit if there was a reasonable hypothesis deducible from the evidence to the effect that Wilson was hit or struck by accident or mischance or inadvertence, without the intention of the defendant accompanying the act. In other words, if the jury was satisfied beyond all reasonable doubt that the blow with the window weight was intentionally and deliberately inflicted, but were in doubt on the question whether the cutting with the knife was accidental and not intended, they must acquit. This, of course, would not have been a correct statement of the law applicable to the facts. Requested instruction 23 was substantially that if the jury believed from the testimony that Wilson was injured by accident, and without evil design or intention or malice aforethought, they must acquit. In view of the clear and explicit instructions given by the court as to what the jury must find in the way of intention and malice aforethought before it could convict, it is clear that the refusal to give this instruction could not have affected defendant's substantial rights, and cannot be considered an error warranting a reversal, if, indeed, it can be considered an error at all.

13. The subject-matter of requested instructions 24 and 25, relating to the impeachment of witnesses and the powers and functions of the jury in the consideration of testimony, was fully and correctly covered by the charge of the court.

14. It cannot be held that the trial court erred in refusing to grant a new trial on the ground of newly discovered evidence on the question of insanity. The showing in that behalf was not such as to warrant us in holding that the trial judge erred in concluding that the newly discovered evidence was not sufficiently strong to render a different result probable. People v. Buckley, 143 Cal. 392, 77 Pac. 169.

15. The trial judge was clearly enough without any doubt as to the sanity of the defendant at the time judgment was pronounced. We cannot say that this state of mind on his part was not fully warranted by the evidence before him and the appearance and conduct of the defendant, and therefore cannot hold that he erred in refusing to suspend judgment until the question of his sanity could be submitted to a jury.

As requested by counsel for defendant, we have carefully examined the whole record, and find nothing therein warranting a reversal. Under the circumstances of this case the penalty of death may seem exceedingly severe, but that is a matter with which neither the trial court nor this court has anything to do. It is the penalty fixed by the Legislature for the offense of which defendant has been convicted.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.

156 Cal. 707

BECHTEL v. CHASE. (L. A. 2,429.)

(Supreme Court of California. Dec. 11, 1909. Rehearing Denied Jan. 10, 1910.)

1. Action (§ 28*)—Waiver of Tort—Nature of Transaction—Fraud.

Where the holder of an undivided interest in the notes of a corporation in financial difficulties was induced by decedent's false representations, as president, to surrender the same and to accept, in lieu thereof, stock at par in a new corporation formed to take over the old corporation's assets and business, such transaction did not constitute a sale of plaintiff's interest in the notes to decedent on the theory that plaintiff could waive the fraud and recover against decedent's estate in assumpsit.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196–198; Dec. Dig. § 28.*]

2. Fraud (§ 31*)—Remedies.

Where plaintiff was induced by decedent, the president of a corporation, to surrender his interest in certain notes of the corporation in exchange for worthless stock of another corporation organized to take over the debtor's business and assets, plaintiff could rescind the transaction and recover the notes, or he might sue for damages sustained by the deceit and recover the value which the stock would have had if the representations had been true.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 27; Dec. Dig. § 31.*]

3. Exchange of Property (§ 10*)—Fraud—Effect—Remedies.

That an exchange of personal property was induced by fraud did not constitute proof that the property surrendered was sold to the wrongdoer for an agreed sum.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 19, 24; Dec. Dig. § 10.*]

4. Action (§ 28*)—Tort—Waiver—Assumpsit.

The rule that one whose goods are wrongfully taken and used by another may waive the tort and sue in assumpsit for their value as for goods sold and delivered does not apply, where plaintiff has voluntarily parted with his property in exchange for something received by him in return.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196–198; Dec. Dig. § 28.*]

5. Pleading (§ 237*)—Variance—Amendment to Conform to Proof.

Where the cause of action alleged was based on a claim, filed with the administrator of decedent's estate, for the purchase price of an interest in certain notes, and alleged that decedent promised to pay therefor the sum of $7,550, while the proof showed that decedent fraudulently induced plaintiff to exchange his interest in the notes for preferred stock in a corporation, plaintiff could not amend the complaint to conform to the proof and recover damages for the fraud.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 608, 609; Dec. Dig. § 237.*]

6. Executors and Administrators (§ 229*)—Claims—Actions—Conformity to Claim Presented.

Under Code Civ. Proc. § 1500, providing that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in certain specified cases, an action against a decedent's estate on a rejected claim could not be maintained on any other cause of action than the one set up in the claim which had been presented and rejected.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 827; Dec. Dig. § 229.*]

7. Appeal and Error (§ 1028*)—Review—Prejudice.

Where a judgment for defendant was the only one that could properly be rendered on the facts alleged, errors committed at the trial were not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

Department 1. Appeal from Superior Court, Riverside County; B. F. Bledsoe, Judge.

Action by Luke D. Bechtel against Lucius K. Chase, administrator with the will annexed of the estate of Charles D. Foster, deceased. From an order denying plaintiff's motion for a new trial after verdict for defendant, plaintiff appeals. Affirmed.

William F. Palmer, Luke D. Bechtel, and Palmer & Mahan, for appellant. Lafayette Gill and Louis W. Myers, for respondent.

SLOSS, J. This action was brought against the administrator with the will annexed of the estate of Charles D. Foster, deceased, to recover from said estate the sum of $7,550, principal, and interest thereon from January 1, 1904, at the rate of 6 per cent. per annum.

The complaint states plaintiff's case in three counts or causes of action. While these vary somewhat in phraseology, all are based upon the same transaction. The first is in the form of a common count, alleging that the estate of Charles D. Foster, deceased, is indebted to plaintiff in the sum of $7,550, with interest from the 1st day of January, 1904, for goods, wares, merchandise, bills of exchange, promissory notes, stocks, and choses in action sold, furnished, and delivered by plaintiff to decedent, at decedent's special instance and request, in decedent's lifetime. The second alleges that on the 24th day of August, 1896, Charles D. Foster, the decedent, purchased of and from the plaintiff the undivided $^{151}/_{316}$ of two promissory notes of the Northern Investment Company of Kentucky at and for the price of $7,550, and agreed to pay interest on said purchase price at the rate of 6 per centum per annum from said date until paid; that pursuant to said agreement plaintiff delivered to said decedent the said undivided interest in said notes; and that no part of the purchase price except interest to January 1, 1904, has been paid. The third count alleges that on the 24th day of August, 1896, the plaintiff was the owner of $^{151}/_{316}$ of two certain promissory notes of the Northern Investment Company of Kentucky; that on said day plaintiff sold his said undivided interest in said notes to said Charles D. Foster at and for the price of $7,550 to be paid on demand with 6 per centum per annum interest payable semiannually. The delivery of the notes and plaintiff's interest therein and the nonpayment by Foster of any part of the amount due except interest to January 1, 1904, are alleged as in the second count.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

All three counts contain the necessary allegations regarding the death of Foster, the admission of his will to probate in the county of Suffolk, in the commonwealth of Massachusetts, in which Foster had resided, the subsequent admission of said will to probate in the county of Riverside in this state, and the appointment of the defendant Chase as administrator with the will annexed. Each count also alleges the presentation to the said administrator and the rejection by him of plaintiff's claim as creditor. This claim stated plaintiff's demand as follows:

"Estate of Charles D. Foster to Luke D. Bechtel, of Los Angeles, Dr.

Aug. 24, 1896. To purchase price of $^{151}/_{316}$ interest in two promissory notes of the Northern Investment Co. of Kentucky, obligor..........	$7,550 00
April 17, 1906. To interest accumulated on the above purchase price at six per cent. per annum from date of sales payable semiannually * * * from January 1st, 1904, to April 17th, 1906 (previous accumulations of interest having heretofore been paid by the decedent in his lifetime)	1,096 30
Total	$8,646 30

"The said Charles D. Foster promised to pay the said sum of seven thousand five hundred and fifty ($7,550.00) dollars, amounting on April 17th, 1906, principal and interest, to eight thousand six hundred forty-six & $^{30}/_{100}$ ($8,646.30) dollars."

The answer makes no denial of the admission of the will to probate, of the appointment of the administrator, or of the presentation and rejection of the claim as alleged. The other material allegations of the complaint are denied. The case was tried before a jury which returned a verdict in favor of the defendant. Judgment was entered upon this verdict, and plaintiff subsequently moved for a new trial. His motion was denied, and he now appeals from the order denying said motion.

As will be seen from the above statement of the pleadings, the action is, as to each count of the complaint, one to recover the purchase price of personal property alleged to have been sold for a stated price and delivered. The actual transaction between the parties was, however, something very different from such sale. Taking the evidence in the light most favorable to the appellant's claim, it may be said to have disclosed substantially the following state of facts: The Northern Investment Company was a corporation organized under the laws of Kentucky. It had executed certain promissory notes, some of which were owned and held by the plaintiff and one Grubb; plaintiff's interest in said notes being $^{151}/_{316}$. The Northern Investment Company became involved in financial difficulties, and Foster, who was its president, undertook a scheme of reorganization. A new corporation, the Mercantile Realty Company, was to be formed to take over the property of the Northern Investment Company. Holders of notes of the Northern Investment Company were requested to surrender their notes and take in exchange therefor preferred stock of the Mercantile Realty Company at par. Letters urging the plaintiff to surrender his notes and accept stock of the Mercantile Realty Company upon this basis were written by Foster, and plaintiff finally consented to make the exchange. He surrendered his Northern Investment Company notes to Foster and received in exchange preferred stock of the Mercantile Realty Company of the par value of $7,550, together with $6.68 in cash; the total, $7,556.68, representing the amount then due on plaintiff's interest in the notes. We may assume for the purposes of this discussion that the evidence supports the plaintiff's contentions that the agreement in question was made by Foster personally and not on behalf of the Mercantile Realty Company; that Foster falsely and fraudulently represented to plaintiff that the preferred stock of the Mercantile Realty Company was worth its par value; and that the plaintiff believed these fraudulent representations and entered into the agreement in reliance upon them; and, further, that the said stock was in fact worthless.

So assuming, it may be conceded that plaintiff had a right of action against Foster for any damage sustained by reason of the fraud practiced upon him. But we are entirely unable to see how the circumstances above detailed could be held to constitute a sale by Bechtel to Foster of the notes of the Northern Investment Company for $7,550. The transaction was not a sale of the notes for an agreed price, but was one whereby the notes were transferred in consideration of the issue to plaintiff of preferred stock in the corporation. The plaintiff might proceed in any one of various ways to seek relief for the fraud practiced upon him in inducing him to exchange his notes for worthless stock. He might rescind the transaction and recover the notes which he had been induced to turn over; he might perhaps, treating the transfer of the notes as void, recover them or their value without rescission. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1030. He might bring an action for the deceit practiced upon him and recover such damage as he could show to have been suffered by him. In such last-mentioned action the measure of recovery might be the same as that here sought, i. e., the value which the preferred stock would have had if the false representations made with regard to it had been true. Cruess v. Fessler, 39 Cal. 336; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac.

1011. But on no possible theory can it be said that the fact that an exchange of property was induced by a fraud would amount to proof that the property surrendered was sold to the wrongdoer for an agreed sum of money.

The plaintiff seeks to bring the case within the rule that, where personal property is wrongfully converted, the injured party may "waive the tort and sue in assumpsit." In many jurisdictions this doctrine is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. 4 Cyc. 332. In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value as for goods sold and delivered. Roberts v. Evans, 43 Cal. 380; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626. But the application of this rule, even in its more liberal form, cannot be extended to a case where plaintiff has voluntarily parted with his property in exchange for something received by him in return. The very basis of the "waiver of tort" is that plaintiff consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and recovers the value, due him under an implied contract of sale. But where he has actually agreed to an exchange, which is executed, his affirmance of the transaction is an affirmance of it as a whole. Having parted with his property for an agreed consideration, he cannot, while relying upon his transfer as one made pursuant to contract, hold the defendant to the payment of any other consideration than the one agreed upon. No contract will be implied by the law as against an express contract not disavowed by either party. So long as plaintiff treats the transfer of the notes to Foster as valid, his only remedy for the fraud alleged by him is by means of an action in tort to recover damages therefor.

We have up to this point discussed the case as if it were merely one of variance between the pleadings and the proof. If this were all, it might be said that the plaintiff should be allowed to amend his complaint to conform to the case made by him. An amendment of the complaint, however, would be of no avail. The action is one upon a claim presented to an administrator. The claim itself is one for the purchase price of an interest in the two notes, and alleges that decedent promised to pay the sum of $7,550. It is thoroughly settled in this state that in an action against the estate of a decedent upon a rejected claim the plaintiff cannot recover upon any other cause of action than the one set up in the claim which has been presented and rejected. Code Civ. Proc. § 1500; Lichtenberg v. McGlynn, 105 Cal. 45, 38 Pac. 541; McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466; Barthe v. Rogers, 127 Cal. 52, 59 Pac. 310; Etchas v. Orena, 127 Cal. 588, 60 Pac. 45; Brooks v. Lawson, 136 Cal. 10, 68 Pac. 97; Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738; Morse v. Steele, 149 Cal. 303, 86 Pac. 693.

In this action, therefore, it would be impossible for the plaintiff, under any form of pleading, to recover except by showing facts which would justify a finding that he had sold to Foster an interest in the promissory notes for the price of $7,550. The case made by the plaintiff in the court below proves conclusively that he has no such cause of action and cannot establish one. If a new trial were granted, the result would necessarily be the same as that already reached. Under these circumstances, it is useless to consider the alleged errors of the trial court in admitting or rejecting evidence or in instructing the jury. From the facts appearing it is perfectly clear that, regardless of the rulings complained of, a judgment for the defendant was the only one that could properly be rendered. The alleged errors could not, therefore, have been prejudicial. Robinson v. W. P. R. R. Co., 48 Cal. 424; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Foster v. Carr, 135 Cal. 83, 67 Pac. 43; Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 Pac. 1109.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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156 Cal. 713

HALE et al. v. SAN BERNARDINO VALLEY TRACTION CO. (L. A. 2,382.)

(Supreme Court of California. Dec. 11, 1909. Rehearing Denied Jan. 10, 1910.)

1. APPEAL AND ERROR (§ 1004*)—REVIEW—DAMAGES.

A verdict for damages will not be disturbed as excessive on appeal, unless it is so plainly and outrageously excessive as to suggest, at the first blush, passion, prejudice, or corruption of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

2. DEATH (§ 99*)—EXCESSIVE DAMAGES.

Decedent was 26 years old at his death. He was employed in a hardware store at a salary of $75 a month, had the full confidence of his employers, and was considered well acquainted with the hardware business for one of his experience. *Held*, that in an action by his widow and child for his death, a judgment for $12,000 will not be reversed as excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

3. APPEAL AND ERROR (§ 972*)—ARGUMENT OF COUNSEL—SCOPE—DISCRETION OF COURT.

As to the scope of counsel's argument, much must be left to the discretion of the trial court; the judge hearing the argument, seeing the manner of its delivery, observing any outward manifestation upon the jury, being able to determine whether it is unfair and prejudicial much better than can the appellate court.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3847; Dec. Dig. § 972.*]

4. Trial (§ 125*)—Argument of Counsel—Appeal to Sympathy.

In determining the loss to the widow and infant child from the death of the husband and father, the jury may determine the loss of the society, comfort, care, and protection of decedent, as well as of his support, and hence plaintiff's counsel could address the jury upon that question, and picture to the imagination the probable pecuniary privations of the widow and child, and statements that a railroad company viewed the death of a person as a business proposition, and estimated a life as not very valuable; that the widow and children of the person killed realized what the man was worth; that they suffered the loss of his society and support, and felt what they had lost; that they might, because of that loss, have to struggle against adversity in a cold world. and that the widow might even have to work at the washtub to earn a living for herself and child; and that the railroad company "goes on just the same" —and asking the jurors to imagine their own wives and families deprived of their only hope and support, was not objectionable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303–307; Dec. Dig. § 125.*]

5. Appeal and Error (§ 207*)—Review—Argument of Counsel—Failure to Preserve Objection.

In a death action, the complaint alleged that defendant's car in which decedent was riding when killed was carelessly, negligently, and recklessly operated, and caused to strike another car, thereby causing decedent's death, and the answer admitted that the collision mentioned was caused by the negligence of the motorman in charge of the car, and then stated, "Except as herein admitted, said defendant denies that the said accident was caused or occasioned by any fault or negligence on its part," and during the opening statement defendant's counsel objected to plaintiff's counsel stating how the accident occurred, on the ground that there was no issue presented by the answer on the question of defendant's liability. *Held*, that the form of the answer, in connection with the remark of defendant's attorney, left the extent of admission in doubt, if it did not go so far as to concede the recklessness of defendant's employés, and, if counsel desired to claim that the denial was broad enough to include the averment of recklessness, he should have called the attention of the court and the opposing counsel to the point; and, there being nothing to show that plaintiff's counsel was not acting in good faith, or that he purposely misstated the admission, and defendant's attorney merely excepting to the remark, but not asking the court to caution the jury, nor referring to the pleadings in any way, nor asking any instruction as to the alleged misstatement, and it not appearing that the jury was not properly instructed in regard to it, the point cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.*]

Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Daisy A. Hale and others against the San Bernardino Valley Traction Company. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Gibson, Trask, Dunn & Crutcher and Leonard & Surr, for appellant. Chas. L. Allison and Frank B. Daley, for respondents.

SHAW, J. This is an action by the widow and child of Edward A. Hale, deceased, to recover damages for his death, which was caused by the negligence of the defendant. The answer admitted that the death of Hale was caused by the defendant's negligence, and denied only the damages. The amount of damages was the sole issue of fact to be determined. The jury returned a verdict for $12,000 as damages, and judgment was rendered accordingly. The defendant moved for a new trial, on the grounds, first, that the damages allowed were excessive; and, second, that plaintiffs' attorneys were guilty of misconduct in their addresses to the jury. The motion was denied. The defendant appeals from the order and from the judgment.

1. The deceased was 26 years of age at the time of his death. He was in good health, and of sound constitution, and his expectancy of life at that age was 38 years. He was sober, industrious, and economical, had always been a man of good habits, of unquestioned honesty and integrity, devoted to his wife and child, affable and of kindly disposition, one who easily made friends and kept them. At the age of 19 he began work in the city of San Bernardino as salesman in the cigar and magazine business, where he continued 2 years. He then became a general clerk in a hardware store, intending to learn the business, and remained in that business until his death. His wages at first were $50 a month. They were raised to $65, and then to $75 a month, which amount he was receiving at his death. He was married 4 years before his death. As a clerk he paid strict attention to his business, and had the full confidence of his employers and was considered very well acquainted with the hardware business for one of his experience. The trial court considered the question of excessive damages, and concluded that the sum allowed was not unreasonable. The amount of damages in such cases is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Aldrich v. Palmer, 24 Cal. 516; Wheaton v. N. B. & M. R. R. Co., 36 Cal. 591; Lee v. S. P. Co., 101 Cal. 118, 35 Pac. 572; Howland v. Oakland, etc., Co., 110 Cal. 523, 42 Pac. 983; Swain v. Fourteenth St. Co., 93 Cal. 185, 28

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pac. 829. The financial loss which the death of a man of the age, character, capacity, and disposition of the deceased might reasonably be expected to entail upon his wife and infant child is not so manifestly insignificant as to bring one inevitably to the conclusion that $12,000 could not have been given, except under the influence of passion or prejudice. We cannot interfere in the case at bar on the ground of excessive damages.

2. We do not think the arguments of appellant's counsel were so grossly unfair or improper as to require this court to reverse the ruling of the trial court to the contrary. Upon such questions much must be left to the discretion of that court. The judge who tries the cause below hears the argument, sees the manner of its delivery, observes any outward manifestation of its effect upon the jury, and can determine whether it is unfair and prejudicial in the particular case much better than can this court upon the bare printed record. The arguments complained of, for the most part, consisted of statements to the effect that a railroad company viewed the death of a person for which it was liable in damages as a business proposition, and estimated the life as not very valuable; that the widow and children of the person killed realized what the man was worth; that they suffered the loss of his society and support, and felt what they had lost; that they might because of that loss, have to struggle against adversity in a cold world; and that the widow might even have to work at the washtub to earn a living for herself and child. And this was contrasted with the statement that the railroad company "goes on just the same." The jurors were asked to imagine their own wives and families thus deprived of their only hope and support. There were descriptive adjectives added to this account of the widow's possible condition that may have added to its effect. It has been frequently held that, in determining the financial loss to the widow and infant child, resulting from the death of the husband and father, the jury may consider the financial loss accruing from the deprivation of the society, comfort, care, and protection of the deceased, as well as of his support. Beeson v. Green, etc., Co., 57 Cal. 37; Munro v. Pacific, etc., Co., 84 Cal. 525, 24 Pac. 303, 18 Am. St. Rep. 248; Pepper v. S. P., 105 Cal. 402, 38 Pac. 974; Harrison v. Sutter Co., 116 Cal. 169, 47 Pac. 1019; Dyas v. S. P. Co., 140 Cal. 308, 73 Pac. 972; Quill v. S. P. Co., 140 Cal. 273, 73 Pac. 991. The plaintiffs' counsel had the right to address the jury upon this question, and in doing so to picture to the imagination the probable pecuniary privations and condition of the bereaved widow and child resulting from the absence of the supporting care and protection of the deceased. Unless the right of argument is to be restricted to a much greater degree than has been heretofore considered necessary or advisable, there can be no just complaint of the argument we have stated. It seems to have been directed to the question at issue, and to have been confined to the elements of damage allowed by law.

In another part of his argument plaintiffs' counsel, speaking of the admissions of the answer, said "They have confessed to you that they and their agents and employés did in a reckless, in a careless, and in a negligent, manner deprive Edward A. Hale of his life." The complaint alleged that the defendant's car in which deceased was riding "was carelessly, negligently, and recklessly operated, and was carelessly, negligently and recklessly" caused to strike another car, thereby causing Hale's death. The answer admitted that the collision mentioned was caused "by the negligence of the motorman in charge of defendant's car," and then stated: "Except as herein admitted, said defendant denies that the said accident was caused or occasioned by any fault or negligence upon its part." During the plaintiffs' opening statement defendant's counsel objected to the plaintiffs' counsel stating how the accident occurred, on the ground "that there was no issue presented by the answer on the question of the liability of the defendant." If there was an admission that the collision in which the deceased was killed was caused by the reckless conduct of the employés of the defendant, of course there could be no misconduct of the plaintiffs' counsel in stating that admission to the jury. The form of the answer, in connection with the above remark of the attorney for the defendant at the opening of the trial, certainly left the extent of the admission in doubt, if it did not go so far as to concede the recklessness of the defendant's employés. Under these conditions, if counsel desired to claim that the denial was broad enough to include the averment of recklessness, he should have called the attention of the court and opposing counsel to the point. There is nothing to show that plaintiffs' counsel was not acting in good faith, or that he was purposely misstating the admission. The attorney for the defendant merely "excepted" to the remark, neither asking the intervention of the court to caution the jury, nor referring to the pleadings in any way. It does not appear that he asked any instruction on the subject of the alleged misstatement, nor that the jury was not properly instructed in regard to it. In view of all the facts, we do not think the point should be considered on appeal.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

(156 Cal. 759)

CITY OF ARCATA v. GREEN et al. (S. F. 4,998.)

(Supreme Court of California. Dec. 15, 1909.)

1. MUNICIPAL CORPORATIONS (§ 59*)—POWERS CONFERRED.

A municipal corporation has only such powers as are expressly or by necessary implication conferred on it by the Constitution or by statutes passed thereunder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 149; Dec. Dig. § 59.*]

2. MUNICIPAL CORPORATIONS (§§ 680, 681*)—GRANT OF FRANCHISE—NATURE OF POWER.

Under Municipal Corporation Act (St. 1883, p. 269, c. 49) § 862, authorizing trustees of a city of the sixth class to permit the laying of street railroad tracks, etc., under such restrictions as they deem proper, the power to grant leave to build such tracks and impose restrictions is legislative in its nature, and not referable for its support to the power of making contracts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459, 1465; Dec. Dig. §§ 680, 681.*]

3. STREET RAILROADS (§ 24*) — GRANT OF FRANCHISE — CONDITIONS IMPOSED—EXTRATERRITORIAL FORCE.

Under Municipal Corporation Act (St. 1883, p. 269, c. 49) § 862, authorizing trustees of cities of the sixth class to permit the laying of street railroad tracks, etc., under such restrictions as they deem proper, a city cannot exact from the grantee of a franchise to lay tracks, etc., an undertaking conditioned on the completion of the road between outlying towns and through the city within a certain time, since the grant, being legislative in character, could have no extraterritorial effect.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 35–76; Dec. Dig. § 24.*]

4. STREET RAILROADS (§ 24*) — GRANT OF FRANCHISE—VOID CONDITION — SEVERABILITY.

Where a city of the sixth class grants a franchise under Municipal Corporation Act (St. 1883, p. 269, c. 49) § 862, to lay street railroad tracks, and exacts from the grantee an undertaking conditioned on the completion of the road between outlying towns and through the city, and the undertaking is void because the restriction operates extraterritorially, the condition is not severable so that it could be held good as to the part of the road running through the city, especially in view of the provision of the granting ordinance, declaring that it was not intended to grant a franchise for a street railroad within the limits of the city.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 43; Dec. Dig. § 24.*]

5. MUNICIPAL CORPORATIONS (§ 244*)—IRREGULAR CONTRACT—BENEFITS—ESTOPPEL.

A party contracting with a city regarding a subject-matter within the scope of the city's power may, where he has received the benefit of the contract, be precluded from asserting that the contract was not on the part of the city executed in the manner required by law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 682; Dec. Dig. § 244.*]

6. STREET RAILROADS (§ 24*) — GRANT OF FRANCHISE—VOID CONDITIONS — ESTOPPEL.

Where, under Municipal Corporation Act (St. 1883, p. 269, c. 49) § 862, a city grants a franchise for a street railroad, and exacts from the grantee an undertaking which is void because the condition has an extraterritorial effect, the grantee is not estopped to assert the invalidity of the undertaking, since the undertaking was one without the scope of the city's power to exact.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 43; Dec. Dig. § 24.*]

In Bank. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by the City of Arcata against J. E. Green and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. J. Monroe, for appellant. Coonan & Kehoe, for respondents.

SLOSS, J. The city of Arcata, a municipal corporation of the sixth class, seeks by this action to recover the sum of $5,000 on a bond or undertaking executed by the defendants Green and O'Brien as principals and the defendants Bull and Bair as sureties. A demurrer to the amended complaint having been sustained, the plaintiff declined to further amend, and appeals from the ensuing judgment in favor of defendants.

The amended complaint discloses these facts. In February, 1905, the board of trustees of the city of Arcata granted to Green and O'Brien the right to construct, maintain, and operate a single track electric railroad within and through the city of Arcata over certain streets by a route described. Section 2 of the ordinance declares that the grant is made upon certain conditions, relating to the manner of construction, the location of tracks, the maintenance of a portion of the street pavements by the grantees, the placing of poles and wires, equipment and operation of cars, and like matters. One of the conditions is that "all cars shall stop at street crossings whenever signalled by persons desiring to board or alight therefrom subject to regulations of the board of trustees." Section 5 provides that "the above rights and privileges are granted upon the express conditions that the work of constructing and fully equipping an electric railroad between the city of Eureka and the city of Arcata in said county of Humboldt, shall be commenced within nine months after the passage of this ordinance and the same completed and in operation between said Eureka and Arcata and through Arcata, within two years after the passage of this ordinance. * * *" By the terms of section 6, "the franchise and rights herein set forth are granted upon the express condition and consideration that said grantees shall, within the time hereinafter expressed (i. e., thirty days), make, execute and deliver to said city of Arcata, an undertaking in the penal sum of five thousand dollars, * * * conditioned that if said grantees shall commence the work of constructing and equipping said railroad, and shall complete the same within the time and according to the provisions expressed in section 5 of this ordinance, then said undertaking to be of no effect; but that if they fail to commence said work and complete the same as expressed in said section 5, that they will forfeit and pay to said city of Arcata as liquidated damages the said sum of $5,000." Section 7 requires the grantees, within 30 days, to file with the city clerk their written acceptance of the franchise and the conditions, and also within said time to file their undertaking. It is provided in section 12 that "nothing in this franchise shall be construed in any way to give said Messrs. Green and O'Brien, their heirs, executors and assigns, a franchise to maintain and conduct a street railroad within the limits of the said city of Arcata." Within 30 days after the adoption of the ordinance, the grantees filed with the clerk of the board their written acceptance of the franchise, and also the undertaking upon which this action is based. This instrument incorporates, by reference, the entire ordinance, recites particularly the provisions of section 6, and is conditioned as required by that section. The amended complaint alleges that said bond was given voluntarily by the defendants, and that it was approved and accepted by the board of trustees. The grantees of the franchise "have wholly failed to commence the constructing and equipping of said railroad and to complete the same in and through the city of Arcata" within the time allowed by the ordinance, or at all. Alleging that it would be impracticable and extremely difficult to fix the actual damage resulting to the city of Arcata, the plaintiff asks judgment for the penal sum of the bond, $5,000, as liquidated damages.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Without setting forth in further detail the allegations of the complaint, which is very full in its statements of all the steps leading up to the granting of the alleged franchise, it may be said that it affirmatively appears that there was no compliance with the conditions imposed by the act of March 11, 1901, entitled "An act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts." St. 1901, p. 265, c. 103, amended St. 1903, p. 90, c. 82. That statute provides, among other conditions, that certain franchises and privileges shall be granted only to the highest bidder after advertising for bids. It also requires the successful bidder to file with the governing body of the municipality a bond conditioned that the bidder will perform all the terms and conditions of the franchise. There was no advertisement, nor was there any bid for the privilege here granted to Green and O'Brien, and it seems to be conceded by the appellant that, if such privilege was within the class of franchises and privileges described in the act, the ordinance granting it was void, and conferred no rights whatever upon the grantees. In that event, the bond would clearly be without consideration and no recovery could be had thereon (unless on the ground of estoppel, to which we shall refer hereafter).

Much of the discussion in the briefs is devoted to a consideration of the nature of the right purported to be granted by the ordinance, and of the proper construction and effect of section 1 of the act of 1901, defining the franchises and privileges that must be advertised and sold to the highest bidder. The appellant urges that the right granted to Green and O'Brien was not covered by the act, but that the trustees had power, under subdivision 13 of section 862 of the municipal corporation act (St. 1883, p. 270, c. 49) to pass the ordinance in question. The statute relied on (St. 1903, p. 93, c. 86) gives to the trustees of cities of the sixth class power "to permit under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon."

For the purposes of this decision, we may assume that the appellant is right in this contention, and that the trustees had power, under the municipal corporation act, to grant the right to lay tracks and operate a railroad over the streets of the city, without first advertising the right for sale, or selling it to the highest bidder. So assuming, however, we are still confronted with the question whether the conditions attached to the grant, and incorporated in the bond, were such as the city had the power to impose. In this connection we do not overlook the allegation that the bond was voluntarily given by the appellants. But, reading the allegation in connection with the averments showing that the giving of such bond was a condition upon which the trustees, by their ordinance, made the grant of the franchise depend, it means no more than that the grantees accepted the franchise upon the only terms available to them. They consented to furnish the undertaking, but their consent was required in order to enable them to take any benefits under the grant. As between private individuals or corporations, having a general power to make contracts, this would undoubtedly have constituted an agreement binding upon the parties to it. Here, however, one of the parties to the alleged contract was a municipal corporation. As such, it had only such powers as were expressly or by necessary implication conferred upon it by the Constitution or by statutes passed under the Constitution. Herzo v. San Francisco, 33 Cal. 134; Ex parte Frank, 52 Cal. 608, 28 Am. Rep. 642; McCoy v. Briant, 53 Cal. 250; South Pasadena v. Terminal Railway Co., 109 Cal. 315, 41 Pac. 1093. Section 862 of the municipal corporation act, the only law relied on by appellant as the source of the power to grant the franchise, authorizes the city trustees to permit the laying of tracks, etc., "under such restrictions as they deem proper." Conditions may be attached to the grant. But the power to make such grant, and to impose conditions upon it is "legislative in its nature; * * * and is not referable for its support to the power of making contracts." South Pasadena v. Terminal Ry. Co., supra. Unless the condition or "restriction" was one within the scope of the legislative power of the municipality, it cannot be supported as a contract. City of Aberdeen v. Honey, 8 Wash. 251, 35 Pac. 1097.

That it was not within such scope is, we think, a necessary conclusion from the doctrines declared in the South Pasadena Case, already cited. There the plaintiff, a municipal corporation of the sixth class, had granted to a railroad company the right to construct and operate a steam railroad in certain streets of the city. Among the conditions attached to the grant was one limiting the rates of fare to be charged for travel between South Pasadena and Los Angeles. The ordinance declared that, upon failure of the grantee or its assigns to comply with any of the conditions, "all rights under this ordinance shall thereupon and immediately be forfeited, and this grant shall thereupon be null and void." The road was constructed under the license so granted, and was afterwards conveyed to the defendant. The rate of fare to and from Los Angeles having been raised beyond the limit fixed by the ordinance, the city sought to enjoin the operation of the road over the streets of South Pasadena. It was held that the restriction upon rates of fare, applying as it did, to passage beyond the limits of the city, was void for the reason that it attempted to regulate matters outside of the city boundaries. "One of the limitations upon such ordinances," says the court, "is that they can have no extraterritorial force unless by express permission of the sovereign power."

The condition here imposed was that the grantees should within certain periods commence and complete the construction of their road between Eureka and Arcata and through Arcata. So far as this related to the construction between the two cities, it was as clearly extraterritorial as the provision in the South Pasadena Case. It is equally clear that the condition is not severable, and that it cannot be held good as to that part of it which requires construction through the city of Arcata. What the municipality was seeking to bargain for was a road connecting the two cities. The right to run over the streets of Arcata was a mere incident to this scheme, as is strongly indicated by section 12 of the ordinance, which declares that it was not intended to grant a franchise for a street railroad in Arcata. We think there can be no doubt, on the whole ordinance, that the construction undertaken—i. e., from Eureka to Arcata and through Arcata—was a single and complete thing, and that the effort of the trustees was to grant a right upon condition that the entire contemplated road be constructed.

The appellant urges that the defendants, having received the grant which they sought, are estopped to deny the validity of their undertaking which they gave in consideration of such grant. But we think the doctrine of estoppel has no just application here. A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts entirely beyond the range of the municipal authority. "If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the Legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it. * * * We cannot apply the doctrine of estoppel to such a case as this." City Council v. Montgomery, etc., Co., 31 Ala. 76.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

(156 Cal. 782)

SEYMOUR v. OELRICHS et al.

(S. F. 4,767.)

(Supreme Court of California. Dec. 16, 1909. Rehearing Denied Jan. 13, 1910.)

1. FRAUDS, STATUTE OF (§ 44*)—CONTRACTS OF EMPLOYMENT.

An oral contract of employment for 10 years is within the statute of frauds. Code Civ. Proc. § 1973, subd. 1.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 66; Dec. Dig. § 44.*]

2. FRAUDS, STATUTE OF (§ 113*)—MEMORANDUM OF CONTRACT—SUFFICIENCY.

To satisfy the statute of frauds the memorandum must contain the essential terms and material elements of the contract, expressed with such certainty that it may be understood without recourse to parol evidence.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 239-241; Dec. Dig. § 113.*]

3. FRAUDS, STATUTE OF (§ 118*)—MEMORANDUM OF CONTRACT—SUFFICIENCY—SEPARATE WRITINGS.

A general notice reciting that a person named was employed as superintendent of buildings was signed by an agent of the owners. One of the owners subsequently wrote to the person named a letter, reciting that he hoped that everything was pleasant at the office, and that he had full knowledge of the property. Another of the owners thereafter sent a telegram to the agent, reciting that she and a third owner agreed to keep the person named in office at former salary. *Held*, that the writings did not amount to a memorandum of a contract employing the named person for 10 years at a monthly salary.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 262–265; Dec. Dig. § 118.*]

4. Frauds, Statute of (§ 116*)—Contracts—Authority to Enter into Contracts.

Under Civ. Code, § 2309, providing that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing, an agent, in the absence of written authority, has no authority to bind his principal to employ one for 10 years.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 254; Dec. Dig. § 116.*]

5. New Trial (§ 128*) — Specifications — Sufficiency.

Where the ultimate fact alleged and found was that plaintiff entered into a contract with defendants, a specification that the evidence was insufficient to justify the finding, in that it did not show that the contract was ever entered into, or that the attorney in fact of defendants entered into the contract, and that the evidence did not show that defendants ever entered into any agreement with plaintiff, was sufficient to raise the point that there was no evidence to show the authority of the attorney in fact to make the contract which he assumed to make on behalf of defendants.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 261; Dec. Dig. § 128.*]

6. New Trial (§ 128*)—Specification of Error—Insufficiency of Evidence.

Specifications of error to findings are sufficient when they are as specific as the findings themselves.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 261; Dec. Dig. § 128.*]

7. Husband and Wife (§ 138*)—Principal and Agent (§ 137*)—Agency of Husband for Wife — Contracts by Agent — Estoppel.

Where a husband had no authority to bind his wife and her sister by a contract employing an overseer of the wife's and sister's real estate, the fact that the overseer, on the faith of the husband's representations that he would be given a 10-year contract, resigned and irrevocably lost his former position did not estop the wife and sister from denying the contract unless they took some action with notice that such representation had been made.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 534; Dec. Dig. § 138;* Principal and Agent, Cent. Dig. §§ 492–494; Dec. Dig. § 137.*]

8. Frauds, Statute of (§ 158*)—Signature by Agent—Power of Agent—Evidence.

Proof that an agent had authority to bind his principal by some sort of a contract does not, in the absence of proof of written authority, justify the inference that the agent had authority to bind the principal by a contract required to be in writing under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 376; Dec. Dig. § 158.*]

9. Principal and Agent (§ 92*)—Contract by Agent—Effect.

Where an agent was authorized in writing to enter into a contract in behalf of his principal, the principal was bound by the agent's acts, conduct, and statements to the same extent that he would have been had he been personally present.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 245; Dec. Dig. § 92.*]

10. Frauds, Statute of (§ 129*)—Part Performance—Effect.

Mere part performance of a parol contract for personal services not to be performed within a year does not render the contract valid and enforceable under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 288; Dec. Dig. § 129.*]

11. Frauds, Statute of (§ 119*)—Defense—Estoppel.

The doctrine that equity will hold one estopped from relying on the statute of frauds, where to do so will amount to the practice of fraud, is not limited in its operation to any particular class of contracts, but applies in every transaction where the statute is invoked.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 270; Dec. Dig. § 119.*]

12. Estoppel (§ 83*)—Equitable Estoppel—Fraud—Sufficiency.

To constitute fraud sufficient to serve as a foundation for estoppel by conduct, an actual intent to mislead is not essential, and it is sufficient that the case is one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced and suffered another to believe and take action on, and a person against whom the estoppel is asserted must, by his silence or representations, create a belief of the existence of a state of facts which it would be unconscionable to deny.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 218; Dec. Dig. § 83.*]

13. Frauds, Statute of (§ 119*)—Equitable Estoppel—Fraud—Sufficiency.

The acts, conduct, or statements relied on as constituting equitable estoppel must generally be acts, conduct, or statements amounting to a representation of fact, and mere refusal to make a writing as agreed is not as a general rule such fraud as will take a case out of the operation of the statute of frauds under the doctrine of equitable estoppel, and this is ordinarily true, even where a party relying simply on the promise of another has changed his position to his injury because thereof.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 270; Dec. Dig. § 119.*]

14. Estoppel (§ 85*)—Equitable Estoppel—Fraud—Sufficiency.

A representation of a future intention absolute in form, deliberately made to influence the conduct of another, and acted on by the other, is generally the source of a right and may amount to a contract enforceable as such by equity.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 220, 221; Dec. Dig. § 85.*]

15. Frauds, Statute of (§ 119*)—Equitable Estoppel—Fraud—Sufficiency.

A husband, duly authorized to bind his wife and her sister by a contract employing an overseer of the wife's and sister's real estate, orally agreed to employ one as overseer for 10 years at a monthly salary and to reduce the contract to writing, and thereby induced the latter to surrender a life position in the police department in a city and to enter on his services as overseer. The latter would not have left the life position unless he was assured of a permanent position, and the husband knew that fact. *Held*, that the wife and sister were equitably estopped from repudiating the oral contract on the ground that it was void under the statute of frauds.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 270; Dec. Dig. § 119.*]

16. Master and Servant (§ 42*)—Breach of Contract of Employment—Measure of Damages.

In an action by a servant for breach of contract of employment for a specified period, tried before the expiration of the period, the measure of damages is prima facie the contract earnings subject to deductions of earnings from other employments in which the servant was engaged after his discharge, and of what he might earn by the exercise of reasonable diligence during the balance of the unexpired term.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 54–56; Dec. Dig. § 42.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by John Seymour against Theresa A. Oelrichs and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Tobin & Tobin, for appellants. Peter F. Dunne and C. W. Durbrow, for respondent.

ANGELLOTTI, J. An opinion was filed on this appeal on July 6, 1909, and judgment given thereon as follows: "The judgment and order appealed from are reversed." The following is a copy of said opinion, the same having been written by Justice Sloss:

"In this action the plaintiff seeks to recover the sum of $28,500 as damages for the breach of a contract of employment. He alleges that on or about the 1st day of May, 1902, the defendants Theresa A. Oelrichs and Virginia Vanderbilt, with their brother Charles L. Fair, since deceased, were the heirs at law of James G. Fair, deceased, and the owners of his estate, consisting in large part of real property in the city and county of San Francisco. It is alleged that on or about said date the said heirs of James G. Fair entered into a contract with the plaintiff whereby it was agreed that said heirs should employ the plaintiff for the period of ten years from June 1, 1902, at a salary of $300 a month, to act as overseer of their lands and the buildings thereon. On August 14, 1902, Charles L. Fair died, and all of his interest in the property above mentioned devolved upon his sisters Theresa A. Oelrichs and Virginia Vanderbilt. Plaintiff, as is averred, entered upon the performance of his duties under the aforesaid contract and continued in such employment until about the 29th day of June, 1904, when, without his consent the defendants Theresa A. Oelrichs and Virginia Vanderbilt refused to perform said contract any longer. Plaintiff has ever since been ready and willing to perform said contract upon his part.

"The answer denies the making of the contract as alleged, and avers that plaintiff was employed by the Fair heirs from month to month only. The court found that all of the allegations of the complaint were true except the allegation of damage, with respect to which it found that plaintiff had been damaged in the sum of $11,100. It was further found that the contract of employment alleged by plaintiff was, in the first instance, entered into by word of mouth, but was afterwards reduced to writing subscribed by the parties to be charged thereby. The writings regarded by the court as constituting a written memorandum or contract will be more particularly referred to hereafter. It is further found that on the 1st of May, when the original oral agreement was made, the plaintiff was holding the position of captain of detectives in the police department of the city and county of San Francisco at a salary of $250 a month; that the heirs of James G. Fair did at that time request him to give up his position as captain of detectives, and assured him that if he would do so they would give him a position for ten years upon a salary of $36,000 payable in equal monthly payments of $300, and would within a short time put such employment and the terms thereof in writing and sign the same. It was upon such representations and assurance, the court finds, that plaintiff resigned his said position as captain of detectives and took service with said heirs as alleged. There is a further finding to the effect that it is not in the power of said heirs to restore to said plaintiff his status and position as captain of detectives. The defendants, Theresa A. Oelrichs and Virginia Vanderbilt, have continuously failed and refused to give to plaintiff any written contract as promised. Upon these findings the court entered judgment in favor of plaintiff and against Theresa A. Oelrichs and Virginia Vanderbilt for the sum of $11,100 with interest and costs, and said defendants appeal from the judgment and from an order denying their motion for a new trial.

"It is perfectly clear that the contract alleged was one that by its terms was not to be performed within one year, and was therefore, under the provisions of the statute of frauds, required to be in writing. Code Civ. Proc. § 1973, subd. 1. It is equally clear that the writings mentioned in the findings were not sufficient to comply with the requirements of the statute. The first of these is a general notice reading as follows: 'Office of Fair Heirs. 230 Montgomery St., San Francisco. June 18, 1902—To Whom It May Concern: Mr. John F. Seymour is in our employ as superintendent of buildings, and is entitled as our representative to admission to all our properties. We ask the kind consideration of any of our tenants and others whom he may come in contact with. Very respectfully, Fair Heirs, by Charles S. Neal.'

"The second is a letter written to Seymour by Charles L. Fair under date of July 22,

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1902, and containing the following expression: 'I suppose by this time you have full knowledge of the property of the estate and hope that everything is pleasant at the office.' The third is a telegram sent by the defendant Virginia Vanderbilt to Charles S. Neal, under date of March 4, 1904. In it are the words: 'My sister and S (self) agree to keep Seymour in office at former salary.'

"Even if it were assumed that the evidence is sufficient to show that either Charles S. Neal or Charles L. Fair was authorized to bind the appellants, and that the defendant Mrs. Vanderbilt was authorized to bind her sister, Mrs. Oelrichs, we find nothing in any of the writings which shows any such contract as the one set up by plaintiff. Giving them their utmost effect, the papers disclose no more than that Seymour was employed by the Fair heirs as superintendent of buildings at a salary. There is no reference to an employment for any given period. As plaintiff had received payment for the time during which he had rendered service, the very essence of his case was a contract of employment for 10 years. To satisfy the statute of frauds a memorandum 'must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intentions of the parties.' Browne, Statute of Frauds (5th Ed.) § 371. In Breckinridge v. Crocker, 78 Cal. 529 [21 Pac. 179], this court said: 'The memorandum must contain all the material elements of the contract.' Again, in Craig v. Zelian, 137 Cal. 105 [69 Pac. 853], it is said: 'The statute of frauds was originally enacted "for the prevention of frauds and perjuries" and an agreement * * * is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.'

"In the absence of evidence to support the finding of a written contract, we are compelled to inquire whether the judgment may be sustained upon the finding that an oral agreement was entered into as alleged. In this particular, too, the sufficiency of the evidence to sustain the finding is questioned by the appellants. The plaintiff offered testimony tending to show that while he was occupying the position of captain of detectives of the police department of the city and county of San Francisco he had been urged and requested by Charles L. Fair and by Hermann Oelrichs, the husband of one of the defendants, to resign his position and enter the service of the Fair heirs. The suggestion came, originally, from Charles L. Fair. After several discussions of the subject, Fair and Oelrichs, the latter asserting that he represented Mrs. Oelrichs and Mrs. Vanderbilt, agreed to give him a 10-year contract at $300 a month. To this Seymour assented, and about two weeks later he went into the office of the Fair heirs, taking the place of superintendent of buildings. His salary of $300 a month was paid until his discharge in June, 1904, with the exception of a short period during which a smaller sum was paid him.

"It is claimed by the appellants that the record contains no evidence showing any authority on the part of either Charles L. Fair or Hermann Oelrichs to bind Mrs. Oelrichs and Mrs. Vanderbilt by any such contract as found by the court. We think this contention is sound and must be sustained. The contract was one which, as we have seen, was required to be in writing, and, under section 2309 of the Civil Code 'an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.' Nason v. Lingle, 143 Cal. 363 [77 Pac. 71]. The record does not show that any such written authority was given by either of the appellants to Charles L. Fair or to Hermann Oelrichs. Indeed, as concerns Fair, it is not claimed that he assumed to act on behalf of his sisters. The position taken by respondent in connection with the effect of Oelrichs' acts is that the specifications of insufficiency of evidence contained in the bill of exceptions were not such as to raise the question of Oelrichs' authority to bind the appellants. As has been stated, the allegation of the complaint is simply that the plaintiff entered into the contract alleged with the Fair heirs, and the finding follows the allegation of the complaint. One of the specifications (designated 'Second') reads as follows: 'The evidence is insufficient to justify the finding that the alleged contract set forth in paragraph 3 of plaintiff's complaint was on the 1st of May, 1902, or thereabouts, entered into orally or by word of mouth by and between the plaintiff on one side and C. L. Fair and these defendants, or any or either of them, on the other, in this, that the evidence is insufficient to show that the plaintiff, Seymour, ever orally entered into any contract of service for a term of years as alleged in his complaint with C. L. Fair and his sisters, Theresa A. Oelrichs and Virginia Vanderbilt, or any or either of them; that the evidence is insufficient to show that Hermann Oelrichs, as the attorney in fact of said Theresa A. Oelrichs and Virginia Vanderbilt, ever orally or in writing entered into any such contract with plaintiff as is alleged in paragraph 3 of his complaint; that none of the oral communications had between plaintiff and C. L. Fair or Hermann Oelrichs or Theresa A. Oelrichs contain any evidence of any such contract as set forth in paragraph 3 of plaintiff's complaint.' A further specification ('Twelfth') states that 'the evidence is insufficient to show that either of these defendants ever entered into any agreement by word of mouth, on or about the 18th day of June, 1902, with plaintiff.' We see no reason for holding that these specifications were not sufficiently definite to enable the appellants to raise the point that there was no evidence to show the authority of Hermann Oelrichs to make the contract which he assumed to make on behalf of Mrs. Oelrichs and Mrs. Vanderbilt. The ultimate fact, and the fact as alleged and found, is that the plaintiff entered into the contract in question with Mrs. Oelrichs and Mrs. Vanderbilt. Such contract could have been made in one of two ways only; by the defendants themselves, or by their agent duly authorized. The specification that there was no evidence that the contract alleged was entered into between the defendants and the plaintiff is all that is required. To meet such specification the plaintiff must be able to point in the record to evidence showing either that the appellants made the contract themselves or that they authorized its making by an agent who made it. The contention of respondent is based upon a narrow construction of that part of the specification first quoted, which states that the evidence is insufficient to show that Mr. Oelrichs as the attorney in fact of Mrs. Oelrichs and Virginia Vanderbilt ever entered into any such contract with plaintiff as is alleged in paragraph 3 of plaintiff's complaint. This, it is claimed, points merely to the question of whether or not Oelrichs actually made the agreement and assumes his authority to do so. As this court has shown by its later decisions, it is no longer disposed to scrutinize specifications of insufficiency with the minuteness which was applied in earlier cases, such as De Molera v. Martin, 120 Cal. 544 [52 Pac. 825]. The more liberal view now entertained is illustrated by the rulings in American Type Founders Co. v. Packer, 130 Cal. 459 [62 Pac. 744]; Stuart v. Lord, 138 Cal. 672 [72 Pac. 142]; Drathman v. Cohen, 139 Cal. 310 [73 Pac. 181]; Holmes v. Hoppe, 140 Cal. 212 [73 Pac. 1002]; Bell v. Staacke, 141 Cal. 194 [74 Pac. 774]; Harris v. Duarte, 141 Cal. 498 [70 Pac. 298, 75 Pac. 58]. In the case last cited the chief justice declares the rule to be that the specifications are sufficient when they are as specific as the findings themselves. In this case there is no finding that the contract was made through Oelrichs as agent or that Oelrichs had authority to act as agent, and there was therefore no necessity for a specification directed to the fact of such agency.

"It is contended by the respondent that, regardless of the foregoing consideration, he is entitled to recover upon the theory of an estoppel. The alleged estoppel is based upon the findings of the court to the effect that Seymour, upon the faith of representations that he would have a 10-year contract, resigned and lost irrevocably his position in the police department. This cannot, in the present state of the record, be invoked as a ground for affirming the order. If Oerlichs had no authority to bind his wife and her sister by a 10-year contract, they could not be estopped by his declaration that they would give Seymour such contract, unless they took some action with notice of the fact that this declaration had been made. Lambert v. Gerner, 142 Cal. 399 [76 Pac. 53]. Without going into a recital of the evidence offered for the purpose of connecting these appellants with the transaction, we may say that there is nothing to show that either of them had knowledge, when Seymour commenced his service, that his employment was other than from month to month. Each of them, when informed of his claim that he had been employed under a contract for 10 years, promptly repudiated the alleged contract. If it could be said that the evidence justifies an inference that Oelrichs had authority to bind one or both of the appellants by some sort of contract, it does not, in the absence of proof of written authority (Civ. Code, § 2309), justify the inference that he had authority to bind them by a contract required to be in writing. Even though they had knowledge that he had made a contract of employment with Seymour on their behalf, their duty to inquire into the terms of such contract did not impute to them notice that he had exceeded his authority and undertaken to bind them by an agreement required to be in writing. The finding of the court that the appellants had requested the plaintiff to resign his position in the police department, etc., is therefore not supported by the evidence. This finding is attacked by specifications which are sufficient under the views above declared.

"It is necessary, therefore, that the order denying a new trial be reversed. Upon a new trial the plaintiff may succeed in proving by competent evidence the authority of Oelrichs to bind the appellant by a contract of employment for 10 years. We do not here pass upon the question whether, if such proof had been made, the appellants would upon the facts here disclosed be estopped to assert the invalidity of the oral contract made by Oelrichs with plaintiff. The question of estoppel is one which often depends upon the peculiar facts shown, and, as the evidence on another trial may vary from that here introduced, we deem it better to omit discussion of this question. Nor do we, for similar reasons, pass upon the question of the measure of damages."

It will be observed that the court did not in this opinion pass upon the question whether, assuming that Mr. Oelrichs had the power to bind the appellants by a written contract for 10 years, the appellants would, upon the facts disclosed by the record, be estopped to assert the invalidity of the oral contract made by said Oelrichs and Charles L. Fair with plaintiff, and also failed to pass upon the question of the measure of damages. Upon petition for rehearing it was concluded by the court that the question of estoppel should be determined for the purposes of a new trial, and solely for that reason an order vacating the decision was made.

We adhere to the views expressed in the

former opinion as to the questions determined therein, and as to such questions adopt the same as the opinion of the court. For the reasons stated therein, the judgment and order denying a new trial must be reversed, but for the purposes of a new trial that must follow, we will determine the question of estoppel.

In our discussion we shall assume, of course, that Mr. Oelrichs was duly authorized in writing to enter into such a contract on behalf of the defendants as is alleged to have been made by him with plaintiff. If he was so authorized, it is apparent that defendants are bound by his acts, conduct and statements to the same extent that they would have been had they been personally present and personally had done just what he did. So assuming, the facts that plaintiff's evidence tended to show are substantially as follows: Plaintiff was captain of detectives in the police department of the city and county of San Francisco, at a salary of $250 per month. Under the law, he held practically a life position as captain of police, being removable therefrom only for good cause, after trial. All this was known to the defendants and to Charles L. Fair, to whose property they have succeeded. Under these circumstances they offered him a position, wherein he was to render personal services in connection with their property in San Francisco for a compensation in money. The terms of the contract were finally agreed upon before Mr. Fair left for Europe, Mr. Fair acting for himself and Mr. Oelrichs representing the defendants. Plaintiff told them that he then had a life position, with a right to a pension if he remained long enough in the police department, and that he could not afford to leave the place and go into anything else unless he was certain of steady employment, and they then told him that they would give him a 10-year contract at $300 per month. This was assented to by plaintiff. The day before Mr. Fair left for Europe, to be absent a few weeks, being very busy in closing up certain business affairs that had to be attended to before he left, he told plaintiff: "Now, in regard to this contract, you leave that stand until I get back, and I will give you the contract." Plaintiff asked him why it could not be done "now," and Fair told him not to be afraid, it would be all right, everything would be all right. It was understood that he was to go to work at once. On leaving Mr. Fair, plaintiff met Mr. Oelrichs and told him about his conversation with Fair, and Oelrichs said: "As far as I am concerned I will give you my part of it now if you want it. I represent Mrs. Oelrichs and Mrs. Vanderbilt and there will be no trouble about it at all, but you might just as well leave it go until Fair returns," and plaintiff said, "All right." This was about June 1, 1902. Plaintiff relied absolutely upon the understanding that he was to have a written contract for 10 years at $300 a month, and would not otherwise have resigned his position in the police department or entered the employ of the defendants and Fair. The morning Fair went away, he asked plaintiff when he was going to resign, and plaintiff said, "To-day," and Fair said, "All right, you go ahead, it will be all right, everything will be all right on my return." He did resign at once and his new employment commenced June 1, 1902. Fair was killed near Paris, France, August 14, 1902, without having returned to America. Plaintiff continued to perform all services agreed to be rendered and received $300 a month therefor to July 1, 1904, when defendants, having determined to sell all their San Francisco property, discharged all of their employés, including plaintiff, and have ever since refused to recognize him as an employé or pay him any portion of the salary agreed upon. Plaintiff had no intimation that either Mrs. Oelrichs or Mrs. Vanderbilt did not know all about the terms upon which he entered their employ until November, 1903, when an attempt, which was not persisted in, was made to reduce his salary; Mrs. Oelrichs on November 30, 1903, told him that Mr. Oelrichs had no right to make such an arrangement. There was nothing to indicate that Mrs. Vanderbilt personally had any knowledge that plaintiff was an employé at all until after Fair's death, or that she personally knew anything about the alleged contract. It is not claimed by plaintiff that either Mr. Oelrichs or Mr. Fair did not act in perfect good faith in this matter, it being conceded that each of them fully intended to execute the written contract.

The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, "invalid" under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities. Browne on Statute of Frauds, § 448. He necessarily is compelled to rely solely on the claim that the defendants by their conduct and promises, on which he was entitled to and did rely, having induced him to give up his life position in the police department in order to enter their employ for a term of years at $300 a month, on the assurance from them that they would give him a written contract for such time and amount, and it being impossible for him to be placed in statu quo, are estopped from now setting up the statute of frauds as a defense to his action on the contract. Under this claim, the fact of part performance by plaintiff plays no part whatever. It was the change of position caused by his resignation from the police department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service, but was something that must be done by plaintiff before he could begin to perform, as was known to the defendants. Plaintiff's case, in this regard, would be just as strong if after his resignation he had been prevented by defendants from beginning to perform.

The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle "thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme." 2 Pom. Eq. Jur. § 921. It was said in Glass v. Hulbert, 102 Mass. 24, 35, 3 Am. Rep. 418: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds." This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See Browne on Statute of Frauds, § 457a. In the section last cited, Mr. Browne says: "A plaintiff * * * must be able to show clearly * * * not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made."

We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies "in every transaction where the statute is invoked." It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U. S. 580, 25 L. Ed. 618, and quoted therefrom in Carpy v. Dowdell, 115 Cal. 687, 47 Pac. 697, as follows: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

The question, then, is whether the facts of this case bring it within the principle we have discussed. It is clear that there was such a change of position on the part of plaintiff in his irrevocable surrender of his office in the police department, induced in fact by his reliance on the promise of defendants and Fair that a written contract for 10 years at $300 a month would be given, that he will incur great injury and loss in case the defendants are permitted to rely upon the statute of frauds as a defense. That there would necessarily be such a change of position on his part in the event that he relied upon their promise and accepted their offer was known to them, and the promise was given with this knowledge and with the intent that it should be relied on by him and the change in his position thereby induced. The injury done plaintiff by a repudiation of the promise by defendants under these circumstances would certainly appear to be "unjust and unconscientious." Is it permissible to them, in view of the well-settled principle stated to so repudiate it by interposing the fact that the contract has not been reduced to writing, as promised, as a defense to this action?

Learned counsel for defendants say that no fraud on the part of defendants is shown, and that there can be no estoppel in the absence of fraud on the part of the person estopped. The presence of fraud is, of course, essential. It is established by a multitude of cases that to constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct an actual intent to mislead is not essential. Mr. Pomeroy in his work on Specific Performance says that the fraud essential in such cases is not necessarily an antecedent fraud, consciously intended by a party in making the contract, but a fraud inhering in the consequence of thus setting up the statute. Section 104. In Anderson v. Hubble, 93 Ind. 570, 576, 47 Am. Rep. 394, it was aptly said: "It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which it would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct. * * * All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design." See, also, 2 Pom. Eq. Jur. § 805. It is unnecessary to cite other authorities upon this well-settled doctrine in regard to equitable estoppel. We do not understand it to be disputed by counsel for defendant. Their claim, as we understand it, is that there is nothing more in this case than a mere promise on the part of defendants to give the written contract, made honestly and in good faith, and that a refusal to comply with such a promise so made cannot serve as a basis for the application of the doctrine of equitable estoppel; the contention being that the mere failure to keep an oral promise to reduce an oral contract to writing cannot suffice to constitute the fraud essential to the application of such doctrine, and that there must be some other fraud shown, such as actual fraud to prevent the contract being reduced to writing. This claim presents the most doubtful question in this case. The authorities all recognize the proposition that the acts, conduct, or statements relied on as constituting ground for the estoppel must generally be acts, conduct, or statements amounting to a representation of fact, as distinguished from mere expression of opinion or intention, or mere promise of something to be done in the future. It has therefore been said many times that the mere refusal to make a writing, as agreed, is not such fraud as will take a case out of the operation of the statute of frauds under the doctrine of equitable estoppel. This, undoubtedly, is ordinarily true, even where a party, relying simply on the honor, word or promise of the other, has changed his position to his injury because thereof. But is it applicable to such a state of facts as we have before us? Practically, defendants said to plaintiff: "We want you to enter our employ at once. We know that to do so you must give up your life position in the police department and that you are not willing to do this unless you are assured of employment for ten years at $300 a month. A written contract is, under our statute, essential to guarantee you such employment. We will execute this contract just as soon as Mr. Fair returns from Europe. Go ahead and resign your position now and commence work with us at once, and it will be all right. The written contract will be given as promised." Here, certainly, in the language of a note to section 877 of Pomeroy's Equity Jurisprudence (volume 2), was a representation of a future intention absolute in form, deliberately made for the purpose of influencing the conduct of the other party, and it is stated in such note that, notwithstanding the rule set forth in the text that a statement of intention merely cannot be a misrepresentation amounting to fraud, such a representation of intention as last set forth, if acted upon by the other party, is generally the source of a right, and may amount to a contract enforceable as such by a court of equity. Mr. Bigelow, in discussing the essentials of estoppel by conduct, and particularly the necessity of a representation or concealment of a fact, says that where the statement or conduct is not resolvable into a statement of fact, and does not amount to a contract, the party making it is not bound unless guilty of clear moral fraud, or unless he stood in a relation of confidence toward him to whom it was made. Bigelow on Estoppel (5th Ed.) p. 572. The same learned author further says that situations may arise in which a contract should be held an estoppel, as in certain cases where only an inadequate right of action would, if the estoppel were not allowed, exist in favor of the injured party, citing the case of Faxton v. Faxton, 28 Mich. 159, in which a mortgagee was held estopped from enforcing his mortgage, where he had induced the son of a mortgagor, contemplating removal, to remain on the mortgaged land and care for it and support the family of the mortgagor, to whom the mortgagee was related, on a promise, honestly made, that the mortgage would never be enforced if he did so. Page 577. In Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254, it was held that a parol declaration by the holder of a note to a surety that he would look to the principal only was a good defense for the surety, on the ground that it lulled the party into security and prevented him from obtaining his indemnity, and that it would be a fraud on the part of the holder to subsequently call upon the surety contrary to such assurance. In White v. Walker, 31 Ill. 422, a somewhat similar case, it was said that while a promise to forgive a debt or forbear its collection, unsupported by any consideration, was ineffectual as a defense viewed merely as an agreement, yet if the surety has been induced by such assurance to neglect any of the means which might have been used for his indemnity, the "promise may have that effect as an estoppel, which it wants as a contract, and amount to a defense in any subsequent action brought by the creditor." These authorities are cited simply to show that the mere fact that there was no misrepresentation of fact, but only a promise of future action, is not always a bar to equitable relief. The cases to be found in support of the doctrine that the mere omission or refusal to make a writing, as promised, is not such fraud as will take a case out of the operation of the statute of frauds, are generally cases where the promise was not made under such circumstances as would warrant the conclusion that it constituted, in the eye of equity, a contract, the repudiation of which would be a manifest fraud on the other party. For instance, in stating the rule, the Supreme Court of Indiana said, in Caylor v. Roe, 99 Ind. 1, that never has it been held that the simple failure or refusal to reduce a verbal contract to writing, unaccompanied by elements of estoppel or other circumstances invoking the equitable powers of the court, is such a fraud as will authorize the courts in excepting the contract from the operation of the statute of frauds. The case of Equitable Gas, etc., Co. v. Baltimore, etc., Co., 63 Md. 285, cited by defendants, was a case of an oral contract for the sale of personal property which, according to its terms, was not to be performed within one year. It was intended by the parties that it should be put into writing. The action was by the vendee to obtain an injunction preventing the disposition of the property to others and for specific performance. There were allegations showing the irreparable injury that would be suffered by the plaintiff in view of its action had in reliance on the contract. The court recognized it to be a settled rule "that the equity of part performance to entitle a plaintiff to specific execution of a contract within the statute does not relate to contracts for personal service not to be performed within a year." But they further said that here the parties intended a written contract, and that if such contract was fraudulently withheld, if executed, or, if not, signed, if the execution be fraudulently and without justifiable cause delayed, a court of equity may require its production or enforce proper execution. It is obvious that "the application of the rules as to equitable enforcement must to a considerable extent be governed by the circumstances of each case." Browne on Statute of Frauds (5th Ed.) p. 586.

While the question is by no means free from doubt, we believe that it should be held that there were sufficient facts in this case to support a conclusion that the promise here to give such a written agreement as was required by the statute was made under such circumstances that the irrevocable surrender by plaintiff of his position in the police department in full reliance thereon made it, in the eye of equity, a binding contract, the subsequent repudiation of which by defendants would constitute such a manifest fraud as would justify the application of the doctrine of equitable estoppel.

For the purposes of a new trial it may further be properly said that we are entirely satisfied with the opinion filed in this case by the District Court of Appeal of the Third District, written by Justice Hart, of that court, so far as the question of measure of damages is concerned. We adopt that portion of their opinion as the opinion of this court. It is as follows:

"3. Upon the question of damages, it is contended by the defendants that the basis or measure thereof for a breach of contract such as the one under consideration, where the action is tried before the expiration of the term of service stipulated in the contract, is such actual damage as the evidence shows the plaintiff has sustained up to the time of the trial. Such actual damage in such a case would, of course, be the equivalent in amount to the salary for that portion of the stipulated term of employment ending with the beginning of the trial of the action, less what the plaintiff has been paid by the defendants and what he has earned and received, if anything, from other employments after his discharge from the service of the defendants and up to the trial of the action. Schroeder v. Cal. Yukon Trading Co. [D. C.] 95 Fed. 296.

"It appears that the plaintiff, some 8 months after his employment under the contract with defendants was discontinued, secured a position with Wells, Fargo & Co. at a monthly salary of $200. The court based its award of damages on the aggregate salary to which plaintiff would have been entitled for the unexpired portion of the contract period of 10 years with defendants, deducting therefrom, however, the amount earned by plaintiff in his employment with Wells, Fargo & Co. up to the time of the trial, together with the amount which he would earn during the remainder of the 10 years at the salary of $200 per month, the amount paid him by Wells, Fargo & Co., assuming that he would retain his employment and salary with Wells, Fargo & Co. during all of the unexpired portion of the stipulated 10 years.

"Counsel have been unable to find any California decision in which the question of the measure of damages is directly presented, discussed, and adjudicated in a case, like the one here, where the action for the violation of the terms of a contract of hiring has been instituted before the expiration of the period of time or the term for which the service of a party is stipulated to run. The point has been squarely presented and decided, however, in other jurisdictions, but the conclusions reached are not uniform. In some states the rule contended for by the appellants is laid down and sustained upon reasons which appear to have some support, while in others it is held that the proper basis upon which damages should be awarded for the breach of the terms of a contract such as the one here is the entire term for which the party has been employed, making deductions of earnings from other employments in which the plaintiff might have been engaged after his discharge from service by the master, and also allowing for what he may earn, by the exercise of reasonable exertion and diligence, during the balance of the unexpired term. We are thoroughly persuaded that the weight of authority and by far the best reasoned cases support the position of the respondent. * * *

"The gist of the complaint is in the breach of the contract and the injury resulting to plaintiff by reason of such breach. The action is not, in other words, one in which the plaintiff seeks to recover wages, but is for damages for the violation of the terms of the agreement by which he was employed for certain compensation to perform services for the defendants for a stipulated term of years. The measure of damages is, therefore, prima facie, the contract price. In Hamilton v. Love, 152 Ind. 645 [53 N. E. 182, 71 Am. St. Rep. 384], an action involving the breach of a contract of hiring, it is said: 'There can be but a single action, and not successive actions. The action must be for damages for a breach of the contract, and not in assumpsit for constructive services, or for wages. All damages sustained by the servant, in consequence of the wrongful act of the master, whether present or prospective, must be included in the recovery. A single judgment for the injury bars all other claims. The suit may be brought at any time after the breach, either before the expiration of the term of the contract, or afterwards, within the statutory limits. But whether brought before or after the expiration of the term of the contract, the measure of the damages is the same.'

" 'The measure of damages,' say the Missouri Court of Appeals, in Lally v. Cantwell, 40 Mo. App. 50, speaking of a contract like the one here, 'is the contract price, although the master may recoup the damages by showing that the servant either earned, or by reasonable exertion might have earned, money in other employment during the contract period. * * * Nor is the servant in such cases confined to damages which have accrued up to the institution of the suit, or even up to the day of the trial, as the defendant's counsel erroneously supposes, where the damages are of a continuing character.'

"The rule as thus declared is laid down and sustained in the following cases: Pierce v. R. Co., 173 U. S. 1 [19 Sup. Ct. 335, 43 L. Ed. 591]; De Camp v. Hewitt, 11 Rob. (La.) 290 [43 Am. Dec. 204]; Sutherland v. Wyer, 67 Me. 64; Cutter v. Gillette, 163 Mass. 95 [39 N. E. 1010]; Miller v. Boot & Shoe Co., 26 Mo. App. 61; Boland v. Glendale Co., 127 Mo. 520 [30 S. W. 151]; Kelly v. Wheel Co., 62 Ohio St. 598 [57 N. E. 984]; Wilke v. Harrison, 166 Pa. 202 [30 Atl. 1125]; R. Co. v. Staub, 7 Lea (Tenn.) 397; School District v. McDonald [68 Neb. 610] 94 N. W. 829 [97 N. W. 584]; Daniell v. Boston & M. R. Co. [184 Mass. 337] 68 N. E. 337, 339; Forked Deer Co. v. Shipley, 80 S. W. 476 [25 Ky. Law Rep. 2299]; Olmstead v. Bach et al., 78 Md. 132 [27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273].

"In the last-mentioned case it is said: 'A contract of employment for a year for a certain sum per week, payable weekly, is entire and indivisible, and only one action for the breach thereof can be maintained by the discharged employé.'

"But there is no necessity for reviewing the many cases which hold with respondent that the measure of damages in such a case as the present one is prima facie the contract price. The rule is invariably applied in cases of personal injury, where the jury is permitted, in the assessment of damages, to consider evidence bearing not alone upon the immediate, but upon the future, effect of the injury upon the complaining party. Nor is the rule disturbed by the argument, advanced by the appellants, that it is impossible to determine with accuracy what damage plaintiff would actually suffer during the remainder of the unexpired term. It is to be conceded that the question of the extent of the future damage which a complaining party in a case like the one at bar would suffer is fraught with some difficulty. Yet it hardly rests with the defendants to complain of such difficulty, since it arises only through the wrongful act of the defendants themselves. There is no claim here that the plaintiff was incompetent for any reason to properly discharge the duties assigned to him by the defendants. The specific reason for his dismissal from their service does not appear, but it may be safely assumed that if the cause was inefficiency in the performance of the duties of the position, that fact would have been set up. Therefore, if the defendants conceive that to be a hard rule which compels them to respond in damages based largely upon what they characterize as pure speculative injury, they have themselves and no one else to blame. It is well said in Cutter v. Gillette, supra: 'But it is not the law that damages which may be larger or smaller because of such uncertainties are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which bear upon the matters involved in the prognostication are to be considered by the jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit. The liability to have the damages which he inflicts by breaking his contract so assessed is one which the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and if he did not wish to be subjected to it he should have kept his agreement.' And upon this same point our Supreme Court in Holt Co. v. Thornton, 136 Cal. 235 [68 Pac. 709], uses the following language: 'It has often been held that damages may be recovered for the destruction of merely immature growing crops, although there was no absolute certainty that they would ever mature, for he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages.' See Schoemaker v. Acker, 116 Cal. 245 [48 Pac. 62]."

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

(157 Cal. 16)

WAIT v. KERN RIVER MINING, MILLING & DEVELOPING CO. et al. (L. A. 2,435.)

(Supreme Court of California. Dec. 18, 1909.)

1. Corporations (§ 96*)—Unissued Stock—Corporation as Trustee for Stockholder.

As to stock remaining to be issued to a stockholder for property transferred by him to the corporation when it was organized, it is a mere trustee, entitled, however, before being compelled to issue it to any other person to be protected against any subsequent claim therefor by such stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 437, 438; Dec. Dig. § 96.*]

2. Process (§ 86*) — Suit to Determine Rights as to Unissued Stock—Necessary Party—Constructive Service.

While a nonresident entitled to unissued stock is a necessary party to a suit against the corporation to determine rights of another thereto, constructive service is effectual to give the court jurisdiction to determine plaintiff's rights against him so far as concerns disposition of any of such stock, the situs of which is in this state.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 100; Dec. Dig. § 86.*]

3. Execution (§ 29*)—Attachment (§ 73*)—Levy on Nonresident's Property—Situs of Corporate Stock.

For purposes of execution or attachment, the situs of shares of stock is within the state where the corporation resides, and they may lawfully be levied on in such state though owned by a nonresident.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 61; Dec. Dig. § 29;* Attachment, Cent. Dig. §§ 200, 201; Dec. Dig. § 73.*]

4. Courts (§ 19*) — Jurisdiction — Situs of Stock Subject of Action.

Whenever stock is the subject of an action, its situs should be held to be within the state where the corporation resides.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 48; Dec. Dig. § 19.*]

5. Courts (§ 19*)—Jurisdiction of Subject-Matter—Residence as Affecting Situs of Stock.

Where a corporation is organized in another state to do business in this state, and all its property is here, and it is doing business nowhere else, it is sufficiently a resident of this state to bring it within the rule applicable to domestic corporations as to the situs of its stock.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 48; Dec. Dig. § 19.*]

6. Specific Performance (§ 103*)—Decree—In Personam or in Rem.

A decree for specific performance operates primarily in personam, yet in a limited and qualified sense it may also operate in rem when property to be transferred under the contract is within the court's jurisdiction, but defendant is absent therefrom.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 320–323; Dec. Dig. § 103.*]

7. Courts (§ 19*) — Jurisdiction — Proceeding in Rem.

Where the whole relief sought consists in mere delivery of property within the jurisdiction of the courts of a state to a party entitled thereto under a contract, the proceeding is sufficiently in rem to give the courts jurisdiction to effectuate a delivery as against a nonresident defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 48; Dec. Dig. § 19.*]

8. Attachment (§ 207*)—Nature of Remedy—Property of Nonresident.

A claim by an attaching creditor may be established against a nonresident, only constructively served with summons, to an extent sufficient to enable plaintiff to devote defendant's property, attached in this state, to the payment of his claim.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 671–673; Dec. Dig. § 207.*]

9. Attachment (§ 1*)—Nature of Proceeding Against Nonresident's Property.

An attachment of property of a nonresident is a proceeding in rem.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1; Dec. Dig. § 1.*]

10. Lis Pendens (§ 3*)—Bringing of Action as Equivalent to Seizure of Property.

Where a complaint seeks specific property in this state in which plaintiff has acquired an equitable interest by his full performance of a contract with a nonresident, the mere bringing of his action is equivalent to a seizure of the property for purposes of the suit.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 3; Dec. Dig. § 3.*]

11. Specific Performance (§ 5*)—Right to Decree—Determination.

The right of a court of equity to decree specific performance does not turn on the question whether the contract relates to real or personal property, but solely on whether the breach can be adequately compensated in damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5–8; Dec. Dig. § 5.*]

12. Specific Performance (§ 114*)—Transfer of Personal Property — Complaint — Allegation of Inadequacy of Legal Remedy.

The presumption being that an agreement to transfer personal property can be compensated in damages, it is incumbent on one seeking specific performance to allege facts showing the inadequacy of the legal remedy by damages, but he need not allege in terms that the legal remedy is inadequate or that the breach cannot be adequately compensated in damages, and, if the facts alleged and proved sufficiently show such inadequacy, it is enough.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 356; Dec. Dig. § 114.*]

13. Specific Performance (§ 5*) — Transfer of Personal Property—Inadequacy of Legal Remedy—Sufficiency of Pleading and Proof.

If personal property, a transfer of which is sought to be specifically performed, is such that the value of performance cannot be estimated in money with any degree of certainty and taken in lieu of it, the inadequacy of the legal remedy by way of damages is apparent, and so, where the complaint to compel a transfer of stock shows that it was that of a mining corporation whose property consisted of claims of unknown value, it is apparent that it cannot have an established market value, though it is not alleged in terms that it had not such value at the time of commencing action, and the facts as alleged being found on sufficient evidence, it overcomes the presumption declared by Civ. Code, § 3387, that breach of an agreement to transfer personal property can be relieved by pecuniary compensation.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 5–8; Dec. Dig. § 5.*]

14. PLEADING (§ 9*)—CONCLUSIONS OF LAW FROM FACTS PLEADED—CONSIDERATION FOR CONTRACT.

Though by Civ. Code, § 3391, to enforce a contract against a party, there must be an adequate consideration, and the contract as to him must be just and reasonable, the complaint need not allege in hæc verba that the contract is supported by an adequate consideration and is as to defendant fair and just, but it is sufficient to set forth facts from which the court is warranted in concluding it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

15. SPECIFIC PERFORMANCE (§ 50*) — CONTRACTS ENFORCEABLE — ADEQUACY OF CONSIDERATION—FAIRNESS.

Allegations of a complaint for specific performance of a contract to transfer corporate stock, found to be true by the court, fairly showed the parties were dealing as to stock of no market value and that the sale of treasury stock was absolutely essential to develop the claims and give value to stock; that it was practically agreed to give plaintiff one-half of the stock retained by the individual defendant, the principal stockholder, if plaintiff would go to another state and sell a substantial amount of the treasury stock to obtain money for development work. It further appeared that such defendant allowed plaintiff, relying on the contract, to go to a distant city, and there give his time and services in performing his part of the contract for more than six months, and never intimated to him that he thought his services an inadequate consideration for the transfer, or the contract unfair or unjust. *Held*, that there is no standard by which the contract as to such defendant could be held to be unfair or unjust or based on an inadequate consideration, and sufficient facts were alleged and shown to establish, as required by Civ. Code, § 3391, that he received adequate consideration, and that the contract was not as to him unjust or unreasonable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 152; Dec. Dig. § 50.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. E. Wait against the Kern River Mining, Milling & Developing Company and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Reversed.

Murphey & Schmidt, for appellant. Anderson & Anderson, for respondents.

ANGELLOTTI, J. This action was brought to obtain a decree that plaintiff is the owner of 245,000 shares of stock of the defendant corporation, and that the defendants have and hold the same in trust for the use and benefit of plaintiff, and requiring said corporation to issue to plaintiff said 245,000 shares. Defendant Latham having, prior to the institution of the action, absconded and left the state of California and his whereabouts being absolutely unknown, the only service of summons had upon him was by publication. He did not appear in the action. Defendant corporation answered, and the trial of the action was had as between it and plaintiff. The findings were substantially in favor of plaintiff upon all material issues except that of ownership of the stock, the court finding that it is not true that plaintiff is now, or ever was, the owner of said 245,000 shares of stock. The court concluding, as matter of law, that plaintiff was not such owner, and, further, that the court had never acquired jurisdiction of the person of defendant Latham, adjudged that plaintiff take nothing by his action, and that defendant corporation recover its costs of action. A motion for a new trial on the part of the plaintiff was denied. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. The motion to dismiss the appeals was denied by the court when the case was called for oral argument.

Defendant corporation is a corporation organized and existing under the laws of the territory of Arizona, but all of its property is situate and all of its business carried on in this state, and it has its office in the city of Los Angeles. It was organized by Latham, the purpose thereof being the development and handling of certain mining claims in Kern county owned by him, and upon the facts set forth we are warranted in assuming that the sole purpose of its formation as stated in its articles of incorporation was the carrying on of business in the state of California. These mining claims were transferred by him to the corporation upon the understanding that 1,000,000 of the 2,000,000 of the shares of stock thereof should be owned and held by him and his associates, while the other 1,000,000 should be set aside as treasury stock, to be sold for the purpose of raising a fund with which to develop the property. Of his 1,000,000 shares, 500,000 were to be issued as demanded by him to himself or any other person, and the other 500,000 were issued to certain persons at his request. In May or June, 1903, Latham employed plaintiff to go to Chicago and endeavor to sell 50,000 shares of the treasury stock at ten cents per share, and promised that if he sold the same or any considerable portion thereof at that price "he would pay to plaintiff for his services" in making said sales 250,000 shares of his own stock, and also would see that the corporation paid him a certain commission on all stock sold. Latham thereupon caused 5,000 shares of his 250,000 to be issued to plaintiff, and the corporation agreed to pay him certain commissions and his expenses, a portion of which he had received. Plaintiff thereupon went to Chicago, and remained there until February, 1904, when he was recalled to California, and thereafter remained in California in the performance of service for the corporation. He had then obtained purchasers for about 17,000 shares at the designated price, and the sales thereof had been made and the proceeds sent to Latham, who was the president of the corporation. What plaintiff had done in Chicago was entirely satisfactory to Latham, and was "accepted by him as full performance of said agreement." Latham subsequently absconded and left the state, without having caused any of the 245,000 shares due plaintiff to be issued to him, and without having delivered to him any of the stock agreed to be delivered except 5,000 shares. Of Latham's original 500,000 unissued shares, more than 245,000 shares have never been issued by the corporation to Latham or anyone else. These facts were found by the trial court, and there is no sufficient specification of insufficiency of evidence as to any of them.

Defendant corporation was, of course, a mere trustee as to such of Latham's shares of stock as remained unissued, being entitled simply before being compelled to issue the same to any other person to be protected against any subsequent claim therefor by Latham. Its only other claim in regard thereto intimated by the record was a claim that it had a lien thereon for money which it claimed Latham had embezzled from it, but this may here be disregarded in view of the fact that the merits of such claim do not appear to have been determined by the trial court. The theory of plaintiff is that, by virtue of his performance of the terms of the agreement between himself and Latham, he became the owner in equity of 245,000 shares of Latham's unissued stock, with the consequent right to have the certificate for the same issued to him by the corporation, or at least, if he was not such owner, that he had such an interest in or lien on the stock as would warrant the relief sought against the corporation, even though by reason of his nonresidence personal service had not been made and cannot be made on Latham.

While Latham was undoubtedly a necessary party to this action, we are of the opinion that the constructive service of summons upon him was effectual to give the lower court jurisdiction to determine the rights of plaintiff against him so far as the disposition of any of the shares of the stock in question is concerned.

It does not appear to be questioned that the legal situs of the shares of stock constituting the subject-matter of this action is, for all purposes material here, in this state. It is well settled that, for purposes of execution or attachment, the situs of shares of stock is within the state where the corporation resides, and that they may lawfully be levied on in such state though owned by a nonresident. We can perceive no reason why the rule as to situs should not be the same as to any authorized proceeding to subject the stock to the lawful claim of another, whether that claim be one of ownership of the property or of a right to specific enforcement of a contract relative to it. In other words, wherever such stock constitutes the subject-matter of an action, we see no reason why it should not be held to be within the state where the corporation resides. That state is ordinarily, of course, the state by or under the laws of which the corporation was created. Defendant corporation was, as we have seen, organized under the laws of Arizona. But for all practical purposes, according to the record, it is a California corporation. Its contemplated business was all to be transacted in this state, all of its property is here, and it does business nowhere else. As was said by Judge Lurton of another corporation in Young v. South Tredeger Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752, "its whole tangible and ponderable substance is in this state." It is a foreign corporation only in the sense that it is created in another state, and continues to enjoy corporate life by permission of that state. In every other sense, it is solely a California corporation. So far as it in fact does or can do business at all, it does it solely by permission of this state, and within its borders. Under such circumstances its residence in Arizona, or anywhere else outside of California, is the merest fiction. As to such a corporation, so organized and situated in regard to all its business and property, we can see no good reason why, as was said in the case last cited, "the fiction as to the situs of the corporation entity ought not to yield in the interest of justice to the actual facts," to an extent sufficient to warrant the holding that the corporation is sufficiently a resident of this state to bring it within the rule applicable to domestic corporations as to the situs of its stock.

The relief sought by plaintiff against Latham is in the nature of specific performance of a contract for the delivery of certain mining stock, in a case where all the conditions to be performed by him have been performed, and nothing remains to be done other than the mere delivery by Latham of the stock. If we are correct in what we have said as to the situs of this stock, we have an action for specific performance as against a party who is a nonresident and cannot be personally served with summons, in a case where the whole subject-matter of the contract is within this state, and nothing remains to be done but to compel a transfer thereof. While it is well settled that a decree for specific performance of a contract operates primarily in personam, yet in a limited and qualified sense it may also be said to operate in rem when property to be transferred under the contract is within the jurisdiction of the court, but the defendant is absent therefrom. See 26 Am. and Eng. Ency. of Law, p. 132. Where the whole relief sought consists in the mere delivery of property within the jurisdiction of the courts of a state to the party entitled thereto under a contract, the proceeding is in a sense one in rem, sufficiently so, in our judgment, to give such courts jurisdiction to effectuate a delivery as against a nonresident defendant. In the leading case of Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565, speaking of substituted service by publication, the United States Supreme Court, after saying that such service may be sufficient where property is once brought under the control of the court by seizure or some equivalent act, said: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same." See, also, Boswell's Lessee v. Otis, 9 How. 348, 13 L. Ed. 164. In the case of Rourke v. McLaughlin, 38 Cal. 196, it was held, as one of the grounds of the decision, that specific performance would be decreed "whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court." The contract there involved was one for the sale of land situate in this state, and the claim was that as the vendor was a resident of Ireland and beyond the jurisdiction of the court he could not be compelled to execute a conveyance. The court said that his absence will neither prevent his making a deed voluntarily, "nor prevent the courts of this state from compelling the deed to be given by the plaintiff himself, or by a commissioner appointed to act in his place," and that "specific performance" could be compelled, the whole subject-matter of the contract being within the jurisdiction of the courts of this state. Where nothing remains to be done under the contract but the transfer of property within this state by the nonresident, there is no difference in substance between the position of the plaintiff and the position of a creditor seeking to subject property of a nonresident by attachment proceedings to the payment of his asserted claim against such nonresident. In each, the plaintiff asserts his claim against the nonresident, the validity of which must be established in the proceeding. It is elementary that the claim may be so established in the latter case against a nonresident only constructively served with summons to an extent sufficient to enable plaintiff to devote the property of the defendant that is in this state and has been seized on attachment, to the payment of his claim. As to that property, his proceeding is one in rem. In the former case, the claimant is doing substantially the same thing. Specific property in this state is sought by the complaint, property in which by his full performance of his contract plaintiff has acquired an equitable interest, and the mere bringing of his action is equivalent to a seizure of the property for the purposes of the suit. See Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 301, 5 Sup. Ct. 135, 28 L. Ed. 729. No claim has been made in this case that the court was without jurisdiction as to Latham if a proper case for specific performance has been made to appear.

It is urged that there is a total lack of allegation and proof of facts necessary to bring the action within the exception to the rule that specific performance will not lie to compel a transfer of personal property, and nothing to overcome the presumption that an agreement to transfer personal property can be relieved by pecuniary compensation. Civ. Code, § 3387. The right of a court of equity to decree specific performance "does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages." Senter v. Davis, 38 Cal. 450, 452; Fleishman v. Woods, 135 Cal. 261, 67 Pac. 276. The presumption being that an agreement to transfer personal property can be so compensated, it is incumbent on one seeking specific performance in equity to allege facts showing the inadequacy of the legal remedy by way of damages. It is, however, not necessary to allege in terms that the legal remedy is inadequate, or that the breach cannot be adequately compensated in damages. Indeed, this might be held to be insufficient as being the allegation of a mere conclusion in a case where allegations of the specific facts justifying the conclusion were required. If the facts alleged and proved sufficiently show the inadequacy of the legal remedy, it is enough. If the property is of such a nature that the value of the performance cannot be estimated in money with any degree of certainty and taken in lieu of it, the inadequacy of the legal remedy is apparent. Senter v. Davis, supra. The complaint here shows that the stock was that of a mining corporation, whose property consisted of certain mining claims of unknown value. It is not in terms alleged that this stock had not at the time of the commencement of this action an established market value, but it is apparent enough that it cannot have such a value. In Treasurer v. Commercial, etc., Co., 23 Cal. 390, this court had occasion to consider the question of the sufficiency of a complaint in this respect, in an action for specific performance of a contract for the delivery of certain mining stock. A complaint which showed no more than that the stock was of a corporation formed for the purpose of mining for coal was held sufficient. It was pointed out that the only basis for the rule that specific performance will not be enforced for the transfer of stock is that the stock is capable of an exact compensation, and that the rule applied more particularly to public stocks, such as are commonly bought and sold in the market. The court said: "In the peculiar condition of business and mining operations in this state, where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stocks have a peculiar value to those acquainted with their affairs, where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great, courts should be liberal in extending the full, adequate, and complete relief afforded by a decree of specific performance. In the view we have thus taken of the principles which should govern cases of this kind, the action of the court below was erroneous." This case has been approved and cited many times. It constitutes sufficient authority for the proposition that the complaint and findings in the case at bar show a case in which the legal remedy afforded by an action for damages may be held to be inadequate.

It is further urged that neither the complaint nor the decision of the trial court shows that Latham received an adequate consideration for the contract, or that the contract as to him was just and reasonable, in either of which cases the law specifies that specific performance cannot be enforced. Civ. Code, § 3391. Again it should be noted that it is not required to be alleged in the complaint in hæc verba that the contract was supported by an adequate consideration and is as to the defendant fair and just, but that it is sufficient to set forth facts from which the court is warranted in concluding that the consideration was adequate and the contract fair and just as to the defendant. See Stiles v. Cain, 134 Cal. 172, 66 Pac. 231; White v. Sage, 149 Cal. 616, 87 Pac. 193. Allegations of the complaint that were found to be true by the trial court fairly showed that the parties were dealing in reference to stock that had no value in the market and could be sold at as low a price even as ten cents per share only by having a promoter who could induce parties to see enough merit in the undeveloped mining claims to invest their money therein, and that the sale of some of the treasury stock was absolutely essential to any development of the claims and the giving of any value to Latham's stock. The agreement of Latham was practically to give one-quarter of his original allotment of stock, or one-half of the stock that he had retained for himself, to plaintiff if he would go into another state and sell a substantial amount of treasury stock for the purpose of obtaining money wherewith to do necessary development work and thus make the stock owned by him worth something. For services that resulted in producing the money absolutely essential to the development of mining claims that might, in fact, prove to be worth much or nothing, he was willing to give plaintiff one-half of his remaining interest in the claims. Under such circumstances, no one would be warranted in saying that the services contracted for did not constitute an adequate consideration or that the contract was not fair and just. The facts alleged and found are of such a nature that it is apparent that there is no standard by which this contract as to defendant can be held to be unfair or unjust or based on an inadequate consideration. It further appears that Latham allowed plaintiff, relying on the contract, to go to Chicago and there to give his time and services in performance of his part of the contract for a period of more than six months, and never intimated to plaintiff that he thought the consideration inadequate, or the contract in any way unfair or unjust. The case of Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276, is sufficient authority for the ruling that sufficient facts are alleged and shown to establish that Latham received an adequate consideration for his contract, and that it was not as to him either unjust or unreasonable.

We are of the opinion that the complaint and the findings showed a sufficient case for specific performance as against Latham. If this be so, in view of what we have said, the judgment in favor of defendant corporation cannot be sustained.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.

156 Cal. 765

HITE v. MERCANTILE TRUST CO. et al.

(S. F. 5,204.)

(Supreme Court of California. Dec. 15, 1909.)

1. Cancellation of Instruments (§ 37*)—Offer to Return Consideration—Sufficiency.

The complaint, in an action to vacate for fraud a judgment in an action for divorce, which adjudges that plaintiff was not defendant's wife, and to declare void an agreement releasing all claims in the community property in consideration of a specified sum which was paid, which alleges that, in event plaintiff is successful and should ultimately be found entitled to receive as widow a share of the estate of her alleged deceased husband, she will credit the sum paid as a part of such share, taking only the balance, if any, does not contain a sufficient offer to return the sum paid to uphold the action to rescind the agreement, for, on the agreement being set aside and the judgment vacated, the question of plaintiff's marital status is reopened, and she may not succeed in obtaining any part of the estate, though she succeeds in the action.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 73; Dec. Dig. § 37.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. DIVORCE (§ 83*)—ABATEMENT.

An action for divorce pending at or reopened after the death of one of the parties is abated by the death and fails because the marriage relation which is the subject-matter of the action has ceased to exist.

[Ed. Note.—For other cases, Divorce, Cent. Dig. §§ 269–272; Dec. Dig. § 83.*]

3. DIVORCE (§ 165*)—JUDGMENT—VACATION—GROUNDS.

A woman releasing, by a valid agreement, all her claims and interest in a man's community property and estate, is not entitled, after the man's death, to a vacation of the judgment in an action for divorce which adjudges that the woman has never been the man's wife, because the setting aside of the judgment will not give her any interest in the property which is the only remaining subject of the litigation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533–548; Dec. Dig. § 165.*]

4. JUDGMENT (§ 447*)—VACATION—EQUITABLE RELIEF.

Equity will not vacate a judgment where a party seeking the relief could not possibly derive any benefit from it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 849–851; Dec. Dig. § 447.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Lucy Hite against the Mercantile Trust Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Stanton L. Carter, for appellant. E. W. McGraw, Titus & Creed, E. B. Young, and F. A. Denicke, for respondents.

SHAW, J. In the court below, upon sustaining the demurrer of certain of the defendants to the amended complaint, judgment was given in favor of said defendants against the plaintiff. The plaintiff appeals.

We think the judgment is not to be construed as a judgment in favor of all the defendants, but only in favor of those whose demurrer to the complaint had been sustained as therein recited. Hence the objection that the judgment was in favor of the other defendants and was consequently irregular is without foundation.

The complaint states facts upon which the plaintiff seeks a decree vacating a judgment against her in favor of one John R. Hite and declaring void certain agreements between her and said John R. Hite. The only points which it is necessary to notice may be presented by a brief outline of the facts stated in the voluminous complaint. Plaintiff alleges: That she intermarried with John R. Hite in the year 1872; that said marriage remained in full force until the death of John R. Hite, which event occurred on April 18, 1906; that in 1898 plaintiff began an action in the superior court of Mariposa county against Hite for a divorce and a division of the community property; that Hite answered denying the marriage relation; that on April 28, 1900, she was fraudulently induced to, and did, execute an agreement with Hite to release all her interest in his property and all claims against him, upon payment to her by him of the sum of $21,000, which agreement, however, does not appear to have been performed by either party; that on April 29, 1901, she was by Hite fraudulently induced to, and did, execute another agreement with him, whereby, in consideration of $16,000 then paid to her, she released all claims against him and all her present and future interest in his community property, and all interest as heir at law, or otherwise, in or against his estate after his death; that thereafter, at a date not stated, the divorce action was tried and judgment was given therein that she was not, and never had been, the wife of said Hite; that she take nothing by said action; and that this judgment also was obtained by fraud. The prayer is that these agreements be adjudged null and void and that the judgment be vacated. The facts constituting the alleged frauds by which it is claimed the plaintiff was led to execute said agreements and by which said judgment was obtained are fully set forth. It is unnecessary to state them at length.

There is no allegation that the plaintiff has ever returned or offered to return the $16,000 received by her in consideration of the agreement of April 29, 1901. She makes no offer to return it in her complaint. The only offer she makes is that, in the event she is successful in this suit and should ultimately be found entitled to receive, as widow of John R. Hite, a share of his estate, she will credit the $16,000 as a part of such share, taking only the balance, if any there be. This is not a sufficient offer. The action, so far as the agreements are concerned, is an action to rescind them. If the agreements were set aside and the judgment vacated, she would not, ipso facto, be entitled to a share as widow. The question would be merely reopened for further investigation of her marital status toward John R. Hite, of the nature and amount of his estate, and of the effect of his will, which gives nothing to the plaintiff. She may not succeed in obtaining any part of the estate, even if she should succeed in the present suit. No reason why the money was not returned before the beginning of this suit, or why an offer to return it was not made, is stated. Her offer, aforesaid, is futile and insufficient to uphold her action to rescind that agreement. Civ. Code, § 1691; Kelley v. Owens, 120 Cal. 507, 47 Pac. 369, 52 Pac. 797; Westerfield v. New York, etc., Co., 129 Cal. 84, 58 Pac. 92, 61 Pac. 667; Matteson v. Wagoner, 147 Cal. 744, 82 Pac. 436; Hill v. North P. Ry. Co., 113 Fed. 919, 51 C. C. A. 544. The agreement of April 28, 1900, was not carried out, and the averments regarding it are material only upon the question of fraud in procuring the second agreement and the judgment.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This obstacle to the maintenance of any action to rescind or annul the agreement of April 29, 1901, is also fatal to the case so far as it is an action to set aside the judgment in Hite v. Hite. That was an action for divorce. When John R. Hite died, the marriage was dissolved, and the divorce action, if then pending, or if now reopened, would necessarily abate and would fail because its subject-matter, the marriage relation, had ceased to exist. Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064; Smith v. Smith, 124 Cal. 653, 57 Pac. 573; Begbie v. Begbie, 128 Cal. 155, 60 Pac. 667, 49 L. R. A. 141.

The only thing left for dispute between Lucy Hite, conceding her to be the widow of John R. Hite, and the defendants, who claim under his will, would be the respective interests of the parties in his estate. If plaintiff could establish her status as his lawful wife at the time of his death, she would be entitled to a widow's share in the community property. But the effect of the agreement aforesaid was to release and extinguish all the rights she then had in his property as his wife, and all she might thereafter have as his widow. It completely estops her from claiming any part of his property, or right therein of any kind, after his death as well as before. As she has shown no right to have this agreement set aside or disregarded, it follows that she fails to show that the setting aside of the judgment would give her any right or interest in the property, the only remaining subject of the litigation. Equity will never interfere to vacate a judgment where the party seeking the relief could not possibly derive any benefit from the relief sought. The defendants have no interest in her mere personal status, unless it could affect the property which they hold. As it cannot do that, no cause of action against them is shown. Bell v. Thompson, 147 Cal. 693, 82 Pac. 327; Whitney v. Kelley, 94 Cal. 153, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106.

There are several other objections which the respondent contends would justify the ruling of the court below sustaining the demurrer. It is urged: That the superior court of San Francisco could not entertain a suit to vacate the judgment of the superior court of Mariposa county; that the action, being an action for divorce, the death of Hite would discontinue it as to the property regardless of the effect of the agreement of release; that no ability to prove the marriage relation is shown, even if a new trial were granted; that the action is barred by the statute of limitations and by laches; and that the complaint is uncertain in many material particulars. In view of our conclusions above stated, it is not necessary to pass upon these objections, and we express no opinion concerning them.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

156 Cal. 746

WOLFF v. CLOYNE. (L. A. 2,316.)

(Supreme Court of California. Dec. 15, 1909.)

1. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

2. Specific Performance (§ 32*)—Contracts Enforceable—Mutual Contracts.

A purchaser, in a contract for the sale of real estate which provided for a mortgage for a deferred payment of the price, contracted to sell to a third person, for cash, on the delivery of the deed. Negotiations between the purchaser and the vendor for the payment of the entire price and the immediate execution of the deed were then pending, and subsequently the vendor agreed to convey at once on receiving payment of the price. *Held*, that the contract with the third person was mutual and enforceable, notwithstanding Civ. Code, § 3390, subd. 4, providing that an agreement to perform an act which the party has not the power lawfully to perform and require to do cannot be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89, 90, 92; Dec. Dig. § 32.*]

3. Vendor and Purchaser (§ 22*) — Contracts—Description—Sufficiency.

A contract for the sale of real estate, which describes the land as lying north of the R. and D. place, and being the same the vendor had lately bought, sufficiently described the land, it appearing the the vendor had lately bought land situated as described, under an agreement which described a right of way, as the extrinsic circumstances expressly referred to sufficed to make the description complete and certain as against the objection that the contract was uncertain because not mentioning the right of way.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

4. Vendor and Purchaser (§ 22*) — Contracts—Description—Sufficiency.

A contract for the sale of real estate is not uncertain because not mentioning a right of way, when the right of way will go with the land as an appurtenant, though not specifically described.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

5. Frauds, Statute of (§ 131*)—Sale of Land — Contracts — Description—Sufficiency.

A contract, in writing, for the sale of real estate, which binds the vendor to sell a piece of land, 245 acres, more or less, at a specified sum per acre, payable on the delivery of the deed, makes the price depend on the number of acres, and by implication provides for the ascertainment of the area by a survey, or otherwise, and a subsequent oral agreement that the deed shall not be made until the area has been ascertained by a survey which the vendor is to make adds nothing to the contract and does not bring it within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 283; Dec. Dig. § 131.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. PLEADING (§ 433*)—DEFECTS—CURED BY FINDING.

Where, in an action for the specific performance of a contract for the sale of real estate, the answer alleged facts showing that the contract was not fair or reasonable, and a large part of the evidence was devoted to the issue whether the contract was fair and reasonable, defects in the form of the averments of the complaint in that respect were cured by the answer and a finding that the contract was fair and reasonable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1456; Dec. Dig. § 433.*]

7. SPECIFIC PERFORMANCE (§ 131*)—DECREE—REQUISITES.

Where the complaint, in an action for the specific performance of a contract for the sale of real estate, alleged that the deed tendered to the purchaser before the action was begun was filed with the clerk of the court for delivery to the purchaser under conditions ordered by the court, the better practice required the insertion, in the judgment awarding relief, of the proper direction to the clerk for the delivery of the deed on satisfaction of the judgment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 426; Dec. Dig. § 131.*]

8. APPEAL AND ERROR (§ 1152*)—DEFECTS—CORRECTION ON APPEAL.

Where the judgment for specific performance of a contract for the sale of real estate according to the complaint, which alleged that the deed tendered to the purchaser before the beginning of the action was filed with the clerk of the court for delivery to the purchaser under conditions to be imposed by the court, does not mention the land or the deed, nor give any directions concerning its delivery, but simply adjudges that the vendor shall recover of the purchaser the balance of the price, the court, on appeal, will modify the judgment by inserting therein the proper direction to the clerk for the delivery of the deed on satisfaction of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483, 4489; Dec. Dig. § 1152.*]

Department 1. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by M. L. Wolff against Thomas Cloyne. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Modified and affirmed.

I. W. Stewart and Orestes Orr, for appellant. Chas. F. Blackstock, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying his motion for a new trial. The complaint states a cause of action to enforce specific performance of the following contract: "Oxnard, December 29, '06. I have this day sold to Tom Cloyne and Tom Cloyne has bought of M. L. Wolff a certain Pce of land some 245 acres more or less lying north of the Revolon & Dreyfus place and being the same Pce M. L. Wolff bought lately at 70.00 per acre one thousand dollars receipt of which is hereby acknowledged balance payable when deed is given subject to lease given to Otte. M. L. Wolff. Thomas Cloyne." It is alleged that this contract was intended to and in fact did refer to a certain tract of land, the description of which is fully set forth. The land is a part of a larger rectangular-shaped tract containing 320 acres, known as "parcel E," running a mile east and west and half a mile north and south, bounded on the west by a road known as the "Wood road." A slough extended across the western part of this tract, from north to south, leaving about 75 acres between it and said road. The tract described as sold, and which Wolff had then recently bought, was the portion of the 320 acres lying east of the slough and including a right of way over a strip along the bank of the slough, northwesterly over the land lying north, from the northwest corner of the land sold to the Wood road, a distance of about 900 feet. The punctuation of the contract, as shown in the record, is such as to leave the price uncertain. It is not controverted, however, that the words "70.00 per acre" states the price of the sale to Cloyne and not the price for which Wolff had "bought lately." The answer admits the execution of the contract, but avers that defendant entered into it in the erroneous belief, induced by Wolff's representations at and before the time of its execution, that the tract referred to extended to and abutted upon said Wood road and included the whole of said "parcel E"; whereas, in fact, there is no road or other means of access to the tract described in the complaint, and it extends west only to the slough.

The court found that all the allegations of the complaint were true, that the land was worth the price stated, that the right of way mentioned in the description set forth in the complaint afforded means of access to it, and that the defendant did not make the contract under any mistake as to its size or location, but was fully informed thereof. It is contended that the facts particularly stated are not sustained by the evidence. Upon these points the case as presented is the familiar one of a conflict in the evidence. There was abundant evidence to sustain the court's findings and some to the contrary. In such a case the findings are conclusive upon this court. A review of the evidence would be of no value. At the time the contract was made, Wolff did not have title to the land, but held an agreement or option to purchase it from the real owner. The price named being $70 per acre, a survey was necessary to fix the exact quantity and price of the land, and at the time of its execution there was an oral agreement that Wolff would have a survey made, and that as soon as this could be done the deed would be made and the balance of the price paid. The option which Wolff held had, by its terms, expired before the sale from Wolff to Cloyne; but it had been extended for an indefinite period by the owner.

It is contended that the contract was not mutual, and therefore not enforceable, because Wolff did not then hold the title. He had at that time a valid agreement from one

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Etting, the real owner, under which he could obtain title. This agreement provided for a mortgage for certain deferred payments of the price, but at the time of the contract with Cloyne negotiations were pending between Wolff and Etting for the payment of the entire price and the execution of a deed from Etting to Wolff immediately. This was afterwards agreed to between them, and as soon as Wolff could get the necessary survey made he paid Etting, obtained the title, and tendered to Cloyne a good and sufficient deed purporting to convey the land to Cloyne, which Cloyne refused to accept. These conditions are sufficient to make the contract mutual. Easton v. Montgomery, 90 Cal. 315, 27 Pac. 280, 25 Am. St. Rep. 123; Civ. Code, § 3390, subd. 4. At the time Wolff was required to convey the title, he had obtained it, and Cloyne could then have enforced performance, had Wolff refused it.

There is no merit in the point that the contract of Wolff and Cloyne is uncertain because it did not mention the right of way to the Wood road. It described the land as that which Wolff had lately bought, lying north of the Revolon and Dreyfus place. He had lately bought a tract thus situated from Burson, to whom the agreement from Etting, the owner, had been executed. This agreement described the right of way in question. The extrinsic circumstances thus expressly referred to sufficed to make the description complete and certain. Furthermore, the right of way established by the Etting agreement and deed would constitute an appurtenance, and would go with the land, although not specifically described in subsequent deeds. Rianda v. Watsonville, etc., Co., 152 Cal. 527, 528, 93 Pac. 79; Stanislaus W. Co. v. Bachman, 152 Cal. 724, 93 Pac. 858, 15 L. R. A. (N. S.) 359.

The oral agreement that the deed was not to be made until the area of the land was ascertained by a survey which Wolff was to have made does not render the contract void. By the contract, Wolff agreed to sell "a certain Pce of land some 245 acres more or less * * * at 70.00 per acre." It sufficiently identified the land, but the price depended on the number of acres it contained. The price could be made certain by a survey or by agreement as to the area, and they chose to have it fixed by a survey. The price could not be fully paid until it was ascertained. By the express terms of the contract, the deed was not to be made until the price was paid. By implication, therefore, the deal was not to be closed until a survey was made, or the area ascertained in some way. The oral agreement added nothing to the force of the agreement to convey, except to put the burden of the survey upon Wolff, instead of upon both of them. This we regard as immaterial and not sufficient to bring the contract within the statute of frauds.

It is further claimed that the complaint does not show that the contract is just and reasonable. It is alleged that the contract is fair, reasonable, and just, that defendant lived in that vicinity, that he was a successful farmer, and had known the land for many years, that land adjacent to it has been sold since at the same price, and that the land in question produces crops annually that pay a reasonable interest on the price agreed upon. The evidence that the land, at the time of the sale and ever since, was worth at least the price fixed by the contract, was full and satisfactory. It is not disputed that the defendant had been for many years a successful farmer of that vicinity, nor that he examined the land the day before the contract was made. The proof that the contract was fair, just, and reasonable was ample. The complaint does not directly allege the value, and its averments on the general subject are somewhat argumentative and indefinite. The answer contains elaborate averments that the land was worth far less than the price, and other facts to show that the contract was not fair, just, or reasonable. It is apparent that the parties understood that this issue was presented. A large part of the evidence on both sides was devoted to the question whether or not the contract was fair, just, and reasonable, and that seems to have been the principal controversy. We think the defects in the form of the averments of the complaint in that respect should be considered as cured by the answer and by the findings and judgment.

The complaint alleges that the deed which was tendered to the defendant before the action was begun was filed with the clerk of the court "to be delivered to the defendant under such conditions as said superior court may order and direct." The finding is that this is true. The judgment does not mention the land or the deed, nor give any directions concerning its delivery. It is a simple judgment that the plaintiff recover of the defendant the balance of money found to be due upon the contract of sale. It can scarcely be supposed that the defendant would have any difficulty in obtaining such delivery of the deed upon payment of the judgment. The better practice, however, in all such cases, is to insert in the decree the proper direction to the clerk for the delivery of the deed upon satisfaction of the judgment. It is not necessary to reverse the judgment for this defect. It can be cured by a modification thereof. There are no other points requiring discussion.

The order denying a new trial is affirmed. The judgment is hereby modified by adding thereto the following clause: Payment of the sums herein adjudged to the plaintiff may be made to the clerk of this court for the plaintiff, and said clerk shall thereupon deliver to the defendant, his heirs, assigns, or legal representatives, the deed for the land in controversy deposited by plaintiff with the clerk at the beginning of this action. If such payment is made to the sheriff, said deed shall be delivered to the sheriff by the clerk and by the sheriff delivered to defendant upon payment. If paid to the plaintiff, he shall concurrently deliver the deed.

As thus modified, the judgment is affirmed. Defendant shall recover of the plaintiff one-third of the costs of the transcript on appeal.

We concur: SLOSS, J.; ANGELLOTTI, J.

11 Cal. App. 677

CONTINENTAL BUILDING & LOAN ASS'N v. WOOLF et al. (Civ. 670.)

(Court of Appeal, Third District, California. Nov. 6, 1909.)

1. Courts (§ 85*) — Rules of Court — Construction.

The rules of the Supreme Court governing the practice in the appellate courts should be substantially followed and enforced.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 296, 297; Dec. Dig. § 85.*]

2. Appeal and Error (§ 628*) — Transcript on Appeal—Failure to File in Time—Excuse.

Appellant prepared, in due time, a draft of the proposed bill of exceptions. Respondent obtained extensions of time to prepare amendments until April 10th. Appellant's counsel was compelled to go to a distant city on March 30th on official business, and he did not return until April 18th. On the following day he found in his office proposed amendments to the bill of exceptions, and he immediately requested the trial judge to fix an early date so that the transcript on appeal might be filed within 40 days after March 29th. The judge fixed April 23d; but respondent caused a delay in the settlement thereof, and the bill of exceptions was not settled and signed until April 30th. Appellant at once prepared the necessary papers for the transcript; but, because of official duties of appellant's attorney, the transcript was not filed until May 21st. *Held* to show a reasonable excuse for the delay in the preparation of the transcript within Court Rules 2, 5 (78 Pac. vii, viii), requiring the filing of the transcript within 40 days, etc., though the fact that an attorney is busy attending to other engagements is not of itself sufficient to excuse a failure to file the transcript within the time limited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2755, 2760, 2761; Dec. Dig. § 628.*]

3. Appeal and Error (§ 625*)—Filing Abstract on Appeal—Sufficiency.

Counsel for appellant served the transcript on appeal at 10 o'clock and was at the office of the clerk of the Court of Appeal at about a quarter to 1, and there left the original transcript with the requisite number of copies with the deputy clerk of the Supreme Court, with the request that he file the transcript in the office of the Court of Appeal on the return of the clerk thereto, and the deputy agreed to, and did, so file the transcript. Notice of motion to dismiss the appeal for failure to file the transcript on time was served on appellant's counsel at 23 minutes to 1 o'clock on the same day. *Held* to justify a finding that the transcript on appeal was on file at the time of the notice and filing of the motion to dismiss within the spirit of Court Rule 5 (78 Pac. viii), providing that where the transcript, though not filed within the time prescribed, is on file at the time the notice to dismiss is given, that fact shall be a sufficient answer to the motion to dismiss the appeal for failure to file the transcript on time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2743; Dec. Dig. § 625.*]

4. Appeal and Error (§ 956*)—Discretion of Court—Review.

Whether circumstances of a particular case are such that a mistake or inadvertence should be excused is left largely to the court to which application is made, and its decision will not be disturbed except in a clear case of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3810; Dec. Dig. § 956.*]

5. Appeal and Error (§ 2*)—Right of Appeal—Procedure.

The right of appeal is conferred by the Constitution and statute, and the rules of procedure for its exercise must be liberally construed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3-5; Dec. Dig. § 2.*]

6. Appeal and Error (§ 942*) — Review — Rules of Court—Discretion in Application.

Though the rules of court cannot be arbitrarily set aside, a reasonable discretion should be committed to the District Courts of Appeal in the decision of questions involving the application of those rules in cases coming to those courts by direct appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3808; Dec. Dig. § 942.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Continental Building & Loan Association against Louis Woolf and another. From a judgment for plaintiff, defendants appeal. On motion to dismiss appeal. Denied.

Wm. Hoff Cook, for appellants. Gavin McNab, for respondent.

HART, J. This is a motion to dismiss the appeal in this action on the ground that no transcript herein has been filed within the time prescribed by rule 2 of this court (78 Pac. vii).

The record on this motion and upon which it is pressed consists of a certificate of the county clerk of the city and county of San Francisco, a certificate of the clerk of the District Court of Appeal of the First District, an affidavit of Bronte M. Aikins, one of the attorneys for the respondent, and an affidavit of the attorney for the appellants.

From the certificate of the county clerk these facts appear:

That a judgment was rendered by the superior court in and for the city and county of San Francisco and entered in favor of plaintiff and against defendants, for the possession of certain real property, situated in said city and county, on the 2d day of December, 1908; that thereafter, on the 29th day of March, 1909, a notice of appeal was filed by defendants, appealing from said judgment; that said notice of appeal was served upon the attorneys for plaintiff on said 29th day of March, 1909; that an undertaking on appeal was filed by the appellants on the 9th day of April, 1909; that "the sureties thereon made affidavit in the sum of $150 each and no more"; that "the only bill of exceptions or statement on appeal settled herein is a bill of exceptions upon a motion to set aside said judgment"; that the appellants received a duly certified transcript of the record herein on the 17th day of May, 1909; and "that no notice of a motion for a new trial, or order denying a new trial herein, is of record in this office."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Aikins deposes that on the 29th day of March, 1909, the defendants served on attorneys for the plaintiff a notice of appeal from the judgment entered in favor of plaintiff and against the defendants on the 2d day of December, 1909; "that no notice of motion for a new trial, or order denying a new trial herein, has been served upon attorneys for plaintiff herein." Aikins further deposes, in his affidavit of service of the notice of motion to dismiss the appeal, that he served said notice on the attorney for the appellants at 23 minutes to 1 o'clock p. m., on said 21st day of May, 1909.

The clerk of the District Court of Appeal for the First District, to which court this cause was originally appealed, it having been subsequently transferred to this court for decision, certifies that the transcript was filed in his office on the day on which the notice of motion to dismiss the appeal was filed, to wit, on the 21st day of May, 1909; the notice of motion to dismiss having been filed first in point of time, according to the order in which the filings appear in the register of actions of said court.

Resistance to the motion to dismiss is interposed and based upon the affidavit of Wm. Hoff Cook, attorney for the appellants. The facts set forth in said affidavit are, in substance, as follows, after reciting the fact of the judgment having been entered against the appellants: That affiant, in behalf of his clients, moved to set aside and vacate said judgment and that on February 11, 1909, the court made the following order on said motion: "Ordered that if, within 15 days, defendants pay to plaintiff the sum of $1,062, said motion be granted, and, if not so paid, motion be denied." That defendants did not receive notice of said order until March 3, 1909, and then refused to abide thereby. That "in due time thereafter affiant duly prepared a draft of a proposed bill of exceptions in relation to said judgment and motion and order, but plaintiff's attorneys obtained extensions of time to prepare any amendments thereto until April 10, 1909." That affiant, who is assistant district attorney of the city and county of San Francisco, was, as such official, on the 30th day of March, 1909, compelled to go to the city of Washington, D. C., on official business, and there argue cases before the United States Supreme Court, and that he returned from Washington on the 18th day of April, 1909. On the following day, April 19th, affiant found in his office certain proposed amendments of plaintiff to said bill of exceptions; said amendments having been left there during his absence. That affiant "immediately requested the judge of said court to fix an early date for the settlement of said bill," urging the fact that he desired to have the transcript on appeal filed within 40 days from March 29, 1909. That thereupon said judge fixed April 23, 1909, as the time for the settlement of said bill, "but plaintiff through an attorney caused a delay of the settlement thereof, and affiant stated several times to said attorney of plaintiff that he wished to have an immediate settlement thereof for the aforesaid reasons, but said attorney then and there representing plaintiff asked for continuances and told said judge and affiant that the time for filing said transcript would not begin to run until the settlement of said bill of exceptions, and affiant considered said statements in the nature of a stipulation or an estoppel extending the time for filing such transcript on appeal. That said bill of exceptions, by reason of plaintiff's acts, was not settled and signed until April 30, 1909." Affiant alleges: That he at once proceeded to prepare the necessary papers for said transcript so that it could be printed. That he put the transcript in the hands of the printer on the 4th day of May, and urged the printing of the same so that he could have it for filing on the 9th day of May, but that the printer did not have the printed transcript completed until May 13, 1909. That on May 14th he "furnished a copy thereof to plaintiff's attorney with the original thereof, and requested him to sign the stipulation therein as to its correctness," which plaintiff's attorney refused to do, "stating that he did not have the time to spare, and thereupon affiant took such original to the county clerk and requested his certificate thereto. That said county clerk could not, and did not, give affiant said original again until the afternoon of May 17, 1909." On the last-mentioned date, affiant was required by his official duties to prepare a brief in an important criminal case, then pending on appeal before the Supreme Court, which brief was required to be prepared, printed, and filed by May 22, 1909. That on May 18, 1909, affiant was, in his official capacity, engaged during the entire day in the argument of a case before one of the departments of the superior court of the city and county of San Francisco, and that on the 19th and 20th of May affiant was engaged in writing the brief referred to, finishing the preparation of the same on the 20th of May. On the 21st of May, 1909, about the hour of 10 o'clock a. m., affiant served the transcript on appeal on plaintiff's attorney, and later that morning "made corrections in the copies to correspond with the said original, as certified by the county clerk, and it was impossible for affiant to file said original transcript before 1 o'clock p. m. of said 21st day of May, 1909, by reason of being obliged to make said corrections, and by reason of being occupied with other official matters, and furthermore affiant had no reason to believe from the past conduct of plaintiff's attorney that he claimed said transcript to have been served too late." Affiant explains that he caused the transcript to be filed under the following circumstances: "About quarter of 1 o'clock of May 21, 1909, affiant was at the office of the clerk of this court to file said original transcript on appeal, and also the requisite number of copies thereof, but said office was closed, and thereupon affiant went into the office of the clerk of the state Supreme Court, in the same building, and on the same floor thereof, to leave there the requisite number of copies of said transcript for said court, and the official then in charge of said office was Mr. I. Erb. That affiant left with said Erb said copies, and also said Erb took said original transcript on appeal and the requisite number of copies thereof for this court, and told affiant that he would deliver the same to the clerk of this court as soon as he returned, and affiant is informed, and therefore alleges, that said Erb did as he promised."

The fact is not disputed that the transcript was not filed within 40 days after the perfection of the appeal, as required by rule 2, and the further fact that at the precise time of the filing of the motion to dismiss the appeal the transcript had not been actually filed, is not disputed.

Rule 5 of the Supreme Court provides, among other things, that "if the transcript, or points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be a sufficient answer to the motion."

Briefly recapitulating the facts, we find that counsel for appellants served the transcript at about 10 o'clock of the 21st day of May, and the notice of motion to dismiss the appeal was served on appellants' counsel at 23 minutes to 1 o'clock p. m., of the same day. Counsel for appellants was at the office of the clerk of the court of appeal at about quarter to 1 p. m., and, the clerk of said court not being present, he left the original, with the requisite number of copies, with a deputy clerk of the Supreme Court, whose office is located in the same building and on the same floor, with the request that he file said transcript for him in the first-mentioned office as soon as the clerk thereof returned thereto, and that said deputy agreed to and did so file it. But it seems that, in what appears to have been a contest of speed between opposing counsel to reach the office of the clerk of the District Court of Appeal for "first place," the attorneys for the respondent were victorious, only by a "neck," however. It is probable that, had the clerk been in his office when counsel for appellants first appeared there, the transcript would have at least been filed before the motion to dismiss was filed. Under these circumstances, however, it is asked that the appellants be deprived of their right to have the merits of their appeal passed upon by this court.

We recognize the proposition that the rules adopted by the Supreme Court for the government of the practice in the appellate courts of this state are as essential a part of the procedure in said courts as are the rules of practice and procedure laid down by the Legislature, and that they should in all cases be substantially followed and enforced. But we think that, by an equitable construction of rule 5, with reference to the circumstances of this case, appellants may be relieved of the severe penalty which counsel for the respondent ask us to impose upon them. We think that counsel for appellants offers a reasonable excuse for the delay in the preparation of his transcript so that it was not in condition to be served and filed within the 40 days prescribed by rule 2, supra, and we further think that, inasmuch as it appears, with reasonable certainty, from the fact of the service of the transcript before notice of the motion was given, that appellants intended, when making the service thereof, to file said transcript the very same day of such service, and from the fact that they did actually file it on that day, it would do no violence to rule 5 to hold that the transcript was on file at the time of the noticing and filing of the motion to dismiss within the spirit if not within the strict letter of said rule.

In Vinson v. Los Angeles Pac. R. R. Co., 147 Cal. 483, 82 Pac. 54, it is said: "Whether or not circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must, of necessity, be left largely to the court to which application is made, and it is well settled that this court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent. Particularly is this so where the discretion is exercised in favor of the granting of the relief sought, as such action tends to bring about a conclusion on the merits, which is always to be desired"—citing O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. It is further said in that case that "the application for relief was made so promptly after the expiration of the 10 days that no appreciable injury could have been caused to plaintiffs by the delay."

The transcript here was filed and the notice to dismiss given in such close proximity in time that it cannot be said that the granting to appellants relief from their apparent default has resulted, or will result, in injury to the respondent.

The right of appeal is conferred by the Constitution, and statutes and rules of procedure for its exercise are to be liberally construed. Estate of Nelson, 128 Cal. 242, 60 Pac. 772. There is no denial here of any of the matters set forth in the affidavit of counsel for appellants with respect to the causes leading to the delay in the preparation of his transcript. While we do not wish to be understood as holding that the fact that an attorney is busy attending to other professional engagements is sufficient of itself to excuse a default such as is sought to be taken advantage of here, it is nevertheless a circumstance to be considered, and, as considered with other facts set out in the affidavit of appellants' attorney, it must figure to some extent in the determination of the question whether the appellants shall, in this case, be denied their remedy by appeal which the Constitution expressly grants to them.

The motion here, it must be remembered, is an original proceeding in this court in a case appealable directly to a District Court of Appeal, and we think that, while the rules of the court cannot under any circumstances be arbitrarily overlooked or set aside, a reasonable discretion should be committed to the District Courts of Appeal in the decision of questions involving the application of those rules in cases coming to said courts by direct appeal.

Even if, in reaching the conclusion upon this motion to which the circumstances lead us, rule 5 has been given a little elasticity, the respondent must in fairness concede that the result is just and "tends to bring about a conclusion on the merits which is always to be desired." Vinson v. L. A. P. R. Co., supra.

For the foregoing reasons, the motion to dismiss the appeal is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 674

PEOPLE v. BRENT. (Cr. 135.)

(Court of Appeal, Second District, California. Nov. 6, 1909. Rehearing Denied Dec. 6, 1909.)

1. CRIMINAL LAW (§ 354*)—EVIDENCE—MENTAL CONDITION.

When the mental condition of one at a particular time is in issue, conduct, acts, and declarations, after as well as before the time in question, are admissible, if sufficiently near in point of time, and if they appear to have any tendency to show what that mental condition was.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354.*]

2. CRIMINAL LAW (§ 670*) — TRIAL — RECEPTION OF EVIDENCE.

That the court may intelligently rule on an objection to a question not of itself showing its relevancy or materiality, counsel must state what is expected to be proven.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1593; Dec. Dig. § 670.*]

3. CRIMINAL LAW (§ 1036*) — APPEAL — REVIEW.

Where counsel does not state to the court what is expected to be proven by a question not of itself showing its relevancy or materiality, the appellate court cannot determine whether defendant's substantial rights have been prejudiced by the ruling.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1036.*]

4. CRIMINAL LAW (§ 667*)—EVIDENCE—MENTAL CONDITION—DISCRETION OF COURT.

The admissibility of statements made by accused before and after the commission of the crime, and offered to show insanity, is very much in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 667.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Sanford Brent was convicted of assault with intent to murder, and from the judgment, and from an order denying a new trial, he appeals. Affirmed.

Wesley H. Beach, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant and appellant was accused by the district attorney of Los Angeles county, by information, of the crime of assault with a deadly weapon with intent to commit murder, and his conviction followed. This appeal is from the judgment imposed by reason thereof, and from an order denying a new trial.

The defense chiefly relied upon was insanity. The principal assignments of error relate to the action of the court in sustaining objections to testimony offered by defendant. One witness in behalf of the defense testified that she was a nurse at the hospital of which defendant was a patient; that "he seemed to be laboring under a nervous strain, and it looked as though he had been drinking." The witness was then asked by defendant's counsel if he made any statement regarding the cause of his condition; "what statement he made in relation to his domestic affairs"; "what statement, if any, was made by the defendant at that time regarding any lawsuit pending"; and, again, "what statement, if any, regarding his property." Another witness was asked questions of similar import, while still another, who, having seen and conversed with defendant at the hospital, testified: "He was very nervous and absent-minded. Instead of answering my questions, he would dismiss them from his mind as if he could not comprehend what I had said." Thereupon counsel for defendant asked, "What was the question you asked him"? and, in addition, propounded questions similar to those asked other witnesses, as before stated. All of these witnesses united in an opinion that defendant acted in an irrational manner. The court sustained an objection to the questions relating to what was said by the defendant to these various witnesses.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The proposition advanced by appellant, to the effect that, when the mental condition of one at a particular time is in issue, conduct, acts, and declarations after, as well as before, the time in question are admissible in evidence, if sufficiently near in point of time, and if they appear to have any tendency to show what that mental condition was, may be accepted. It follows that the questions propounded by defendant, to which objections were sustained, under certain circumstances might have been proper, if they were intended to develop facts the establishment of which would tend to prove insanity. But that a court may intelligently rule upon an objection urged to a question which does not of itself show its relevancy or materiality, it is imperative that counsel should state to the court what is expected to be proven. Without such statement, the court cannot determine whether the facts sought to be established by the question are pertinent or tend to prove any matter involved in the issues, and this court cannot, in the absence of such statements, determine whether or not the substantial rights of the defendant have been prejudiced by the ruling. People v. Casselman, 101 Pac. 693; People v. Ellsworth, 127 Cal. 596, 60 Pac. 161. Even had these questions so propounded been followed by statements of what was expected to be proven, the admissibility thereof, having in view the lapse of time between the conversations and the date of the tragedy, together with the character of the evidence offered, was very much within the discretion of the court. Estate of McKenna, 143 Cal. 586, 77 Pac. 461. The criticism above made applies equally to other questions asked concerning conversations of defendant with other witnesses as to his wife's conduct and relations with another man and the discords connected with his married life. None of these things were made to appear as reflecting any light upon the mental condition of the accused; nor can it be said that the questions asked the wife on cross-examination of themselves indicated the object sought to be attained, or that any answer thereto would in any wise be competent, relevant, or material.

While it may be conceded that the record discloses that the court misapprehended the real object of the questions, and excluded the evidence upon such ground as to develop a misunderstanding of the point involved, yet the occasion of such misunderstanding and misapprehension arose from the omission of defendant to indicate to the court the purpose of the questions and the objects sought to be attained thereby, if, as before stated, such object was to establish the insanity of defendant.

We find no error in the record, and the judgment and order are affirmed.

We concur: TAGGART, J.; SHAW, J.

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11 Cal. App. 695

SAN FRANCISCO SULPHUR CO. v. ÆTNA INDEMNITY CO. (Civ. 645.)

(Court of Appeal, First District, California. Nov. 10, 1909. Rehearing Denied Dec. 9, 1909; Denied by Supreme Court Jan. 6, 1910.)

1. PLEADING (§ 205*) — VARIANCE—VARIANCE BETWEEN ALLEGATIONS AND EXHIBIT—MANNER OF RAISING OBJECTION.

Variance between allegations of the complaint and an exhibit attached thereto cannot be raised by general demurrer, but only by special demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 507; Dec. Dig. § 205.*]

2. PLEADING (§ 312*)—COMPLAINT—EXHIBITS —EFFECT OF ALLEGATIONS.

In an action on an undertaking given to discharge an attachment the title of the undertaking which was attached to the complaint as an exhibit, and recitals in the body thereof, showing that the original action was brought against certain persons as individuals, could not be taken as an allegation of such fact; the complaint alleging that the action was against a firm.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 943, 948; Dec. Dig. § 312.*]

3. PLEADING (§ 433*) — VARIANCE—VARIANCE BETWEEN EXHIBIT AND COMPLAINT—AIDER BY JUDGMENT.

In an action on an undertaking given to discharge an attachment, allegations of the complaint that the original action was against a firm will control recitals in the undertaking attached thereto as an exhibit that it was against certain persons as individuals, where the variance was first raised after judgment at the oral argument on appeal.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1458; Dec. Dig. § 433.*]

4. EVIDENCE (§ 83*)—RELEASING BONDS—ACTIONS—PRESUMPTIONS—LEGALITY OF OFFICIAL ACTIONS.

Since under Code Civ. Proc. § 540, a sheriff may release property from attachment any time before his return, but can only release it after making return upon an order of court as provided in sections 554, 555, where the complaint, in an action on a releasing bond, alleged that the sheriff accepted the undertaking and discharged the attachment, it will be assumed that he acted legally and received the undertaking before the writ was returned.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

5. ATTACHMENT (§ 337*)—BOND FOR RELEASE —DISCHARGE OF SURETIES—BANKRUPTCY OF PRINCIPAL.

Under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), making void all attachments or other liens obtained against an insolvent at any time within four months before filing a petition of bankruptcy against him, and discharging the at-

tached property, the filing of a petition in bankruptcy within four months after an attachment was levied against the insolvent's property, and his adjudication of bankruptcy after judgment went against him in the attachment suit, would not affect the liability of sureties upon a bond given to release the attached property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1218; Dec. Dig. § 337.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by the San Francisco Sulphur Company against the Ætna Indemnity Company. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

See, also, 7 Cal. App. 98, 93 Pac. 888.

Geo. F. Hatton and H. F. Peart (Franklin P. Nutting, of counsel), for appellant. Wm. J. Herrin, for respondent.

KERRIGAN, J. This is an appeal from a judgment and from an order denying a motion for a new trial in an action on an undertaking given by the defendant to discharge an attachment in an action by the plaintiff against W. F. Clark & Bro. and the Seropian Bros. Company, a corporation. The undertaking given was the one required by section 540 of the Code of Civil Procedure, and therein the defendants in the original action, as principals, and the defendant here, as surety, jointly and severally undertook that the defendants there, W. F. Clark & Bro. and the Seropian Bros. Company, would pay whatever judgment the plaintiff might recover in that action, not exceeding a sum named. In December, 1904, plaintiff recovered judgment against W. F. Clark & Bro. in that action, and payment thereof was demanded of them, which they refused, whereupon plaintiff brought this action against the surety, the defendant here. In November, 1904, and within four months after the issuance of the attachment, W. F. Clark & Bro. filed a petition in bankruptcy, and upon that petition an adjudication in bankruptcy was made. A copy of the undertaking is attached to and made a part of the complaint, and according to the title of the exhibit and a recital in the body thereof it would seem that the original action was against W. F. Clark and E. C. Clark, copartners, doing business under the firm name and style of W. F. Clark & Bro., but from the allegations of the body of the complaint it appears that the action was against several persons who had been carrying on business under the common name of W. F. Clark & Bro., and that they were sued in the original action under such common name as authorized by section 388, Code Civ. Proc.

Under the authorities in this state, the variance between the exhibit and the allegations of the complaint cannot be raised by general demurrer. And as the point was not made by special demurrer the complaint must be held good. Mendocino Co. v. Morris, 32 Cal. 145; Palmer v. Lavigne, 104 Cal. 30, 37 Pac. 775; Blasingame v. Home Insurance Co., 75 Cal. 633, 636, 17 Pac. 925.

So far as the Clarks are concerned, the complaint alleges that the attachment was against the property of W. F. Clark & Bro. in an action against W. F. Clark & Bro., and that the judgment was obtained in that action against W. F. Clark & Bro.; that the condition of the bond was that defendant herein would pay any judgment recovered in that action. The bond was executed as follows: "W. F. Clark & Bro." The title of the undertaking and the recital in the body thereof already referred to may be evidence, but they do not serve as allegations that the original action was against the Clarks as individuals under section 414, Code Civ. Proc. Lambert v. Hackell, 80 Cal. 611, 22 Pac. 327. In any event this point was not made in the trial court nor here until at the oral argument, and the case had gone to judgment, in view of which facts we think the allegations in the body of the complaint should be held to control. Mendocino Co. v. Morris, supra; Blasingame v. Home Ins. Co., supra; Fudickar v. E. R. Irrigation Dist., 109 Cal. 29, 36, 41 Pac. 1024; Burkett v. Griffith, 90 Cal. 532, 541, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; Seattle Crockery Co. v. Haley et al., 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; Penrose v. Pac. M. & L. Ins. Co. (C. C.) 66 Fed. 253; Cushing v. Pires, 124 Cal. 664, 57 Pac. 572.

Defendant demurred specially on the ground that it could not be ascertained from the complaint that an order was made by the superior court to discharge the attachment or to fix the amount of the bond.

There are two methods prescribed by the Code of Civil Procedure for releasing property from attachment by giving an undertaking: (1) Under section 540 the sheriff may release property from attachment at any time prior to his return on the writ; (2) after the return, however, such a release must be by the court as provided in sections 554 and 555. Here it is alleged in the complaint that the sheriff accepted the undertaking and discharged the attachment, and we will assume that he thus acted according to law, and received the undertaking while the writ was in his possession and before it was returned. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156; Maskey v. Lackmann, 146 Cal. 777, 81 Pac. 115; Preston v. Hood, 64 Cal. 405, 1 Pac. 487.

There is an affirmative defense set forth in the answer, and the parties admit that W. F. Clark & Bro. filed a petition in bankruptcy within four months after the levying of this attachment, and it is claimed by defendant that, by reason of this petition and the adjudication of bankruptcy which followed, the attachment became void from its inception, and that therefore the bond given to release the attachment was without consideration, and null and void. This contention rests on section 67f of the bankruptcy act of 1898 (Act Cong. July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), which reads as follows: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected by the levy, attachment, judgment or other lien shall be deemed wholly discharged and released from the same." The obligation of the surety was to pay the debt when it should be established by a judgment. A judgment was recovered in that action by plaintiff, and we think the liability of the surety to pay it was unaffected by the subsequent proceedings in bankruptcy. It has been so held in this state and elsewhere. In McCombs v. Allen et al., 82 N. Y. 115, upon the faith of an undertaking to pay the amount of any judgment which might be recovered, property held by virtue of an attachment was discharged, and it was there held to be no defense to an action against the sureties on the bond that the judgment debtor had filed a petition in bankruptcy within four months from the date of the attachment. The court said: "There was no attachment lien nor any attachment in force upon which such proceedings could operate, and this fact is conclusive against the defendants' claim so far as it rests upon the provisions of the bankrupt law." Continuing the court said: Whatever effect the provisions of the bankrupt law "might have had upon the attachment, they cannot avail the defendant in this action when called upon to perform his promise. By reason of it the debtor's property was restored to him, and became subject, whether in his own hands or those of his assignee in bankruptcy, to the claims of creditors. Neither the letter nor the policy of the statute is infringed by holding defendants liable upon their undertaking." See, also, King v. Block Amusement Co., 126 App. Div. 48, 111 N. Y. Supp. 102; Eastin v. Ormsby, 18 R. I. 309, 27 Atl. 216; Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the last case it is said that if, at the time the proceeding in bankruptcy is instituted, there is no attachment in force on which the proceedings can operate, the attachment lien having already been discharged by a bond given, the liability of the sureties on the bond is not released or affected by the subsequent bankruptcy of their principal.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

11 Cal. App. 701

SAN FRANCISCO SULPHUR CO. v. ÆTNA INDEMNITY CO. (Civ. 645.)

(Court of Appeal, First District, California. Nov. 10, 1909. Rehearing Denied Dec. 9, 1909; Denied by Supreme Court Jan. 9, 1910.)

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by the San Francisco Sulphur Company against the Ætna Indemnity Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Geo. F. Hatton and H. F. Peart (Franklin P. Nutting, of counsel), for appellant. Wm. J. Herrin, for respondent.

KERRIGAN, J. In the above-entitled cause it has been stipulated by the respective parties that the matters to be determined by this court are identical with the matters to be determined in the cause bearing the same title but numbered in the trial court No. 3,619 (106 Pac. 111), and that the judgment of this court may be the same in both cases. In the case numbered in the trial court No. 3,619 we have this day affirmed the judgment and order appealed from.

It is therefore ordered, in accordance with the aforesaid stipulation, that in the cause numbered No. 11 in the trial court the judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

11 Cal. App. 665

PEOPLE v. GARWOOD. (Cr. 133.)

(Court of Appeal, Second District, California. Nov. 5, 1909. Rehearing Denied by Supreme Court Jan. 3, 1910.)

1. CRIMINAL LAW (§ 511*)—TESTIMONY OF ACCOMPLICE—CORROBORATION—SUFFICIENCY.

On a trial for robbery, evidence *held* to sufficiently corroborate an accomplice under Pen. Code, § 1111, providing that the testimony of an accomplice is insufficient unless corroborated by other evidence which in itself tends to connect accused with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127–1137; Dec. Dig. § 511.*]

2. CRIMINAL LAW (§ 511*)—TESTIMONY OF ACCOMPLICE—CORROBORATION.

The corroboration of an accomplice required by Pen. Code, § 1111, need not extend to every detail covered by the statement of the accomplice; but the corroborating evidence is sufficient if it of itself tends to connect accused with the commission of the offense, though it is slight and entitled, when standing alone, to but little consideration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1128; Dec. Dig. § 511.*]

3. WITNESSES (§ 245*)—EXAMINATION—REPETITION OF QUESTIONS.

Where an accomplice, when first called as a witness, showed his reluctance to testify, and subsequently changed his disposition in that respect, the court was justified in permitting a repetition of questions to which the accomplice had admittedly given evasive answers.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.*]

4. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in receiving evidence that the accomplices of accused, when seen standing near to the place of the commission of the crime, appeared nervous as if they were looking out or as if they were being watched, was not prejudicial; the evidence having no reference to accused.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

5. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY EVIDENCE.

The statement of the foreman of a street car line that the running time on a street was the same on the evening of the commission of a crime as it was at the time of the trial thereof is a statement of a fact made on the personal knowledge of the witness and is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 973; Dec. Dig. §§ 419, 420.*]

6. CRIMINAL LAW (§ 1023*)—APPEAL FROM VERDICT.

Under Pen. Code, § 1237, authorizing an appeal from a final judgment of conviction and from an order denying a new trial, etc., the verdict is not a subject of an appeal, and an appeal therefrom must be disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2583; Dec. Dig. § 1023.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

T. J. Garwood was convicted of robbery, and he appeals. Affirmed.

Willis & Robinson, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of robbery and appeals from the judgment and an order of the court denying his motion for a new trial.

Appellant's chief contention is that the record discloses no evidence tending to connect him with the commission of the crime, other than that of an acknowledged accomplice by the name of Pfeifer, who, with defendant and one Gavin, had been jointly charged with the offense. The person robbed conducted a store at the corner of Temple and Olive streets in the city of Los Angeles. The evidence of the accomplice Pfeifer was to the effect: That he, Gavin, and defendant, for the purpose of committing the robbery, repaired to the vicinity of this store on the evening of December 23, 1908; that in going to the store they walked north on Olive street to Temple street, at which point, and a few feet south of Temple street, he and Gavin stopped, while defendant, in accordance with the prearranged plan, walked a short distance east on Temple street, but in view of Pfeifer and Gavin, to whom he waved his hat as a signal to them to proceed, and, after receiving such signal, they did enter the store and robbed the proprietor thereof; that after committing the offense the three met in a room and divided the proceeds of the crime. The robbery occurred about 8:45 p. m. Under section 1111, Pen. Code, this evidence of Pfeifer is insufficient to justify the conviction of defendant, unless it is corroborated "by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." In our judgment, there is ample evidence to satisfy the statute in this regard. Two witnesses called by the people testified: That about 8:30 o'clock on the evening of the robbery, while walking east on Temple street, they passed the store where the crime was committed, at which time they saw the defendant sitting upon a curb in front of a yard about 100 feet east of Olive street; that about 100 feet from where defendant was sitting they saw two men standing on Olive street, near Temple, towards whom and the store defendant was looking, and which two men they afterwards recognized as Gavin and Pfeifer. The active part in the robbery taken by defendant, according to the testimony of the accomplice, was that of a "lookout," and the independent evidence tends strongly to corroborate Pfeifer's statement in this respect. The fact that the corroboration does not extend to every detail covered by the statement of the accomplice is unimportant. It is not necessary that it should. People v. Kunz, 73 Cal. 315, 14 Pac. 836; People v. Cloonan, 50 Cal. 449. Neither does the rule require that the degree of such evidence be strong; indeed, "the corroborating evidence is sufficient if it of itself tends to connect the defendant with the commission of the offense, although it is slight and entitled, when standing by itself, to but little consideration." People v. McLean, 84 Cal. 482, 24 Pac. 32.

Counsel for appellant contends that the court erred in overruling defendant's objections to a number of questions which he claims assumed facts not in evidence and contradictory of the evidence theretofore given by the witness. Appellant does not specify the questions, other than to designate the folios of the transcript. Reference to the designated folios in some cases discloses no question asked of any witness; in others, no question to which the objection urged is applicable. The reluctance of Pfeifer to testify at all when first called as a witness and his subsequent change of disposition in this respect justified the court in permitting a repetition of questions to which the witness had admittedly given erroneous or evasive answers. We find no error in such rulings.

In reply to a question as to what Pfeifer and Gavin appeared to be doing when seen standing at the corner of Temple and Olive streets, the witness answered: "Why, they appeared nervous as if they were looking out, or as if they were being watched, or might be watched." Defendant moved to strike out this answer, which motion was denied. Conceding the ruling to have been error, nevertheless, such evidence having no reference to the defendant, his rights could not have been prejudiced thereby.

Appellant next contends that the court erred in permitting the prosecution to show, by a witness who was not present when the cars were operated, the running schedule of cars on

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Temple street on December 23, 1908, and refers to transcript folios 511 to 519 as disclosing such error. Reference to the specified folios discloses that the only evidence included therein was that of a foreman of the street car line, who testified that the running time on Temple street was the same on the evening of December, 23, 1908, as it was at the time of the trial. This was not hearsay, as contended by appellant, but a statement of fact made, so far as the evidence shows, upon the personal knowledge of the witness. The time schedule was not offered in evidence.

The verdict of the jury is not the subject of an appeal (section 1237, Pen. Code), and the purported appeal therefrom must be disregarded.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

11 Cal. App. 685

PEOPLE v. CAHILL. (Cr. 105.)

(Court of Appeal, Third District, California. Nov. 9, 1909.)

1. Larceny (§§ 55, 56*)—Sufficiency of Evidence—Corpus Delicti.

Evidence in a prosecution for grand larceny *held* sufficient to show the corpus delicti, and to sustain a conviction.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. §§ 55, 56.*]

2. Criminal Law (§§ 369, 371*)—Admissibility of Evidence—Other Offenses.

In a prosecution for stealing an automobile, evidence that a pair of gloves left in the automobile by the owner when he used it the last time before it was stolen was found in the possession of accused at the time of his arrest is admissible, although it tends to prove the commission of another offense, for where an accused commits two offenses at the same time and place, so that they constitute the same or proximately the same transaction, evidence of the crime not charged is admissible if it shows motive or any other fact relevant to the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824, 830–832; Dec. Dig. §§ 369, 371.*]

3. Criminal Law (§ 517*)—Evidence—Confessions.

The confession of accused is admissible in evidence, where there is nothing to show that the confession was not freely and voluntarily given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146–1156; Dec. Dig. § 517.*]

4. Criminal Law (§ 531*)—Admissibility of Confessions—Preliminary Evidence.

The question whether a confession has been obtained under such circumstances as to render evidence thereof competent is one of law, and testimony bearing upon that question alone is not admissible where it is offered after the question of the admissibility of the evidence of the confession has been decided.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 531.*]

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

R. E. Cahill was convicted of grand larceny, and he appeals. Affirmed.

A. B. Reynolds, for appellant. U. S. Webb, Atty. Gen., and Eugene S. Wachorst, Dist. Atty., for the People.

HART, J. The defendant was convicted of the crime of grand larceny under an information charging him with that offense, and he presents this appeal from the judgment of conviction and the order denying him a new trial.

The points urged for a reversal are: (1) That the evidence is insufficient to support the verdict; (2) that the jury received evidence out of court; (3) that the court erroneously permitted proof of another and distinct offense than that charged; (4) that the alleged confession of the accused was not free and voluntary, and that, therefore, evidence thereof was erroneously admitted; (5) that the court erred in excluding certain testimony offered by the defendant.

It appears from the record that on the 29th day of April, 1909, one H. C. Keyes, a citizen of the city of Sacramento, was the owner of an automobile, which bore the number 320, and on the evening of said day, at about the hour of 9 o'clock, he drove the machine into a garage in said city to be kept there for the night. On the following morning—April 30th—at about the hour of 9 o'clock, Keyes called at the garage for the machine, and it was then discovered that the "auto" was not there; it having been taken away. No one connected with the garage appeared to know where the machine was or just at what hour or in what manner or by whom it was taken from said garage. Investigation failed to throw any light on the whereabouts of the machine or on the mysterious circumstances by which it was taken from the garage until the 30th day of May—a month later—when it was found in the possession of the defendant at the Oakland mole.

1. The evidence sufficiently sustains the verdict. It was proved that the defendant was seen by the witness Tanquary near the hour of 5 o'clock on the morning of the 30th of April in the garage from which the car was taken. There was no other person in the garage at that time. Tanquary had taken his machine there for the purpose of having some repair work done on it prior to taking a trip to Stockton, where he contemplated going in his machine the next day. He intended to leave his machine in the garage, but could find no empty stall or aisle in which to place it. The defendant told Tanquary that the man in charge was asleep, and asked if there was any word he desired to leave. Tanquary replied in the negative, and then left the garage. On the 30th of May, 1909, one Gifford, an expert in-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

spector of automobiles, drove to the Oakland mole in a machine, intending to take the boat for San Francisco. At the "mole" he saw the defendant in possession of the stolen car. Both Gifford and the defendant crossed the bay with their machines on the same boat. After reaching the San Francisco side, the defendant left the boat in the machine he had charge of and Gifford followed him. After following the defendant some distance, Gifford saw two policemen at some point on Clay street. He informed the policemen that the defendant had in his possession a stolen car, and they boarded Gifford's machine and followed the defendant to Montgomery avenue and Union street, where the latter stopped. When Gifford's car reached the point where the defendant had stopped, Gifford said to the policemen, pointing to the "auto" in the possession of the defendant: "This machine has been stolen from Sacramento. I wish you to hold it."

The defendant was questioned by the officers concerning the circumstance of his possession of the machine, and explained that he had been driving the car for a couple of weeks for a lady named Mrs. Consels, residing at Fruitvale, Alameda county. Subsequently the defendant, accompanied by Detective Andrew J. Gaughram, of the San Francisco police department, went to the home of Mrs. Consels, in Fruitvale. There the detective found the wife of the defendant and her mother. What occurred at the house of Mrs. Consels may best be told in the language of the detective: "I asked the lady in question (defendant's mother-in-law) how long this man (defendant) had been employed by her, and she replied about eight weeks. I asked her, 'Where did you get that machine? She says, 'I traded a Winton for it.' I says, 'Where?' She said in Fresno." The witness then asked her if she had a bill of sale for the machine, and she replied that she had, but that it was in the "safe deposit vaults." The detective continued: "I further asked her, 'You would know the man who exchanged machines with you again, if you would see him, would you not?' She says, in a kind of a bewildered way, 'I don't know.' She says, 'I never saw him.' I says, 'Who did make this exchange?' She pointed to Mr. Cahill, and says, 'Mr. Cahill made the exchange.'" Very readily it will be observed that the people presented evidence, independent of that of the confession of the accused, which in itself was enough to persuade the jury of his guilt and to justify the verdict returned. The opportunity for the theft of the machine by the defendant as shown by the fact of his presence at the garage from which it was taken at an early hour of the morning it was missed, his subsequent possession of the machine, his untruthful statement to the detective that he had been driving the machine for only two weeks for a lady at Fruitvale, and the story which he had evidently told the "lady of Fruitvale," who proved to be his mother-in-law, that he had exchanged her car for the one stolen, constituted circumstances of the most incriminatory significance. The further claim of counsel for appellant that the corpus delicti was not shown by these circumstances is, as is patent, without any foundation whatever. The corpus delicti consisted of the asportation of the machine. There can, of course, be no doubt that the evidence, independent of that of the confession, shows that the car was taken from the garage by some one, and that there is no pretense that it was shown that it was taken with the consent of either the owner or the manager of the garage, is a proposition equally as free from doubt, so far as the record discloses. In other words, the irresistible inference from the circumstances proved independently of the evidence of the confession is that the "auto" was wrongfully and feloniously taken from the garage, and hence the corpus delicti was clearly established without the aid of the confession.

2. There is absolutely no showing or even an attempt at showing that the jury received evidence touching the question at issue out of court. The court by the express consent of counsel on both sides made an order allowing the jury to view and inspect the car alleged to have been stolen. The machine was standing near the courthouse at the time of the inspection, which was conducted under the control and in the presence of the judge, as well as in the presence of the attorneys on both sides and the court stenographer, and the jury were in charge of an officer at the time. Section 1119, Pen. Code. The record does not show that this proceeding was in any respect extended beyond its legitimate scope by any act or word of either the jurors or the judge or other officers. To the contrary, the inspection appears from the record to have been conducted strictly in accordance with the requirements of the law.

3. Nor is there any merit in the contention that the court allowed proof of another and different crime from the one charged in the information. At the time the automobile was stolen a pair of gloves, used by the owner when driving the machine, was in the car. These gloves were found in the possession of the defendant at the time of his arrest. Mr. Keyes, owner of the machine, identified the gloves as those used by him when operating the car and which, he testified, he had left in the car on the night of April 29th, the last time that he saw the machine until after it had been found in the possession of the defendant. The court properly allowed proof of the ownership of the gloves, and admitted them in evidence as a circumstance tending to connect the defendant with the commission of the theft. The specific purpose of the proof was to

show guilty knowledge. It is true that the general rule is that evidence of a different and distinct crime from the one charged cannot be admitted against a defendant, but there are exceptions to that rule. Where an accused commits two offenses at the very same time and place, so that they constitute the same or approximately the same transaction, evidence of the crime not charged is admissible if it tends to show motive or any other fact relevantly bearing upon the crime charged. People v. McGilver, 67 Cal. 55, 7 Pac. 49; People v. Rogers, 71 Cal. 565, 12 Pac. 679; People v. Walters, 98 Cal. 141, 32 Pac. 864; People v. Smith, 106 Cal. 81, 39 Pac. 40. The theft of the gloves in the case at bar was a part of the same transaction involving the larceny charged against the defendant, and, as stated, evidence that the gloves had been left with the machine by the owner when he last had possession of the car, and that they were found in possession of the defendant when arrested, was competent and admissible as a circumstance tending to show that he stole the machine.

4. Evidence of the confession of the defendant was properly admitted. The detective to whom, in the presence of others, the defendant confessed his guilt, testified that before any statement was made by the accused involving an admission of guilt the latter was fully informed of his rights; was told that any inculpatory statement he might make would be used against him at his trial; that no inducements holding out to him hope for a light punishment or for clemency were suggested, nor was the prisoner threatened or intimidated into making a confession or a statement of any character. The detective testified that, after the prisoner was thus fully apprized of his rights and in effect assured that he could or could not make a statement, according to his own pleasure, he (defendant) said, "It doesn't make any difference. I am up against it," and then proceeded to explain the circumstances under which he stole the machine. We have been unable to find anything in the testimony of the witnesses detailing the circumstances under which the confession was made indicating that it was not free and voluntary.

5. It is insisted that the court erred in sustaining objections to testimony sought to be introduced by the defense for the purpose of contradicting the witness, Gaughram, as to what occurred just prior to the confession of guilt by the defendant. The latter's wife was asked questions, the answers to which, assuming that they would have been favorable to the defendant, would have merely tended to show that the confession was wrung from the prisoner by the detective, and that it was, therefore not free and voluntary. The court ruled that the testimony should have been offered when the question whether the confession was voluntary or not was before the court, and that it could serve no purpose whatsoever after the confession had been admitted. The ruling of the court upon the proposition was eminently proper. The question whether a confession has been obtained under such circumstances as to render evidence thereof competent or incompetent is purely one of law and its determination committed exclusively to the court, and obviously testimony bearing upon that question alone and having no material relevancy, either directly or indirectly, to the main issue, is inadmissible where it is offered after the question of the admissibility of evidence of the confession has been decided.

We have carefully examined the record, and are warranted in saying that it is worthy of special remark that in the trial of the cause both the court and district attorney displayed commendable solicitude for the rights of the prisoner as well as for those of the people, and that the appellant was therefore accorded a fair and impartial trial.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 652

SARNIGHAUSEN v. SCANNELL et al.

(Civ. 702.)

(Court of Appeal, Second District, California. Nov. 3, 1909.)

1. Bills and Notes (§ 451*)—Actions—Defenses.

Where the payees of a note agreed to lend the maker $2,500 more, the agreement to be filed with a trust company, which should, as trustee for the maker, make a trust agreement with the payees to secure payment of the loan, and that upon such filing the note was to be canceled and returned to the maker, and though the agreement was executed by the payees, who retained a duplicate of it, the maker failed to file the agreement and procure from the trust company the evidence of the indebtedness and security for its payment as the agreement contemplated, the payees were not required to perform any act under the agreement and were not required to surrender the note, though the maker was at all times ready, able, and willing to perform and cause to be performed the terms of the agreement, and the agreement would be no defense to an action on the note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 451.*]

2. Contracts (§ 253*)—Rescission.

It appearing that, though the payees had failed to perform any of the terms of the agreement on their part, no request had been made by the maker that they perform it, but that he had consented to such nonperformance, and, some three or four months after its execution, had accepted the duplicate tendered by the payees, there was a rescission of the agreement by consent of the parties, under Civ. Code, § 1689, providing that an agreement may be rescinded by consent of all the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1146–1148; Dec. Dig. § 253.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

3. PLEADING (§ 166*)—AFFIRMATIVE MATTER PLEADED AS DEFENSE—DENIAL.

There being no provision for a replication to an answer, affirmative matter pleaded as a defense is deemed to be denied, and hence, where a contract is set up as a special defense, plaintiff may show that it was procured by fraud, menace, or duress, or that it has been rescinded, without pleading such matter.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 321½; Dec. Dig. § 166.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by F. Sarnighausen against J. O. Scannell, J. K. Hawk, and R. M. Martin. From a judgment against the defendants Hawk and Martin and an order denying a new trial, they appeal. Affirmed.

Avery & French, for appellants. Z. B. Stuart and Wellborn, Wellborn & Campbell, for respondent.

SHAW, J. Plaintiff sues to recover upon a nonnegotiable promissory note transferred and assigned to him by Juliette and Mary E. Burns, to whom the note had been made and executed by the defendants. Judgment was rendered against defendants Hawk and Martin (service of process not being obtained upon Scannell), from which, and an order denying their motion for a new trial, they prosecute this appeal.

As a defense to the action, Hawk and Martin allege in their answer that at the time of the making and delivery of the note to plaintiff's assignors the latter did, for the purpose of securing the former to sign the same and for the benefit of said Hawk and Martin, execute and deliver to defendant J. O. Scannell a certain agreement in writing, prepared by defendant Martin, which is as follows: "This agreement entered into this 3d day of May, 1907, by and between J. O. Scannell, party of the first part, and Dr. Juliette and Mary E. Burns, party of the second part, both of the city and county of Los Angeles, state of California, witnesseth: That for and in consideration of the sum of two thousand five hundred dollars ($2,500) to be loaned to the said party of the first part by the party of the second part, one thousand dollars ($1,000) of said loan to be paid in cash, receipt of which is hereby acknowledged, the remaining one thousand five hundred dollars ($1,500) to be paid on or before thirty days from date of this agreement, the party of the first part agrees to give his note for the one thousand dollars ($1,000) the cash sum paid him on this contract this date. Said note to be dated May 3d, 1907, and maturing on or before one year from said date, and said note to be indorsed by Mr. R. M. Martin and Mr. J. K. Hawk, all of the city and county of Los Angeles, state of California. It is further understood and agreed that this sum of two thousand five hundred dollars ($2,500) is to be secured by the filing with the Title Insurance & Trust Company this agreement and that they as trustee for the party of the first part will make a trust agreement with the party of the second part to secure the payment of the aforesaid two thousand five hundred dollars ($2,500) coming after a trust agreement of seven thousand dollars ($7,000) now bearing against the undivided one-half interest in and to the twenty-eight (28) feet on the plaza by sixty and one-half (60½) feet on Los Angeles street. This lot covered by a two-story brick building. The title to the said undivided one-half interest of the party of the first part now resting in the Title Insurance & Trust Company as trustee. It is further understood and agreed that when this agreement is filed with the Title Insurance & Trust Company to secure the aforesaid sum of two thousand five hundred dollars ($2,500) advanced by the party of the second part to the party of the first part, that the note for one thousand dollars ($1,000) indorsed by R. M. Martin and J. K. Hawk is to be canceled and returned to the said party of the first part, and the security for the sum of two thousand five hundred dollars ($2,500) advanced to the party of the first part is to rest in the trust agreement above mentioned. This sum of two thousand five hundred dollars ($2,500) is to bear interest at the rate of eight per cent. (8%) per annum until paid."

Upon sufficient evidence the court, in effect, found that while the agreement had been duly executed by Juliette and Mary E. Burns, who retained a duplicate copy thereof, the same was made subsequent to and was no part of the transaction involving the loan for which Scannell and appellants made the note herein sued upon; and also found that appellants were not induced to sign the note by reason of the execution of the agreement. Notwithstanding this finding, appellants contend that, had the agreement been consummated, it would have resulted in the surrender and cancellation of the note, thus absolving them from liability thereon. Conceding this to be true, we fail to see wherein plaintiff's assignors were in default. Under the agreement it was the implied duty of Scannell to file the agreement and procure from the Title Insurance & Trust Company such evidence of the indebtedness and security for the payment thereof as the contract contemplated. In the absence of any performance or tender of performance of this obligation on the part of Scannell, Juliette and Mary E. Burns were not called upon to do any act whatsoever under the agreement. The note was to be surrendered only upon the giving of the security by Scannell. That "Scannell has at all times been ready, able, and willing to perform and cause to be performed the terms and conditions of said agreement," as found by the court, is wholly immaterial. The fact remains that neither he nor appellants ever performed or offered to perform the implied obligation imposed upon Scannell, without which no duty devolved upon plaintiff's assignors to make the additional loan of $1,500 or surrender the note. To hold that this unexecuted contract can be interposed as a defense to a recovery herein would, indeed, be a monstrous proposition.

The court also found that, while Juliette and Mary E. Burns had failed to perform any of the terms of the agreement on their part, no request had ever been made by defendants that they perform the same, "but, on the contrary, defendants have at all times * * * consented to the failure" of performance on the part of said Juliette and Mary E. Burns, who some three or four months after the making of said agreement tendered to appellants the duplicate copy of said agreement so left with them, and appellants accepted the return thereof. Even if we should concede the default of plaintiff's assignors, nevertheless defendants' failure to perform and their consent to like failure of performance on the part of plaintiff's assignors, coupled with the accceptance of the return of the duplicate copy of the agreement, is amply sufficient to show a rescission of the agreement by consent of the parties thereto. Section 1689, Civ. Code.

There is no merit in appellants' contention that this finding is outside the issues. Under our form of pleading, there is no opportunity offered for the filing of a replication to the answer. Colton L. & W. Co. v. Raynor, 57 Cal. 588. When affirmative matter is pleaded as a defense, it is deemed to be denied. Section 462, Code Civ. Proc. Thus, where a contract is set up as a special defense, plaintiff, without pleading such matter, may show that it was procured by fraud, menace, or duress, or that it has been rescinded. Sterling v. Smith, 97 Cal. 343, 32 Pac. 320; Brooks v. Johnson, 122 Cal. 571, 55 Pac. 423; Moore v. Copp, 119 Cal. 429, 51 Pac. 630.

Judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

11 Cal. App. 692

ROTHENBUSCH v. HEBEL et al.

(Civ. 582.)

(Court of Appeal, First District, California. Nov. 9, 1909. Rehearing Denied by Supreme Court, Jan. 6, 1910.)

1. **TRUSTS (§ 72*) — "RESULTING TRUST" — PURCHASE OF PROPERTY WITH FUNDS OF ANOTHER.**

Where land is purchased and paid for with the money of one person, and title is taken in the name of another, without any consideration running from the grantee, and without any gift being made to or intended for said grantee, a "resulting trust" in the land is created in favor of the person paying the purchase price.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 102; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 7, pp. 6188–6192.]

2. **TRIAL (§ 357*)—CONFORMITY OF FINDINGS TO PLEADINGS.**

Plaintiff alleged that she furnished the consideration for the purchase of land conveyed to one defendant, and that defendants agreed, in consideration thereof, to furnish plaintiff a home and to take care of her whenever she resided on the land, and that defendants refused to perform any of the terms of the agreement. Defendants denied any such agreement, but alleged that plaintiff purchased the premises and caused the same to be conveyed to one of the defendants as a gift. *Held*, that findings that there was no consideration for the conveyance to defendant, and that there was no gift, were responsive to the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 855; Dec. Dig. § 357.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Philippina Rothenbusch against Adolph Hebel and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Gray & Rode, for appellants. Traylor W. Bell, for respondent.

HALL, J. Plaintiff brought this action to compel defendant Adolph Hebel to convey to plaintiff a house and lot, bought and paid for with the money of plaintiff, but the title to which was taken in the name of Adolph Hebel. Plaintiff had judgment as prayed for. Defendants moved for a new trial, which was denied, and they have appealed from the judgment and order.

The land in question was purchased from one Daisy Greenlay, who conveyed the title to defendant Adolph Hebel. Plaintiff agreed to provide the entire purchase price, and, accordingly, the entire purchase price was paid out of the money of plaintiff. In her complaint she alleges: "That the consideration for said undertaking on the part of said plaintiff was that said defendant, Adolph Hebel, would at all times give said plaintiff a home with said defendant, Adolph Hebel, in the house situated on said premises, and that said defendant, Adolph Hebel, would take charge of the running of said house, and would cause meals to be cooked for said plaintiff whenever said plaintiff was residing in said house, and that said defendant, Adolph Hebel, would at all times take care of said plaintiff herein, and that said defendant, Adolph Hebel, would at all times permit said plaintiff to have a room in said house in which said plaintiff could keep her personal belongings and her private papers." It is further alleged that defendant Adolph Hebel has refused to perform any of the terms and conditions of said agreement on his part.

The defendants in their answer deny that defendant Adolph Hebel entered into or made any agreement as alleged in plaintiff's complaint, but allege that plaintiff purchased the premises and caused the same to be conveyed to defendant Adolph Hebel as a gift.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court found: "That said plaintiff, in providing said sum of $2,300 for the purchase of said land, and in directing a deed of said land to be executed to said defendant, did so under the belief that said defendant had agreed with said plaintiff that said defendant would at all times give said plaintiff a home with said defendant in the house situated on said premises, and that said defendant would take charge of the running of said house, and would cause meals to be cooked for said plaintiff whenever said plaintiff was residing in said house, and that said defendant would at all times take care of said plaintiff, and would at all times permit said plaintiff to have a room in said house in which said plaintiff could keep her personal belongings and her private papers. * * * That said defendant, in taking the deed to said land in his own name, did so under the belief that said plaintiff intended to make an unconditional gift of said land to said defendant; but such was not the fact, and defendants repudiate and refuse to execute or perform said contract as understood by plaintiff. That there was no meeting of minds between said plaintiff and said defendant, and a resulting trust as to said property exists in behalf of plaintiff." The court further found that plaintiff did not make any gift of said land and premises to said defendant.

The effect of these findings and of the admissions contained in the pleadings is that the land in question was purchased and paid for with the money of plaintiff and the title taken in the name of defendant Adolph Hebel, without any consideration running from Hebel, and without any gift being made to or intended for said defendant. That a resulting trust in the land exists in favor of the party paying the purchase price under such circumstances cannot be doubted.

"The rule is familiar that when, upon a purchase of real property, the purchase money is paid by one person and the conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase money is paid." Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113. To the same effect are: Polk v. Boggs, 122 Cal. 114, 54 Pac. 536; South San Bernardino, etc., Co. v. San Bernardino Nat. Bk., 127 Cal. 245, 59 Pac. 699; Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482; White v. Costigan, 138 Cal. 564, 569, 72 Pac. 178; and Civ. Code, § 853.

It is, however, urged by the appellant that the facts alleged in the complaint do not show a case of a resulting trust, in that after alleging the purchase of and payment for the land by plaintiff, and conveyance of the title to defendant, it is alleged that this was upon consideration of an agreement by defendant Adolph Hebel to do and perform certain things, which it is alleged he refused to do and perform. Defendant, however, denied the existence of any such agreement, and based his claim to the property upon the allegation that it was conveyed to him as an unconditional gift. The court found in effect that there was no consideration for the conveyance to defendant, and that there was no gift of the premises to defendant. These findings respond to the issues tendered by the pleadings. The facts found and admitted by the pleadings boil down to the simple proposition that the land was purchased by plaintiff and paid for with her money, and title conveyed to defendant Adolph Hebel. No gift was made or intended, and no consideration given or agreed to be given for such conveyance. Immediately upon such conveyance being made a trust resulted in favor of the party paying the purchase price, and the trial court correctly so held.

Appellant contends that the finding that plaintiff did not make a gift of the land in dispute to defendant Adolph Hebel is not supported by the evidence. Upon this point it is sufficient to say that we have carefully examined the evidence, and think it is sufficient to support the finding made by the trial court.

The findings made are responsive to the issues tendered by the pleadings, dispose of all material issues, and support the judgment rendered.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

11 Cal. App. 669

KANOUSE v. BRAND et al. (Civ. 690.)

(Court of Appeal, Second District, California. Nov. 5, 1909.)

1. ATTACHMENT (§ 344*)—BOND—ACTION—CONDITIONS PRECEDENT—RETURN OF EXECUTION UNSATISFIED.

Code Civ. Proc. § 552, permits plaintiff, if execution be returned unsatisfied, to prosecute an undertaking given pursuant to sections 540 or 555, or proceed as in other cases upon the return of an execution. Section 540 requires a sheriff to whom a writ of attachment is directed to attach defendant's property, unless he gives security in an amount sufficient to satisfy the judgment or equal to the value of the property, in which case, to take the undertaking. Sections 554 and 555 provide for releasing attached property when defendant has appeared in the action, by moving to discharge the attachment, and requires an undertaking, etc., before making the order. The complaint alleged that plaintiff theretofore sued for a debt, and certain of the debtor's property situated in two counties was attached, and, in consideration of the release of such property, defendants herein, as sureties, executed to plaintiff an undertaking in consideration of which the attached property was released. The undertaking, after reciting the commencement of the action, issuance of the writ, etc., states that the sureties, in consideration of the release of the attached property, jointly and severally undertook in a certain sum, and promised that if plaintiff recovered judgment, defendant would, on demand, pay plaintiff the amount thereof with the percentage, interest, and costs. *Held*, that under section 540 the sheriff must accept the undertaking instead of making a levy, or, if made, must accept it when tendered, before making a return of the writ and release the property, and can only release it after the return upon an order of court under sections 554 and 555, and the bond herein, not having been given pursuant to section 540, the return of an execution unsatisfied was not necessary in order to sue on the bond.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1240; Dec. Dig. § 344.*]

2. ATTACHMENT (§ 349*)—BONDS — ACTIONS — COMPLAINT—SUFFICIENCY OF ALLEGATION—DEMAND.

Where a bond for the release of attached property provided that defendant would on demand pay any judgment recovered by plaintiff, in an action thereon, the complaint must allege a demand upon the judgment debtor and nonpayment of the judgment, and allegations that, after recovery of a judgment against the debtor, plaintiff incurred on execution costs in a certain sum, and of demand of payment upon the sureties and their refusal, were not sufficient allegations of a demand made upon the judgment debtor.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 349.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Theo. Kanouse against L. C. Brand and Max Goldschmidt. From a judgment for plaintiff, defendant Goldschmidt appeals. Reversed, with directions to sustain demurrer to complaint with leave to amend.

E. B. Coil, for appellant. D. Joseph Coyne, for respondent.

SHAW, J. This is an action to recover from the sureties on an undertaking given to procure the release of property levied upon under a writ of attachment.

It is alleged in the complaint that one H. J. Stocker, being indebted to the plaintiff, the latter, in June, 1907, brought suit to recover thereon, and procured to be issued therein a writ of attachment under which certain property of Stocker, situated in Los Angeles and Ventura counties, was attached by the sheriffs of said counties; that thereafter, in consideration of the release of said property so attached, the defendants herein as sureties made and executed to plaintiff an undertaking, in consideration of which the property so held by the sheriffs under and by virtue of said writ of attachment was released therefrom by this plaintiff.

This undertaking, which is set out in the complaint, after reciting the commencement of the action by plaintiff against Stocker, the issuance of the writ of attachment, and that the sheriff of Los Angeles county had, by virtue thereof, attached certain property of Stocker which the latter desired to have released therefrom, provides: "Now, therefore, we, the undersigned, residents and freeholders in the county of Los Angeles, in consideration of the premises, and also in consideration of the release from said attachment of the property so attached, as above mentioned, do hereby jointly and severally undertake in the sum of sixteen hundred and no-100 dollars, and promise that in case the plaintiff recover judgment in the action, defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage, interest and costs; the same to be paid in United States gold coin, if so required by the terms of the judgment." Defendant Goldschmidt filed a general demurrer, which was by the court overruled. No answer was filed, and judgment was rendered against him and his codefendant, who had suffered default, in accordance with the prayer of the complaint.

Appellant contends that the complaint fails to state a cause of action, in that it does not appear therefrom that an execution had been issued and returned unsatisfied, as required by section 552, Code Civ. Proc., which provides: "If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 540 or section 555, or he may proceed, as in other cases, upon the return of an execution." The effect of the provision just quoted is to declare that no action for the recovery upon an undertaking given pursuant to the sections of the Code specified therein shall be prosecuted, unless an execution has been issued and returned unsatisfied, in whole or in part. Brownlee v. Riffenburg, 95 Cal. 447, 30 Pac. 587. This proposition is not controverted by respondent. He contends, however, that the undertaking is not one given pursuant to statute, but that it is a common-law bond, as to which (Palmer v. Vance, 13 Cal. 553; Smith v. Fargo, 57 Cal. 157) the provisions of said section 552 are inapplicable. Neither the issuance of an execution against the judgment debtor, nor the return thereof unsatisfied, is alleged in the complaint. It is therefore clear that if the undertaking declared upon be a statutory bond, the complaint fails to state a cause of action. By the provisions of section 540, Code Civ. Proc., it is made the duty of the sheriff to whom a writ of attachment is directed to attach the property of the defendant in the action wherein such writ is issued, "unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides cost, or in an amount equal to the value of the property which has been, or is about to be, attached; in which case, to take such undertaking." Under this provision it is the duty of the sheriff, instead of levying the writ of attachment, to accept the undertaking in lieu of such levy, or, if he has made the levy and taken the property into custody, to accept the prescribed undertaking when tendered prior to the return of the writ and release the property so attached. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156. The making of his return to the writ divests the sheriff of any statutory power or authority to release the property so held by him under the writ of attachment. After the return thereof a defendant seeking the release of property must apply to the court for an order of release pursuant to the provisions of section 554 and section 555 of the Code of Civil Procedure, or secure such release by application to the plaintiff upon such terms as may be mutually agreed upon. It is clear the release was not obtained under an order of court. Neither is there anything in the allegations of the complaint, nor in the recitals of the undertaking, to indicate that it was given to the sheriff as security pursuant to the provisions of section 540. On the contrary, it is alleged the bond was "made and executed to this plaintiff," and "that the attachment heretofore mentioned under which the sheriffs of the aforesaid counties (Los Angeles and Ventura) held as security of the property of the said H. J. Stocker, and for the release of which attachment the aforesaid bond was given, was by this plaintiff released, in consideration of said bond so given by these defendants." The directions (section 540, Code Civ. Proc.) in the writ of attachment require the sheriff to make the levy and retain the property in custody only in case the defendant fails to give the prescribed undertaking, which, as we have seen, may be given him any time before he makes his return of the writ. Inasmuch as his authority to accept the undertaking and release the attachment is by virtue of the directions to him contained in the writ, the undertaking, the giving of which is authorized by section 540, should, by appropriate wording, show that it is such a one as he was directed to accept, and given pursuant to the command of the writ. The fact that, as appears from the complaint, the bond was given for the release of the property attached in both Los Angeles and Ventura counties, and that it was released by plaintiff, together with the fact that the undertaking is in form a common-law bond, fully justifies the conclusion that the undertaking was not given to the sheriff as security pursuant to said section 540. It, therefore, follows that, inasmuch as the instrument declared upon was not a statutory bond, the issuance of execution against the judgment debtor and return thereof unsatisfied was not a necessary prerequisite to the maintenance of suit thereon. Appellant cites Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416, wherein the court says: "For the protection of the surety it is required that an offer shall be first made to execute against a judgment debtor. Failing in this, the substitute for the attached property is immediately available, and the bond may be enforced at once." The point under consideration, and to which this language was directed, was the right of the obligee to institute suit upon the bond before the expiration of six months after the rendition of the judgment against the judgment debtor; it being claimed that the action on the bond had been prematurely brought. Moreover, we there held that the undertaking, owing to the peculiar wording thereof, aided by the allegations of the complaint, was a statutory bond.

It does not appear from the complaint that any demand was made upon the judgment debtor that he pay the judgment; nor is there any allegation showing the amount of the judgment to be unpaid. The absence of these allegations renders the complaint fatally defective. As appears from the undertaking, the promise on the part of the obligors therein was "that in case the plaintiff recover judgment in the action, defendant will, on demand," pay the same. It thus clearly appears that the promise to pay was conditional, and the bond imposed no obligation on the sureties, unless a demand for payment of the judgment was first made upon defendant Stocker. The allegation of such fact and the nonpayment of the judgment, or part thereof, was essential to the statement of a cause of action against these defendants. Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066; Pierce v. Whiting, 63 Cal. 538. Following the allegation of the recovery of a judgment for a specified sum, it is alleged "that thereafter on execution plaintiff incurred accruing costs of $1.50," for which, and the amount of the judgment, plaintiff prays judgment. Such averment as to the costs expended cannot be regarded as an allegation of demand of payment made upon the judgment debtor. The allegation of a demand of payment made upon the sureties and their refusal to pay is not inconsistent with the fact that the judgment debtor may not have paid the same.

The judgment appealed from is reversed, with instructions to the trial court to sustain the demurrer and to grant leave to plaintiff to amend his complaint, if he be so advised.

We concur: ALLEN, P. J.; TAGGART, J.

11 Cal. App. 656

DICKINSON v. ZUBIATE MINING CO.

(Civ. 737.)

(Court of Appeal, Second District, California. Nov. 3, 1909.)

1. APPEAL AND ERROR (§ 1024*)—REVIEW—ISSUE OF FACT ON MOTION TO QUASH SUMMONS.

The finding of a trial court, on an issue of fact raised by a conflict between affidavits on a motion to quash the summons and the proof of service, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1024.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS ON MANAGING AGENT.

Code Civ. Proc. § 411, providing that, in a suit against a foreign corporation doing business and having a managing agent within this state, summons must be served by delivering a copy thereof to such agent, requires that such corporation must be "doing business" in this state to justify service on it through such agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. § 668.*]

3. CORPORATIONS (§ 668*) — ACTION AGAINST FOREIGN CORPORATION—WAIVER OF OBJECTION TO SERVICE OF PROCESS.

An objection to service of process on a foreign corporation that it was not at the time transacting business in the state may be waived.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 668.*]

4. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—SERVICE OF PROCESS — OBJECTIONS — WAIVER.

If the fact that defendant corporation was not transacting business in the state at the time of service of process on it is not made a ground of its motion to quash the summons, and notice thereof given as required by Code Civ. Proc. § 1010, it will be deemed to have waived any objection to service on such ground.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 668.*]

5. CORPORATIONS (§ 82*)—PURCHASE OF STOCK —RESCISSION—AGREEMENT—BREACH — DAMAGES.

Where suit against a corporation by a purchaser of stock is solely to recover sums agreed to be repaid to plaintiff, according to agreement on his electing to rescind the purchase, the tender of a return of the stock left nothing to be done by him, as the consideration had passed to the obligor, and the only duty imposed on it was to repay the sums specified, bringing the case within Civ. Code, § 3302, providing that "the detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

6. PLEADING (§ 71*)—NECESSITY OF EXPRESSLY ALLEGING DAMAGE IN COMPLAINT.

When plaintiff alleges facts to exist, entitling him to recover the sum of money demanded, he has shown, so far as the complaint can, that he has sustained damages, and, having alleged that defendant promised to pay a specified amount for which judgment is prayed, plaintiff need not allege he had been damaged in such sum.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 142; Dec. Dig. § 71.*]

7. CORPORATIONS (§ 82*)—PURCHASE OF STOCK —CAUSE OF ACTION FOR MONEY PAID THEREFOR.

In a suit against a corporation to recover money agreed to be repaid a purchaser of stock on his electing to take a refund thereof in lieu of the stock, its value is immaterial to plaintiff's cause of action.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

8. CORPORATIONS (§ 82*)—PURCHASE OF STOCK —CAUSE OF ACTION FOR MONEY PAID THEREFOR.

Whether or not defendant accepted plaintiff's tender of a return is likewise immaterial.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

9. CORPORATIONS (§ 82*)—AGREEMENT TO REFUND MONEY PAID FOR STOCK—EFFECT OF MODIFICATION.

Modification of an agreement to refund money paid a corporation for stock on demand therefor, extending the time for the demand and providing for paying interest and repayment of an assessment on the stock, could not release it from the terms of the first agreement.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

10. CORPORATIONS (§ 81*)—CONDITIONAL PURCHASE OF STOCK.

Where a corporation sold stock, agreeing in a contemporaneous written contract to refund the money paid therefor on demand, the transaction was, not a conditional subscription, but a conditional purchase of stock, where the stock had been theretofore issued to another and by him returned to it.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 81.*]

11. CORPORATIONS (§ 82*) — PURCHASE OF STOCK—CONSIDERATION FOR PROMISE TO REPAY PRICE.

The purchase price of stock, paid pursuant to the conditions in a contemporaneous written agreement for a return on the purchaser's election to rescind, was a sufficient consideration for the corporation's promise to repay it.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

12. CORPORATIONS (§ 82*)—AGREEMENT TO REFUND MONEY PAID FOR STOCK—VALIDITY.

The rights of creditors not being involved, an agreement to refund money paid a corporation for stock if after inspection of its property the purchaser be dissatisfied is enforceable.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

13. CORPORATIONS (§ 82*)—CONSIDERATION OF AGREEMENT TO REPAY MONEY PAID FOR STOCK.

Extension of time for repaying money paid for stock agreed to be refunded if the purchaser was dissatisfied. and payment of an assessment, is ample consideration for a contract to repay both sums with interest at the end of six months, if the purchaser elects to demand the same.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

14. CORPORATIONS (§ 428*)—NOTICE OF AGREEMENT IN CORPORATION'S BEHALF.

Through the president and secretary who executed a written agreement in a corporation's behalf, it must be deemed to have had notice thereof when it was made.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 428.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

15. CORPORATIONS (§ 426*)—ACTION ON CONTRACT—ESTOPPEL TO PLEAD WANT OF RATIFICATION.

Where a contract, which a corporation was authorized to make, was made in its behalf by its president and secretary, subject to approval of the directors, its failure for more than seven months after notice thereof to disaffirm the same, with the fact that it retained $200 paid thereunder, estops it to plead want of ratification as a defense to an action thereon.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 426.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by J. M. Dickinson against the Zubiate Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Shankland & Chandler, for appellant. H. E. Guthrie and E. Sharp (Leonard B. Slosson, of counsel), for respondent.

SHAW, J. Action to recover a sum of money paid in the purchase of mining stock, which purchase was made under an agreement for the repayment of the same. Judgment went for plaintiff, from which defendant appeals upon the judgment roll accompanied by bill of exceptions.

Defendant was a foreign mining corporation authorized by its articles of incorporation to transact business in California. It is alleged in the complaint that at the time of the filing thereof, and at all times mentioned therein, defendant was engaged in the transaction of business in said state. That on December 7, 1903, plaintiff and defendant entered into an agreement whereby plaintiff purchased from defendant 1,000 shares of its capital stock for the sum of $3,500, the defendant on its part agreeing that in consideration of such purchase defendant would, on demand of plaintiff, after the latter had inspected and examined defendant's mining property situated in the Republic of Mexico, repay and refund to him the purchase price of such stock. That pursuant to this agreement plaintiff paid the $3,500, and defendant issued to him a certificate for said 1,000 shares of stock. That as a result of his inspection of the property plaintiff was dissatisfied with such purchase, and on January 13, 1904, tendered to defendant the redelivery of the stock, and demanded repayment of the purchase price thereof. That pending negotiations for settlement, and on March 12, 1904, the parties entered into another agreement, as follows:

"San Francisco, Cal., March 12, 1904.

"To Whom It may Concern:

"This agreement made and entered into the above date, between the Zubiate Mining Company of San Francisco and Mexico, party of the first part, and J. M. Sharp and J. M. Dickinson of Saticoy, California, the parties of the second part.

"Witnesseth: That whereas the said parties of the second part, on or about December 7, 1903, paid to the Zubiate Mining Company, three thousand five hundred (3,500) dollars each; said payment being for one thousand (1,000) shares of stock in said company, with an agreement that said Zubiate Mining Company would refund the money in case, after examination, said parties were not satisfied with the character of the mines, and

"Whereas said parties have made a demand upon the company to have the said amount refunded, and

"Whereas said company has levied an assessment of twenty (20) cents per share on the stock of said company, which assessment is now due and payable,

"Therefore, it is hereby agreed that said parties of the second part will pay the amount of the said assessment and the Zubiate Mining Company will agree to refund said amount of three thousand five hundred ($3,500) dollars to each of said parties; also the assessment of two hundred dollars ($200) to be paid by each of the parties, together with interest at eight (8) per cent. per annum from December seventh, 1903, on the principal, and from March 12, 1904, on the assessment, six (6) months from date hereof, provided said parties of the second part elect to accept such refund at that time in lieu of the one thousand (1,000) shares of stock held by each.

"Zubiate Mining Company,
"By Drew R. Oliver, President,
"J. R. Kenny, Secretary.

"Subject to the ratification of the board of directors.

"J. M. Sharp,
"J. M. Dickinson."

That pursuant to the terms of said agreement plaintiff paid to defendant an assessment of $200, and at the expiration of the six months specified in the agreement plaintiff notified defendant that he elected to accept a refund of the money so paid as provided in the agreement, and demanded that defendant pay to him the sums of money specified in the agreement pursuant to the terms thereof, and thereupon tendered the redelivery of the 1,000 shares of stock to defendant, but defendant refused to accept the same or to repay said sums of money and interest thereon. That at all times plaintiff was ready, able, and willing to return said stock to defendant.

Defendant denied all the allegations of the complaint other than the payment to it of said sums of money so alleged to have been paid in the purchase of the stock and payment of the assessment thereon, and admitted that it had refused to repay the same. As a further defense to the action, defendant alleged: (1) That the several agreements set forth in the answer were without consideration and void; (2) that defendant had no power or authority to make or enter into said contracts or either of them; and (3) that any rights which plaintiff may have had by reason of such agreements were lost by reason of his laches in failing to act thereunder within a reasonable time. The finding of the court as to all the issues was in favor of plaintiff, and judgment followed as prayed for in complaint.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant contends that the court erred in denying its motion to quash the summons. As shown by the affidavit of the party serving the summons upon defendant, such service was had on January 13, 1906, in Los Angeles county, "by delivering to and leaving with George A. Hart, the president and managing agent, within the state of California, of said corporation, * * * a copy of said summons," etc. Thereafter defendant moved to quash the summons and set aside the service thereof upon the grounds, among others unnecessary to mention, that said corporation was organized under the laws of South Dakota, and "that said George A. Hart is not a managing agent, or business agent, or any agent, or cashier, or secretary of said defendant corporation." The notice of motion specified that it would be made upon the complaint and an affidavit of George A. Hart, which was sworn to on January 20, 1906, wherein it was averred that "affiant is not a managing agent, nor business agent, nor any agent, nor cashier, nor secretary of said corporation." Reference to the motion as made discloses that it was not made upon the ground that Hart was not managing agent, cashier, or secretary of the corporation at the time, to wit, January 13, 1906, when service was had upon the corporation, but at a time subsequent thereto; nor does this affidavit of Hart, sworn to on January 20th, from which it appears that he was not on that date the managing agent, etc., negative or tend to prove that he was not on January 13th the managing agent in California of defendant. Neither the motion nor affidavit is directed to the time of the service of the summons.

At the hearing of the motion another affidavit of Hart was submitted, where it was averred that he never had at any time been the managing agent of defendant corporation. Regarding this as having reference to and covering the time when service was made of the summons, and conceding the motion to have been directed to such time, it is sufficient to raise an issue of fact as to which there is a conflict between the affidavits of Hart and the person making the affidavit of service, as to which, like any other fact in dispute, this court will not disturb the finding of the trial court when there is a substantial conflict of evidence.

Conceding our position thus far to be correct, appellant, nevertheless, contends that it is shown by Hart's affidavit, which as to such fact is uncontradicted, that defendant was not at the time of service either actively or otherwise engaged in transacting business in California. That a foreign corporation must be "doing business" in this state to justify service upon it through a managing agent is required by section 411, Code Civ. Proc. See, also, Jameson v. Simonds Saw Co., 2 Cal. App. 584, 84 Pac. 289. Such objection to service of process, however, may be waived, and inasmuch as this was not made one of the grounds of the motion and notice thereof given, as required by section 1010, Code Civ. Proc., defendant must be deemed to have waived any objection to service based upon such ground. We, therefore, conclude the court did not err in its ruling upon the motion to quash the summons and vacate the service thereof.

Defendant contends that its demurrer should have been sustained upon the ground that the complaint failed to state a cause of action. The sole purpose of the action was to recover from defendant the sums of money agreed to be repaid in accordance with the terms of the agreements. The tender of the return of the stock, if such tender was necessary, left nothing to be done by plaintiff. The consideration had passed to the obligor, and the only duty imposed upon defendant was the obligation to repay the sums of money specified. Hellings v. Heydenfeldt, 107 Cal. 577, 40 Pac. 1026. This fact brings the case within the provisions of section 3302, Civ. Code, which provides that "the detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." As said in Bartlett v. Odd Fellows' Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139: "When the plaintiff, as here, alleges facts to exist which, if proved, would entitle him to recover the sum of money he demands from the defendant, he has shown, so far as the recitals of the complaint can, that he has sustained damages." Having alleged that defendant had promised to pay a specified amount for which judgment is prayed, it was unnecessary to allege that plaintiff had been damaged in such sum Bank v. Port Townsend, 47 Pac. 896.[1] The value of the stock was immaterial for the reason that plaintiff's right to repayment did not depend upon its value; and, as to the cause of action, it is likewise immaterial whether or not defendant accepted plaintiff's tender of a return of the stock. The second agreement extended the time within which plaintiff might demand performance of the obligation to repay the purchase money, and also provided for the payment of interest thereon and repayment of the assessment. To such extent the first agreement was modified. Such modification, however, could not have the effect of releasing defendant from the terms of the first agreement. There was no error in the ruling of the court upon the demurrer.

The court found against the special defenses set up in the answer. It is contended that such findings are unsupported by the evidence, and that the court should have granted defendant's motion for a nonsuit. It is unnecessary to quote the evidence; suffice it to say, an examination of the record satisfies us that it is ample to justify the ruling of the court in denying defendant's motion for a nonsuit, and fully supports the findings. The transaction did not constitute an unconditional original subscription to the stock of defendant, but was a conditional purchase of stock, which the evidence tended to show had been theretofore issued to another and by him returned to the company. The purchase was made upon conditions fully set forth in a written contract which was contemporaneous with and part of the transaction of purchase. Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772. Nor was the agreement secret. On the contrary, it appears from the evidence of witness Sharp that, early in January at least, plaintiff was, through him, advised by the secretary of the company that "they had a copy of the agreement in the office, and that the matter would be presented to the board of directors at the next meeting." Neither was there any want of consideration. The purchase price paid subject to the conditions contained in the agreement was a sufficient consideration for defendant's promise to repay if plaintiff, after inspection of the property, was dissatisfied therewith. In the absence of the rights of creditors being involved, and none appear, we perceive no reason why this agreement should not be enforceable against the corporation. Vent et al. v. Duluth Coffee & Spice Co., 64 Minn. 307, 67 N. W. 70. Says Mr. Cook in his work on Corporations (section 83): "Instead of subscribing for stock, a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered, if corporate creditors' rights do not intervene."

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[1] 16 Wash. 450.

This being true, the extension of time for repayment, and the payment of $200 on account of the assessment furnishes ample consideration for the contract dated March 12, 1904, whereby defendant agreed to repay both sums with interest thereon at the expiration of six months, if plaintiff elected to demand the same. It is true this agreement was made subject to ratification by the board of directors, and appellant contends that the board failed to ratify it. Through its president and secretary the corporation must be deemed to have had notice of the agreement at the time of the making thereof. It appears from the minutes of the proceedings of its board of directors that it was formally submitted to the board for action on May 9, 1904. No action, however, was taken thereon until October 21, 1904, nearly six weeks after plaintiff, at the expiration of the time specified in this agreement, had made formal demand for repayment, which demand defendant then refused, and by its formal resolution disaffirmed the agreement. Conceding this contract so made on behalf of the corporation to have been unauthorized, nevertheless, it was one which it had authority to make, and its failure to disaffirm the same for more than seven months after notice thereof, coupled with the fact that it retained the $200 paid thereunder, if not a technical ratification of the contract, was nevertheless sufficient to estop the corporation from pleading want of ratification as a defense. Clark & Marshall on Private Corporations, §§ 716d, 716c; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749; Curtin v. Salmon River, etc., Co., 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

157 Cal. 39

LANGDON, District Attorney, v. KOSTER, Auditor. (S. F. 5,319.)

(Supreme Court of California. Dec. 23, 1909.)

1. COUNTIES (§ 139*) — EXPENSES — CRIMINAL PROSECUTIONS—DETECTIVES.

The employment of a special agent and assistant special agents by a district attorney of the city and county of San Francisco is within Pol. Code, § 4307, making a county charge all expenses necessarily incurred by the district attorney in the detection of crime and the prosecution of criminal cases.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 139.*]

2. COUNTIES (§ 57*) — COUNTY BOARD—DECISIONS—EFFECT.

The board of supervisors of the city and county of San Francisco are the judges of the necessity of an expenditure for the employment of detectives; and their determination is to be reversed only in plain case of abuse of their powers.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 74; Dec. Dig. § 57.*]

In Bank. Application by William H. Langdon, as district attorney of the city and county of San Francisco, for a writ of mandate to John A. Koster, auditor of the city and county of San Francisco. Granted.

Wm. Hoff Cook, for plaintiff. Francis V. Keesling (Campbell, Metson, Drew, Oatman & Mackenzie, as Friends of the Court), for defendant.

HENSHAW, J. This is mandate to compel the auditor of the city and county of San Francisco to audit the demand of the petitioner for expenses incurred by him. The expenses are for the payment of the services of William J. Burns as "special agent" at the rate of $625 a month, and of certain enumerated "assistant special agents" at the rate of $150 a month, the total aggregating for the month of April, 1909, the sum of $2,650. These demands were presented to the auditor by the individual claimants, and, upon his rejection of them in the form presented, demand was made by the district attorney in his own name, with an enumeration of the items charged.

In July, 1908, the district attorney addressed a communication to the mayor, seeking an appropriation of $70,000 for the expenses of his office. The communication was by the mayor sent to the board of supervisors, with the recommendation that the request of the district attorney be granted. In compliance with this request the board duly passed an ordinance August 3, 1908, which was approved by the mayor, known as Ordinance 525, authorizing the district attorney and empowering him to appoint additional employés and fixing their monthly compensation. The appointments were made by the district attorney, and the demands of the employés were for several months presented pursuant to the ordinance and provisions of the charter, and approved by the officer and paid. Thereafter the auditor refused to audit these monthly demands, and, to meet his objections to the manner of their presentation, the form of demand was changed; the demand being presented in the new form by the verified application of the district attorney himself. This demand also the auditor refused to recognize. The authority for the passage of the ordinance is found in section 35, art. 16, of the charter of the city and county of San Francisco. Much argument is made to the effect that this provision of the charter is void. The view which we take of the matter, however, renders unnecessary any consideration of the question, for clearly we think the expenses come within those authorized by section 4307 of the Political Code. That section makes a county charge "all other expenses necessarily incurred by the district attorney in the detection of crime and the prosecution of criminal cases." In Humiston v. Shaffer, 145 Cal. 197, 78 Pac. 651, the expenses occasioned by the employment of detectives are recognized as one of the class contemplated by section 4307. Against this it is argued that the expenditure cannot be said to be necessary within the meaning of the statute, since the district attorney has at his call the police force of the city and county of San Francisco and the detective department thereof. But to this it must be answered that the board of supervisors in authorizing the expenditure were the judges of the necessity, and that only in a plain case of an abuse of their powers would their judgment be subject to reversal.

Let mandate issue as prayed for.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

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157 Cal. 41

PARKIN v. GRAYSON-OWEN CO.

(S. F. 4,614.)

(Supreme Court of California. Dec. 23, 1909.)

1. MUNICIPAL CORPORATIONS (§ 706*) — STREETS—INJURIES FROM USE OF HIGHWAY—QUESTION FOR JURY.

In an action for injuries to plaintiff caused by the collision of defendant's team with plaintiff's buggy, where there was evidence that defendant violated a city ordinance forbidding a horse to be left standing in a street unless properly secured, only one of defendant's horses having been hitched, and that only by a strap snapped into the bit and tied to a telegraph pole, a nonsuit was properly refused.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. EVIDENCE (§ 470*) — OPINIONS — ADMISSIBILITY.

A general rule is that witnesses must testify to facts and not opinions, and that when the question to be determined is the result of the common experience of all men of ordinary education, or is to be inferred from particular facts, or where the inquiry relates to a subject not of such a nature as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts on which the opinion is based can be ascertained and made intelligible to the court and jury, the inferences or conclusions must be drawn by the jury, and the opinion of the witness cannot be received.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 470.*]

3. EVIDENCE (§ 506*)—SUBJECT OF EXPERT TESTIMONY—MATTERS IN ISSUE.

Under Code Civ. Proc. § 1870, subd. 9, providing that the opinion of a witness may be given on a question of science, art, or trade, when he is skilled therein, whether defendant's method of hitching his team was a safe one was not a proper subject of expert testimony, and such testimony would be an invasion of the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The erroneous admission of expert testimony that defendant's method of hitching a strap to the snaffle in the horse's bit was not a proper and safe method of tying horses because, if the horse pulled back, the bit was liable to pull apart, or the first buckle back of the bit, or some part of the bridle close up to the ear would give way, is not prejudicial to defendant, where the same information might have been properly obtained by asking the witness what would be the effect of fastening a strap to the snaffle, and where it was admitted that there were no injuries to the bridle at the time of the accident in question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

5. NEGLIGENCE (§ 131*)—ACTION—EVIDENCE—ADMISSIBILITY.

Evidence of precautions taken after an accident is not admissible to show a negligent condition at the time of the accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 255, 256; Dec. Dig. § 131.*]

6. WITNESSES (§ 269*)—CROSS-EXAMINATION—LIMITATION TO SUBJECTS OF DIRECT EXAMINATION.

Testimony that defendant drove the horses which had caused injury to plaintiff after the accident is insufficient to justify cross-examination as to what precautions defendant took after the accident in hitching the horses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949–954; Dec. Dig. § 269.*]

7. MUNICIPAL CORPORATIONS (§ 706*) — STREETS—USE FOR TRAVEL—QUESTION FOR JURY.

In an action for injuries to plaintiff caused by a collision of defendant's team with plaintiff's buggy, whether the hitching of one of the horses was a sufficient securing of the team as required by a city ordinance was a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

8. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions are to be read and considered as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

9. TRIAL (§ 296*) — INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

In an action for injuries caused by a runaway team, an erroneous instruction that the hitching of one of a team of horses was not a sufficient compliance with the city ordinance prohibiting the leaving of horses in a street without their being securely fastened was not cured by correct, but conflicting, instructions that if a hitching strap, fastened to the bit of one horse and not fastened to the other, does not properly secure the team, defendant was guilty of negligence, and if the driver set the brake hard down, and wrapped the reins around the brake and fastened one end of the hitching strap to one of the bits of the horses, these circumstances must be considered in determining whether he used reasonable care in securing the horses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 709, 718; Dec. Dig. § 296.*]

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Hirst Parkin against the Grayson-Owen Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Case transferred from District Court of Appeal to Supreme Court on motion for rehearing. Reversed.

Myrick & Deering, for appellant. Stanley Moore, B. H. Griffins, and Reed, Nusbaumer & Black, for respondent.

PER CURIAM. Defendant appealed to this court from a judgment in favor of plaintiff for $2,000, and from an order denying its motion for a new trial. The appeal was transferred to the District Court of Appeal for the Third Appellate District for determination. In that court, on December 21, 1908, judgment was given reversing the judgment and order denying the new trial. A petition for hearing by this court was granted, and the judgment of the appellate court vacated, and the matter transferred to this court for hearing and determination.

The opinion of the District Court of Appeal, written by Mr. Justice Burnett, was as follows:

"This is an appeal from the judgment and the order denying a motion for a new trial in an action for damages for the injury caused to plaintiff by the running away of defendant's team of horses attached to a butcher wagon, which collided with and upset a buggy in which plaintiff was riding. Plaintiff claimed that the horses were not fastened as required by a certain ordinance of the city of Oakland, which, as far as material here, is as follows: 'No person shall leave or allow any horse or mule to be or remain standing upon any of the public streets of the city of Oakland, unless such animal is in some way properly secured, either by hitching or being under the personal control of some person of suitable age.'

"(1) The court properly denied the motion for a nonsuit. There was sufficient evidence to justify the inference that defendant violated said ordinance. Indeed, the evidence for plaintiff warrants the conclusion that defendant failed to exercise ordinary care in the manner of securing the team. The horses were left standing on a prominent street while the driver went into a restaurant to get his lunch. Only one of the horses was hitched, and that by a strap snapped in the bit and tied to a telegraph pole. The jury from the evidence had a right to believe that the strap was not strong enough nor properly adjusted to secure the horse to which it was attached, and that under the circumstances both horses should have been hitched. At any rate, the showing made by plaintiff was sufficient to carry the case beyond the motion for a nonsuit.

"(2) Appellant contends that the court erred in allowing expert testimony as to the proper hitching of a horse. The matter is presented by the record as follows: 'Q. Let me ask you, Mr. Wright, whether or not using one of these hitching straps that snaffle into the horse's bit and fastening it to a pole or ring, or anything else at the other end, it don't make any difference, let me ask you whether that method is a proper and safe one for the tying of horses? (Objection as not being proper subject for expert testimony.) * * * A. No, simply because when it is put in the bit of a horse, if he pulls back on it, the bit is liable to pull apart, or the first buckle back from the bit will give away, or close up to the ear will give away, or some part of the bridle will give way with the snaffle. This snaffle will be stronger than the leather in the bridle, and therefore, away goes the bridle, if the snaffle don't break.'

"The application of the rule as to expert testimony is often attended with great difficulty, although the rule itself is clear enough. In Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 59 [27 Pac. 592], it is said: 'Section 1870, subd. 9, Code Civ. Proc., provides that the opinion of a witness may be given "on a question of science, art or trade, when he is skilled therein." The general rule, however, is that witnesses must testify to facts, and not to opinions, and that whenever the question to be determined is the result of the common experiences of all men of ordinary education, or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness. Where the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in evidence. If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury.' In that case the conclusion as to negligence depended upon the kind of coupling pin used by defendant on its street car and this question was asked of a witness: 'From your experience in driving those cars and using those pins, would you say that that was a safe pin—the straight pin?' The Supreme Court said: 'Whether this pin was "safe"—that is, unattended with personal risk to the driver—was an issue in the case for the jury to determine from all the circumstances that might be shown,' and it was held that it was not proper for the opinion evidence to be given, as the verdict of the jurors was to be based upon their own opinions from the facts, and should not be influenced by that of the witness. It is equally clear in the case at bar that the very issue to be determined by the jury was whether the method adopted by the defendant's employé for tying or securing the horses was a safe and proper one. The conclusion as to that question would necessarily determine whether plaintiff was entitled to recover. If the method adopted was not a safe and proper one, then defendant was chargeable with negligence. Indeed, the only allegation of the complaint in that respect is that: 'The driver of one of defendant's delivery wagons, to which there was attached two horses, did insecurely, negligently, and improperly hitch one of said horses, and then, without hitching the other horse at all, left said horses,' etc. In effect, therefore, the question was equivalent to asking the witness whether in his opinion negligence was imputable to the driver, and hence to his employer. It is manifestly a case where all the facts and circumstances in relation to the transaction could be disclosed and made intelligible to the jury as the correct basis for the verdict, and it was an invasion of the jury's province to seek to substitute the opinion of a witness as to defendant's conduct for that of the jurors themselves, who were capable and charged with the duty of observing and determining the relation between the facts and the consequences resulting therefrom.

"In Enright v. S. F. & S. J. R. R. Co., 33 Cal. 230, it was held that the opinion of experts is not admissible on the question of the sufficiency of a fence to turn cattle. It is said: 'The facts of the fence, bars and barway included, were to be testified to by the witness; but the question of sufficiency, assuming it to have been in the case, was with the jury and not with them.' In Shafter v. Evans, 53 Cal. 32, the judgment was reversed because the trial court admitted the opinion of witnesses as to the safety of a corral. In Kauffman v. Maier, 94 Cal. 269 [29 Pac. 481, 18 L. R. A. 124], it is held that it was error for the court to admit expert testimony 'as to whether it is more dangerous for a shaft having a rough surface or end to project into the room than it would be if the shaft were smooth, and as to whether a towel could be more safely taken from a smooth revolving shaft than a jagged and rough one.' In Linberg v. Glenwood Lumber Co., 127 Cal. 598 [60 Pac. 176, 49 L. R. A. 33], the questions held to be objectionable were: 'Can you state to the jury whether or not it is more safe for a teamster to sit on a bare load of lumber without a seat, or whether it is more safe with a seat for him?' and 'Can you state whether or not short lines used to drive horses are as safe as long lines without knots?'

"There is much plausability, however, in respondent's contention that the objection of appellant is not broad enough to reach the vice of the question, and also that it is apparent the answer could not have prejudiced the defendant. In reference to the objection itself respondent says: 'While questions in this form should not be put if objected to as to form, we would still contend that we had a right to bring out from skilled and experienced men in this line the various methods for tying horses and the facts recommending each method. For example, we would be entitled to show that bridles were weak in certain places, and that where a horse held by the bit pulled back, the strain came on the bridle close to the top of his head, where there were buckles or weak places.' Hence the contention is made that the general objection that the subject is not a matter of expert testimony was properly overruled and reference is made to the case of Giraudi v. Electric Imp. Co., 107 Cal. 120 [40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114,] as illustrating the distinction sought to be made. In that case plaintiff had been injured by coming in contact with a wire on the roof of a house, and he 'was allowed, over the objection of defendant, to ask certain questions of an expert electrician as to what matters should be taken into consideration in locating electric wires carrying such currents as these in question, and whether it was proper or prudent management to put them so low over a metallic roof. The objection was that it was the province of the jury to determine such matters, and not a proper subject for expert testimony.' The Supreme Court, in discussing the matter, through Mr. Justice Temple, says: 'The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate: In Bemis v. Central Vt. R. R. Co., 58 Vt. 636 [3 Atl. 531], an expert was held not allowed to testify "that it was not prudent to use a certain hoisting apparatus with less than three men, on a stone of two tons heft." Yet the court said there might have been shown "the number of men required, danger in its use by a less number, its safety and adequacy when properly used," and added that the jurors could as well decide for themselves. * * * The difference is largely one as to the form of the question; and, while I do not mean to say that it is immaterial, or that such an error may never be cause for a reversal, I do not think it should be so held here. The answer of the witness gave the facts in full, and explained what methods would have been safe. All this information might have been obtained by proper questions.' So here it would have been proper to ask Mr. Wright what would be the effect of fastening a strap to the snaffle, and the same information would have been obtained. It is true he says it was not a safe way of hitching the horse, but that obviously is his conclusion from the statement that 'some part of the bridle will give way' if the horse pulls back. And again, since it was admitted that there was no injury to the bridle at the time of the accident, it is hard to see how the answer of the witness could have hurt defendant.

"(3) On cross-examination of the driver, George Vincent, called by defendant, the following proceedings took place: 'Q. Where are these horses now? (Objected to as immaterial, irrelevant, and incompetent. Objection overruled. Defendant excepts.) A. One of them is in the company's possession. Q. On what team is he working? (Same objection, ruling and exception.) A. On the city team. The other horse was sold. I don't know where he is. Q. Why was he sold? (Same objection, ruling, and exception.) A. It was sold because we did not particularly have any use for him then. We got in some more new horses. * * * Q. What strap did you use, or what means did you adopt for the tying of these horses after the accident? (Objected to as to the tying of the team subsequent to the accident as immaterial, irrelevant, and incompetent, and no proper cross-examination.)' The objection was overruled, and the witness answered, 'I used a rope'; and he proceeded to state, over objection, how he tied the rope. The ruling in relation to what became of the horses may be disregarded, as appellant, by the objection, should have called the court's attention to the fact that it was not proper cross-examination, and besides, the answer was probably not prejudicial; but the method adopted for tying the horses after the accident presents a more serious question.

"As stated by the Supreme Court, through Mr. Justice Angellotti, in Helling v. Schindler, 145 Cal. 312 [78 Pac. 713]: 'It is now well settled in this state, in accordance with the rule prevailing generally elsewhere, that evidence of precautions taken after the happening of the accident is not admissible to show a negligent condition at the time of the accident.' Other cases are therein cited, where the matter is elaborately discussed, and the wisdom of the rule is clearly demonstrated. However, the rule is not questioned by respondent, but the contention is made that the questions were in the line of proper cross-examination. We fail to find any inquiry in the direct examination as to the method of tying the horses subsequent to the accident. The nearest approach to it is found in the statement of the witness: 'I had been driving this pair of horses from November, 1903, up to the time of the accident. In fact, I drove them up until about four months ago; that is, since the accident. I drove them after the accident just the same.' Hitching the horses is a subject entirely distinct from driving them, and we cannot agree with counsel that the questions were within the legitimate scope of cross-examination.

"(4) Among other instructions, the court gave the following (No. 23): 'It is provided by city ordinance that any horse left standing unattended on the public streets of the city of Oakland shall be properly secured by hitching; and, if the jury believes that defendant's bay horse, which stood farthest away from the curb on San Pablo avenue while defendant's team was left standing by the driver unattended, was not properly secured by hitching, then I instruct you that the defendant was guilty of a violation of the city ordinance.' The evidence, without conflict, showed that only the black horse next to the curb was hitched, but the driver testified on behalf of the defendant that: 'I set it [the brake] hard down, chock-a-block sufficiently tight to block the wheels, so that they were set as near as I could so they would slide, and I wrapped the reins three or four times around the brake.' We think it should have been left to the jury to determine whether this was a sufficient compliance with the requirement of the ordinance. In other words, we consider it unreasonable to hold that when a team is left standing and unattended, the ordinance requires in any event that every horse constituting the team should be hitched. The ordinance should have a reasonable construction, in harmony with its purpose to secure the safety of the citizens in their property and persons. Whether that purpose could be best subserved by requiring every horse of a team to be tied depends upon various circumstances of each particular case, which should be left to the determination of the jury in view of all the evidence. Here the jury was instructed as a matter of law that, 'if the bay horse was not properly secured by hitching,' then the ordinance was violated. It was virtually admitted that the bay horse was not hitched. Hence the court might as well have instructed the jury to find for the plaintiff on the issue of negligence.

"The question, as we view it, was properly presented in instructions 31 and 36 as follows: 'If you should believe from the evidence that the defendant's hitching was safe and sound just before the accident, and still if you should further find that such a hitching strap, when fastened to the bit of one horse and not fastened in any way to the other, does not properly secure the team, then the defendant was guilty of negligence in fastening its team in such a manner upon the occasion in question,' and, 'If you find that upon driving up to the sidewalk, upon dismounting to go into the restaurant, Vincent, the driver, set the brake hard, wound the reins around the brake, and then fastened one end of the hitching strap reasonably fit for that purpose to the bit of one of the horses, and the other end to a post at or near the edge of the sidewalk, you must consider all these circumstances in determining whether the driver used reasonable care and precaution to secure the horses in thus hitching them. If you find, as a fact, that the driver used reasonable care and caution in hitching the horses, then the ordinance was not violated, and your verdict must be for the defendant.' In other words, the jury was told that whether the horses were properly secured and the ordinance violated must be determined by a consideration of all the circumstances, but in said instruction 23 the inquiry was limited to the single circumstance of the failure to hitch the bay horse.

"It is true that instructions are to be read and considered as a whole, but there is no room here for the application of the principle stated in Stephenson v. Southern Pacific Co., 102 Cal. 143 [34 Pac. 618, 36 Pac. 407], and other cases, that 'the fact that when taken separately some of them may fail to enumerate in precise terms and with legal accuracy propositions of law does not necessarily render them erroneous; but it is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just motion of the law upon the point discussed.' The said instructions are inconsistent and confusing. The direction that a violation of the ordinance follows from the determination of one fact by necessary implication excludes the consideration of other facts and circumstances. If the law had been correctly given in said instruction 23, it might be held that the others were too favorable to defendant, and that the error was without prejudice, but we are of the opinion that this conclusion would necessitate a stricter construction of the ordinance than is warranted.

"In view of the foregoing, we do not see how the verdict can be upheld."

Learned counsel for plaintiff strenuously urge that the evidence adduced by them from the driver as to the change in the method of hitching the horses after the accident was properly elicited on cross-examination, in view of matters testified to by him on direct examination. The only testimony so given on direct examination on which reliance is thus based is set forth in the opinion of the District Court of Appeal. We agree with that court in the view that it did not warrant the cross-examination.

In view of the facts of this case the trial court, by instruction 23, clearly told the jury that, in order to comply with the ordinance, the bay horse must be separately hitched, which, concededly, had not been done. The two horses were securely attached one to the other, and remained so attached throughout the runaway, and up to the time of the injuries caused plaintiff thereby, and the question in the case was not whether one or the other of the horses was properly secured by hitching, but whether the team of two horses was so secured. One of the two horses could not be so secured unless the other also was, and there could be no reason for singling out the bay horse and directing the jury that, unless it was "properly secured by hitching," the defendant was guilty of a violation of the city ordinance, other than to inform them that to comply with the ordinance each horse of the team must be separately hitched. This was the necessary implication from the instruction, and we do not see how it could have been understood by the jury in any other way, or how its prejudicial effect was obviated by the giving of other instructions inconsistent therewith.

After mature consideration, we are satisfied with the views expressed in the opinion of the District Court of Appeal and adopt the same as the opinion of this court.

The judgment and order denying a new trial are reversed.

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GRAHAM et al. v. BAILARD, Road Commissioner, et al. (L. A. 2,275.)

(Supreme Court of California. Dec. 24, 1909.)

1. Appeal and Error (§ 1033*) — Harmless Error—Right to Urge Error—Error Favorable to Party Complaining.

In a suit against a road commissioner to enjoin the cutting away a bank on the side of the road, the question being whether the proposed work is on plaintiff's land, the court found that an order establishing the highway had been legally made, and did not include the land in question. *Held* that, on appeal by defendant, the plaintiff cannot question the correctness of such finding, but must concede the establishment of a valid order declaring a public highway.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4059; Dec. Dig. § 1033.*]

2. Highways (§ 53*)—Construction of Order Establishing Highway.

An order establishing a highway may merely designate a line without defining the width of the highway, and a road so described will be deemed a road of the minimum width prescribed by statute, and such a line will be deemed to refer to the center line of the road, in the absence of anything to indicate a contrary intention, but the intention to have the line mark a side of the road may appear from other parts of the description.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 159, 160; Dec. Dig. § 53.*]

3. Highways (§ 68*)—Restraining Improvement—Evidence—Location of Highway.

In a suit to restrain a road commissioner from cutting away banks on the side of a road adjoining plaintiff's land, evidence *held* not to sustain the findings of the court that the highway as described in the order establishing it includes only the land actually worked and traveled as a highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 227–233; Dec. Dig. § 68.*]

4. Highways (§ 79*)—Abandonment.

Where a highway is legally established, the fact that the ground has not been made fit for travel to the entire width does not amount to an abandonment of the portion not used.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 283, 284; Dec. Dig. § 79.*]

5. Eminent Domain (§ 170*)—Taking Land for Highway—Consent of Owners—Conformity to Law.

Under the road law, viewers were required to report the damage to lands over which the road was to run, the names of the landowners who consented to give the right of way, with their written consent, and the names of the landowners who did not consent, and that, where owners did not consent, the board of supervisors should fix the damages to be awarded them, and, if they accepted the same, the board might then make an order opening the highway, but, if any owner should not accept, a condemnation suit might be brought, and, when the title was acquired, the order declaring a highway might be made. A report of viewers stated that an owner consented only to one-half of the width, and that a road 50 feet wide would damage him materially and a communication by such owner annexed to the report protested against more than 25 feet being used, and consented only to the taking of that much. The report of the viewers was accepted. *Held*, that the order establishing the road which did not specify the width is invalid in so far as it purports to appropriate more than 25 feet in width along such owner's property, as in acquiring private property for highway purposes against the will of the owner the authority granted to the board must be strictly construed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 466; Dec. Dig. § 170.*]

6. Highways (§ 63*) — Establishment—Collateral Attack.

An order establishing a highway cannot be attacked in proceedings to restrain a road commissioner from cutting down banks on land upon the side of the road by showing that the order attempted to establish a highway of a less width than the minimum prescribed by law, and was therefore void.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 168; Dec. Dig. § 63.*]

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Lee Ealenor Graham and another against John W. Bailard and the City of Santa Barbara. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

W. P. Butcher, City Atty., H. C. Booth, and E. W. Squier, for appellants. W. S. Day, for respondents.

ANGELLOTTI, J. The plaintiff Lee Ealenor Graham, owning a tract of land in the county of Santa Barbara, commenced this action against the defendant Bailard, as road commissioner, to enjoin him from digging into and cutting away certain points and banks of land upon the side of a road adjoining plaintiff's land. The question in dispute is whether the location of the proposed work is on plaintiff's land, or whether it is within the limits of a public highway. Since the commencement of the action the boundaries of the city of Santa Barbara have been extended so as to include this territory, and the city has been joined as a party defendant. The land owned by Mrs. Graham is a tract of some 23 acres. It consists of the westerly end of a mound or hill, sloping more or less abruptly to the north, west, and south. On the south it is bounded by the Santa Barbara channel. A road, known as the East boulevard, runs easterly along the shore of the channel from the city of Santa Barbara, until it strikes a point on the westerly front of the mound, there connecting with a road which skirts the foot of the mound along its westerly and northerly sides, and runs, in part, between the mound and a salt pond. The work proposed to be done by the defendants is the cutting off and leveling of portions of the hill, consisting of points or projections of earth adjoining this latter road, with a view to elevating and widening the road.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The complaint alleges that these points or projections are within the limits of Mrs. Graham's property. The answer asserts that they are within the boundary lines of the highway. The road as actually marked out and traveled upon the ground does not include the ground in dispute. The defendants allege, however, that there was a legally established highway of a width sufficient to include it, and base their claim in this regard upon the creation of such highway, first, by proceedings taken under Pol. Code, § 2681 et seq.; second, by dedication; and, third, by prescription. The court found that there never had been any road laid out or established either by judicial or legislative action or acquired by dedication or prescription over the premises of the plaintiff other than the present road as now opened, maintained and traveled. Judgment was entered, enjoining the defendants as prayed in the complaint. The defendants appealed from the judgment within 60 days after its entry, and bring up the evidence by means of a bill of exceptions.

It is urged that the evidence fails to support the findings. While the appellants contend for a highway both by dedication and by prescription, they rely in the main upon the position that the highway, to the extent claimed, was established as the result of proceedings taken by the board of supervisors.

The findings in regard to this, in addition to the general finding set forth above, are that on the 21st day of July, 1877, the board of supervisors made and entered an order declaring certain land to be a public highway, and directing the roadmaster to open the same, "that said road as declared, laid, and established was not of the uniform width of 50 feet nor was it entirely on the southeast side of the said line [the line described in said order], but was bounded by the salt pond on the northerly and westerly sides and the foot of the hill on the southerly and easterly sides"; that a road was thereupon laid out in full accord with said order which has ever since been well defined and open and worked for its full width, but none of the projections and points of earth upon which defendants are alleged to be trespassing are within said road "as declared or as laid out"; that said board by said order "did * * * establish and cause to be located a public highway," but that the same was the road as actually laid out on the ground and worked and traveled, and no other. These findings must be read in connection with the general finding first quoted, and show what was meant by the court when it found that there had never been any road laid out or established on the premises of Mrs. Graham other than the present traveled road.

All these findings are attacked by defendant. It is apparent that such findings concede and establish for all of the purposes of this appeal the validity of all of the proceedings for the establishment of a public highway to and including the order purporting to declare the same. On this appeal by defendants from a judgment in favor of the plaintiffs, plaintiffs are not, of course, in a position to question the correctness of these findings. For the purposes of this appeal, they must concede that the findings conclusively establish a valid order declaring a public highway. Defendants claim that the public highway as described in the order includes more than the land now actually worked and traveled as a public highway. The findings of the trial court are against them on this proposition, being in effect, as we have seen, that the highway described in the order is the road actually laid out and used and traveled on the ground, and that it included no more ground. The only question is, then: What land did the description in the order include? We are satisfied that the findings of the trial court upon this particular question are not sustained by the evidence.

The description of the road, as contained in the order, is as follows: "Commencing at a point from which the northwest corner of the Santa Barbara cemetery bears south 37 links distant. Thence 1st. S. 50¾° W. 8.53 chains thence 2nd S. 75¼° W. 6.51 chains To a stake from which an oak tree one foot in diameter bears S. 32¼ W. 74 links distant Thence along south side of Salt Pond the north foot of the hill. 3rd S. 80⅜° W. 2.65 chains to a stake. 4th. S. 85° W. 2.48 chains to a Stake. 5th. S. 85¼° W. 7.50 chains to a stake. 6th. S. 77¾° W. 1.95 chains to a stake, being a stake set in the partition of the estate of George Nidever deceased. 7th S. 44° W. 4.50 chains to a stake. 8th S. 19¾° W. 5.03 chains to a stake. 9th S. 8¼ W. to high water mark of the Santa Barbara Channel, as surveyed by A. S. Cooper whose report accompanies papers on file, and map of the proposed road." The width of the road in feet is not stated in the order; the whole description therein being as above set forth. Defendants' claim is that the order did not attempt to define its width, but only a line along its length. This is permissive in highway proceedings where a minimum width of highway is prescribed by statute. Where a road is so described, it will be deemed to be a road of the minimum width prescribed by statute in the absence of anything showing to the contrary. Elliott on Roads and Streets (2d Ed.) § 381; Crowley v. Board of Com'rs, 14 Mont. 292, 36 Pac. 313; Hentzler v. Bradbury, 47 Pac. 330; Willis v. Sproule, 13 Kan. 257. At the time of these proceedings, section 2710 of the Political Code provided that all highways must be at least 50 feet wide excepting those now existing of a less width. A single line of length being given and the width being determined, the exact location of the road cannot be fixed until it is known whether the line described marks the center, or one or the other side of the road. In the absence of anything to indicate a contrary intention such line will be deemed to refer to the center line of the road. Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87. The intention to have the line mark a side of the road may appear, however, from other parts of the description. 15 A. & E. Ency. of Law (7th Ed.) p. 384; McDonald v. Payne, 114 Ind. 359, 16 N. E. 795; Freshour v. Hihn, supra. Defendants further claim that it clearly appears, when the description is considered in connection with the viewers' reports and map to which it refers, that the line given was intended to mark the northern and western line of the road, and that the whole of the road lies to the south and east thereof. The claim of plaintiffs, sustained to the letter by the findings, is that the order described a road limited in width by the "south side of Salt Pond" on the one side and the "north foot of hill" on the other. The latter construction, as the evidence very clearly shows, will give a strip of very irregular width, in many places several feet less than 25 feet.

The claim of plaintiffs in this regard is based entirely on the words, "thence along south side of Salt Pond the north foot of hill," following the second course, and forming apparently a part of the description of the third course. They say, and the court found, that this is a limitation of width, and was intended to define a road which should be bounded on the one side by the edge of the pond and on the other by the foot of the hill.

We do not find any reasonable support for the latter construction. It is not reasonable to suppose that the surveyor in laying out a road intended to define the width of a small part only of the road, leaving the other undefined, or that the viewers, or the supervisors, in adopting this description, intended to make any such limitation. The construction sought to be placed on these words by plaintiffs is not even the natural and reasonable interpretation. They appear to be only additional terms showing the course and direction of the line of the road, serving to make more certain by reference to fixed natural monuments. The documents referred to, and, in effect, made a part of the order—i. e., the report of the surveyor and the map attached to the report of the viewers—clearly show that plaintiffs' construction is without support, and also that the line described was the northerly and westerly line of the road. The map shows the nine stations referred to in the field notes, and a series of straight lines, in black, connecting them. South and east of these lines and parallel to them are a series of similar lines marked in red ink. The locations of these lines on the map indicate, at a glance, that they are meant to mark the sides of the road, and that the black lines (i. e., those referred to in the field notes) represent the northerly and westerly boundary, and the red the southerly and easterly boundary of the proposed road. The map further shows that the red lines were so drawn as to indicate a road fifty feet in width the whole length. The viewers' report had annexed to it the written consent of Jarrett T. Richards, then the owner of the westerly and larger part of plaintiffs' property, that a road 25 feet in width be located over his property "southeast of the line run by the surveyor, shown on map by black line," and his statement that he would claim no damage therefor, but that he protested against the creation of the road "as made by the viewers." In their report the viewers, stating as required by the law the names of landowners who consent, said that Jarrett T. Richards consented "to ½ of the width." They further said: "We consider the 25 feet in width consented to by Mr. Richards to be an ample width. If a road was made 50 feet in width, it would damage Mr. Richards' property materially." The description in the petition for a road does not materially tend to support plaintiffs' claim. In the light of all this, it is impossible to come to any other conclusion than that the description in the order was simply a description of the northerly and westerly line of the proposed road. Whether the road thus described in the order was a road 50 feet or 25 feet wide throughout its entire length, or a road 50 feet wide except in front of Mr. Richards' property, and there only 25 feet wide, is another question, the determination of which is not material to the particular question we have been discussing. In any event, the findings already referred to are unsupported by the evidence, and, as they are essential to the judgment on the record on this appeal, the judgment must be reversed. It is well settled that, where a highway is legally established by proper proceedings, the mere fact that the ground has not been graded and made fit for travel to the entire width does not amount to an abandonment of the portion not used. Moore v. Roberts, 64 Wis. 538, 25 N. W. 564; McClelland v. Miller, 28 Ohio St. 488; Wolfe v. Sullivan, 133 Ind. 331, 32 N. E. 1018; Humphreys v. Mayor, 48 N. J. Law, 588, 7 Atl. 301; Hentzler v. Bradbury, 5 Kan. App. 1, 47 Pac. 330. Upon a new trial, the question of the exact width of the road will probably be an important one, as well as the question of the validity of the order whether it be construed as purporting to establish a road 50 feet wide on the property formerly owned by Richards, or a road only 25 feet wide on the Richards' property and 50 feet wide elsewhere, or a road 25 feet wide throughout.

It is clear to us that the order must be held invalid in so far as it may purport to appropriate in front of Richards' property more than 25 feet in width lying south and east of the line described. In acquiring private property for highway purposes against the will of the owner, the authority granted to a board or tribunal must be strictly pursued, and an order purporting to open a road in such a case is void unless the requirements of the statute have been substantially complied with. Damrell v. Board of Supervisors, 40 Cal. 154; County of Sonoma v. Crozier, 118 Cal. 680, 682, 50 Pac. 845. It affirmatively appeared on the face of this order that Mr. Richards had consented and waived damages only so far as appeared by the report of the viewers. Under the road law, the viewers were required to report an estimate of the damage to the owners of the lands over which the road was to run, the names of the landowners who consented to give the right of way with their written consent, and the names of the landowners who did not consent. They reported that Mr. Richards consented only "to ½ of the width," and that a road 50 feet wide would damage him materially. His own writing annexed was a vigorous protest against more than 25 feet, and a consent only to the taking of 25 feet. The road law further provided that, where owners did not consent, the board of supervisors should fix the amount of damages to be awarded them, and set the same apart in the treasury for them, and that, if they accepted the same, the board might then make an order declaring the public highway, but, if any owner should not accept, a condemnation suit might be brought, and, when the title was acquired, the order declaring a highway might be made. In this proceeding the board made the order on the theory that Richards was a consenting owner and without making any allowance whatever for the damage accruing to him. Of course, they could not take any of his property without his consent in this way, and any order purporting to do so would be invalid. The provisions of the road law stating these requirements were designed to safeguard the owner against any violation of his constitutional rights, and substantial compliance with them was essential to a valid order taking his property. Richards' written consent to the taking of a road 25 feet wide would probably estop him and his successors from alleging any invalidity in the order so far as that width is concerned, especially now that a road has been constructed.

But we do not think that the order should be construed as purporting to take more than 25 feet in width along Richards' property. To so construe it would attribute to the board of supervisors an intention to take a portion of his property against his consent without compensation. The viewers' report was clear and explicit so far as their intention in the matter was concerned. They said that they considered the 25 feet in width consented to by Mr. Richards to be "an ample width," and that to make the road 50 feet in width would damage him materially, and it was clearly on that theory that they made him no allowance for damages. The law requires that the board of supervisors should approve or reject the viewers' report, and provided that, if they approved it, they may proceed in the matter of opening the road. They did order the report "accepted," and so proceeded, all of which necessarily implies an approval of the report. This conclusion involves, of course, the holding that the board intended to make a road of less width, in part at least, than the minimum prescribed by law, the contrary of which should be presumed in the absence of a showing otherwise. We are of the opinion that the record of the proceedings does so show.

It is suggested that an order declaring a public highway of less width than the minimum prescribed by law would be void. While such an objection might be effectual in a proceeding seasonably brought, we think the more reasonable view to be that the proceedings may not be impeached for this reason on a collateral attack, especially when the road has been constructed and traveled and acquiesced in for a long period of years. See Elliott on Roads and Streets (2d Ed.) § 381.

We are further of the opinion in the light of the record that the limitation as to width can be regarded only as applying exclusively to the Richards' property. If we are correct in our views as to the proper construction of the order, it is clear that there can be no force in the claim that there has been any dedication or acquirement of an easement by prescription as to any of the Richards' property more than 25 feet from the line described in the order, except in so far as any of such property is included in the road as actually used for highway purposes.

There is no other matter that requires attention for the purposes of a new trial.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

157 Cal. 30

CITY OF LOS ANGELES v. LELANDE, City Clerk. (S. F. 5,430.)

(Supreme Court of California. Dec. 22, 1909.)

1. Municipal Corporations (§ 106*)—Officers—City Clerk.

The city clerk of Los Angeles is a ministerial officer who must sign every ordinance duly passed, regardless of any views which he may entertain as to its legality.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 106.*]

2. Mandamus (§ 176*)—Compelling the Signing of City Ordinance.

The mandate directed against the city clerk of Los Angeles for his refusal to sign an ordinance duly passed may properly go no further than to order him to perform the plain duty of signing it.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 392; Dec. Dig. § 176.*]

In Bank. Petition by the City of Los Angeles for a writ of mandamus against Harry J. Lelande, city clerk thereof. Denied.

See 104 Pac. 717.

Leslie R. Hewitt, City Atty., and John W. Shenk, Asst. City Atty., for petitioner. W. B. Mathews, for respondent.

PER CURIAM. The petition is denied. The application is within the precedent established by City of Los Angeles v. Hance, 137 Cal. 490, 70 Pac. 475, but the court is of the opinion that this decision should not be followed. The city clerk is a purely ministerial officer, whose duty it is to sign any and every ordinance which has been duly passed, regardless of any views which he may entertain as to its legality or illegality. Mandate directed against the clerk for his refusal to sign an ordinance could properly go no further than to order him to perform his plain duty, and any discussion touching the legality or illegality, constitutionality or unconstitutionality, of the ordinance in question would be the merest obiter, binding upon no one, and not determinative of any rights.

(157 Cal. 31)

LLEWELYN v. LEVI. (L. A. 2,248.)

(Supreme Court of California. Dec. 23, 1909.)

1. New Trial (§ 61*)—Grounds—Failure to Make Findings.

Where plaintiff contracted to sell land to defendant for $10,000, and deposited a deed in escrow, to be delivered if defendant made certain payments within fixed dates, and the parties made a further agreement that up to the date for the last payment the property might be sold for any sum not less than $12,000, the profit to be divided equally, and the defendant orally agreed to use his best endeavor to sell the property at the highest price obtainable, and no sale was made, but defendant agreed to take the property at $15,000, paying plaintiff one-half the difference, but plaintiff alleged that defendant failed to make any fair and reasonable effort to sell the land, and that if he had made such effort, he would have sold it for $20,000, or more, and this was denied by the answer, the failure of the court to find on the issue thus made requires a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 127; Dec. Dig. § 61.*]

2. Partnership (§ 7*)—What Constitutes.

An agreement between a seller and purchaser of land that it might be sold for an advanced price at any time before the time fixed for the last payment of the purchaser, and the profit should be shared between them, constituted them partners in the enterprise of resale.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 20; Dec. Dig. § 7.*]

3. Partnership (§ 70*)—Mutual Rights and Liabilities.

Under Civ. Code, §§ 2410, 2411, partners are trustees for each other, and in proceedings connected with the conduct of the partnership, each is bound to act in the highest good faith to his copartner and may not obtain any advantage by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 114; Dec. Dig. § 70.*]

4. Partnership (§ 96*)—Partnership Property—Rights of Partners.

A partner has no right to deal with partnership property other than for the benefit of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 144; Dec. Dig. § 96.*]

5. Partnership (§ 79*)—Mutual Rights—Sale of Property.

Where a purchaser of land agreed to use his best endeavors to sell the land at an advanced price, the profit to be divided with the vendor, he had no right to refrain from selling at the best price obtainable, exceeding the minimum fixed by the agreement, for the reason that he thought the property was worth more than the price offered, and for the purpose of making a greater profit for himself.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 127; Dec. Dig. § 79.*]

6. Partnership (§ 79*)—Mutual Rights—Sale of Property.

The obligation of a purchaser, under an agreement with a vendor of land, to resell the land for the best price obtainable, was not affected by the receipt of a telegram from the vendor advising him to accept a certain price.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 127; Dec. Dig. § 79.*]

7. Accord and Satisfaction (§ 20*)—Validity.

Where plaintiff sold land to defendant for $10,000, with an agreement that defendant should use his best endeavors to find a purchaser therefor at not less than $12,000, the profit to be divided between them, and defendant, having procured an offer of $15,000, which plaintiff was willing to accept, falsely reported that the offer had been withdrawn, and offered to take the land at $15,000, paying plaintiff his share of the advance in the price, where plaintiff claimed that defendant, by fair effort could have sold the land for $20,000 or more, on which issue the court made no finding, the settlement at $15,000 is of no avail to defendant.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 140; Dec. Dig. § 20.*]

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by William Llewelyn against Adolph Levi. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

J. Wade McDonald, for appellant. Sam Ferry Smith and Collier, Smith & Hoff, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendant, and an order denying plaintiff's motion for a new trial. The action was one to obtain judgment setting aside a settlement of their differences, previously had between the parties, on the ground that the same was procured by fraudulent misrepresentations on the part of defendant, and for the amount of $5,000 alleged to be the true amount due from defendant to plaintiff.

In view of the condition of the pleadings and certain unassailed findings of the trial court there can be no dispute as to certain material facts. On July 12, 1906, plaintiff was the owner of certain real property in the city of San Diego. On that day he entered into an agreement with defendant in regard to said property, evidenced by two writings signed by both parties. One of these was an agreement for the sale of the property by plaintiff to defendant, for $10,000, payable $2,500 cash, the receipt whereof was acknowledged, $2,500 within 30 days, and $5,000 "on or before the 1st day of January, A. D. 1907." This agreement recited that plaintiff had executed a deed to defendant, to be held in escrow by the First National Bank of San Diego, for delivery to defendant if he paid to the bank or plaintiff $2,500 on or before 30 days from July 12, 1906, and $5,000 on or before January 1, 1907, with interest, and if such payments were not made the deed was to be redelivered to plaintiff. It was further provided therein that plaintiff was to have the use and occupancy of the premises until January 1, 1907, paying therefor $40 per month from August 1, 1906. The other writing was an agreement between defendant, as party of the first part, and plaintiff, as party of the second part, which, after reciting the sale by plaintiff to defendant and the deposit of the deed in escrow, and, further, "whereas, said parties are to share in the profits of a sale of said property, if sold prior to the first day of January, A. D. 1907," provided: "It is therefore understood by and between said parties, that the said property may be sold at any time before the 1st day of January, A. D. 1907, for a sum of not less than $12,000, and if so sold, that out of the proceeds of said sale said sum of $10,000 as aforesaid shall be paid to the said party of the first part, together with interest thereon from this date, at the rate of 6 per cent. per annum, and all sums over said $10,000 and said 6 per cent. per annum (exclusive of expenses of sale) are to be divided equally between said parties. That is to say, to the said party of the first part one-half thereof, and to said party of the second part one-half thereof. It is further understood and agreed, that if a sale of said premises is not made prior to the 1st day of January, A. D. 1907, that all the interest, rights and equities of said party of the second part under this agreement shall cease, end and determine."

At the time of the execution of these agreements it was understood between the parties that plaintiff was intending to leave San Diego county and go into the northern part of the state, and the defendant "verbally promised and agreed that he would use his best endeavors to sell said property during the life of said agreements for the highest price obtainable therefor, and said plaintiff did leave said county and remained away therefrom continuously, except for a period of two weeks during the latter part of the month of August and the early part of the month of September, and for about two days in the month of November, 1906, during which visits similar conversations to those had at the time of the execution of said agreements were had between said parties." The deed was deposited in escrow as provided. On August 22, 1906, defendant paid to the bank the $2,500 installment, and on December 24, 1906, he paid to the bank the $5,000 installment, whereupon the deed was delivered to him.

It is alleged in the complaint, and must be deemed admitted by the form of denial in the answer, that during the latter part of the month of December, 1906, much of the property in the city of San Diego made a rapid and permanent increase in value and price, and that this property had attained a market and selling value of practically $20,000. There is no finding on this, but the evidence is all one way, to the effect that this property had a market value of $20,000 during the last 12 or 14 days of December, 1906. On December 18, 1906, Charles S. Hardy made, through one Walsh, a real estate agent, a cash offer of $15,000 for this property, less the agent's commission of 5 per cent. Defendant, on receiving this offer, telegraphed plaintiff as follows: "W. Llewelyn, Asti, Sonoma Co., Cal. Have sold lots fifteen thousand ($15,000) dollars. Are you satisfied? Answer quick. Adolph Levi." On receiving this message, plaintiff, on December 20, 1906, telegraphed defendant as follows: "A. Levi, San Diego, Cal. Satisfied. Sell, though might bring more later. W. Llewelyn." Defendant thereupon refused to accept Mr. Hardy's offer "for the reason that he believed the same to be worth more money," and offered it to Hardy for $20,000, which offer was not accepted. Defendant never received any bona fide cash offer other than Mr. Hardy's $15,000 offer. On December 24, 1906, according to the findings, he "elected to take said property to himself" for the sum of $15,000, believing, the court found, that he had a legal right to do so, inasmuch as plaintiff had indicated his willingness to sell for that sum. He apparently did not notify plaintiff of his "election." Plaintiff returned to San Diego in January, 1907. He was informed by defendant that the offer of $15,000 by Mr. Hardy had been withdrawn by the purchaser because of the delay in the receipt by defendant of plaintiff's reply to the telegram, and that he had not been able to sell the property prior to January 1st for any sum greater than $15,000. He said that he was willing to take the property himself at the sum of $15,000, and would pay plaintiff one-half the difference between that price and $10,000, provided plaintiff would allow defendant one-half of the commission which would have been paid to a real estate agent for making the sale at $15,000. Plaintiff believed and relied on all the statements of defendant, and had no knowledge whatever to the contrary, and, relying thereon, agreed to a settlement. The defendant gave to plaintiff his promissory note for $2,250, and plaintiff executed and delivered to defendant a writing reciting that the parties "have this day settled all matters and differences between them, arising out of the sale," etc., except a certain matter of taxes, which has since been settled.

It was substantially alleged in the complaint that the property could have been sold for $20,000, or more, between the 15th day of December, 1906, and the 1st day of January, 1907, if the defendant had made any reasonable and fair effort to so sell it, and that the defendant failed to make any reasonable or proper effort to sell it for $20,000, or any other sum or amount whatever above the sum of $15,000, after December 18, 1906, and before January 1, 1907. All this was denied by the answer. The trial court failed to find on the issue thus made, although there was evidence which would have sufficiently sustained a finding in accord with the allegations of the complaint. The failure of the trial court to make any finding on this issue is assigned as a particular in which the decision is against law. Plaintiff sought by this action to recover the amount in which he had been damaged by the alleged fraudulent failure of defendant to perform his agreement. In view of the facts stated we are satisfied that the issue last referred to was most material, and that, owing to the failure of the trial court to find thereon, a new trial must be had.

The intent of the agreement of the parties is clear and unmistakable. Plaintiff's views as to the probable real value of his property were such that he was unwilling to part with it for $10,000, except upon the condition specified in the second paper, and defendant's consent to this condition was, of course, a material part of the consideration for the agreement to sell. That condition was, in substance, that the plaintiff and defendant were to share equally in the profits of any sale that could be made of the property prior to January 1, 1907, for $12,000 or more. The effect of this was to constitute them partners until January 1, 1907, in the enterprise of a resale of this property, at a profit for their mutual benefit, with the proviso that no resale was to be made for less than $12,000. It was the understanding and agreement of the parties, relied on implicitly by plaintiff, that, owing to the proposed absence of plaintiff, the defendant was to assume the burden of endeavoring to make such sale, and defendant promised "that he would use his best endeavors to sell said property during the life of said agreements for the highest price obtainable." Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner, and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. Civ. Code, §§ 2410, 2411. A partner has no right to deal with partnership property other than for the sole benefit of the partnership. Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135. Under the agreement it was the plain duty of defendant to plaintiff to make all reasonable and proper effort to sell the property prior to January 1, 1907, for the best price obtainable. He had no right to refrain from selling for the best price obtainable (if that price exceeded the minimum fixed by the agreement), for the reason that he thought the property was worth more than the amount offered. If he could by reasonable and proper effort sell for $12,000 or more prior to January 1, 1907, he must do so for the common profit of himself and his partner, and it was his plain duty to his partner to obtain the best price which was, in his judgment, obtainable. He could not abstain from doing this for the purpose of making a greater profit for himself. If he did so abstain, he would be guilty of fraud against his copartner, and liable to him for the damage caused thereby. His obligation in this regard continued to January 1, 1907, notwithstanding the telegram from plaintiff relative to Mr. Hardy's offer.

There appears to be some claim that, inasmuch as plaintiff by his telegram signified his willingness that the offer of $15,000 be accepted, defendant was released from the necessity of making further effort to sell for a higher price, and given the right to elect to close the partnership transaction and retain the property himself upon the theory of a resale for $15,000, although he then believed the property to be worth in the market more than that sum, which is what the court finds he did. But plaintiff had not given his consent to any such course. He had done no more than to indicate his assent that his partner might, if he thought it best for their mutual interests, sell the property to some third party for the sum of $15,000, and this assent was given in response to a communication from defendant, which was calculated to impress plaintiff with the belief that defendant deemed it best for their common interest that such sale to a third person should be consummated. When defendant refused to accept the $15,000 offer, the obligation created by the partnership agreement continued to exist. If defendant thenceforth secretly repudiated his trust, and willfully refrained from further effort to sell for the benefit of the partnership, with the intention and for the purpose of making a greater profit for himself, it appears clear that he should be held liable to account to his partner, upon the theory of a resale made for the highest sum that he would have obtained for the property prior to January 1, 1907, if he had made all reasonable and fair efforts to sell it. The damage to plaintiff was the amount of which he was deprived by the failure of defendant to make such a sale. We think the principles enunciated in King v. Wise, 43 Cal. 628, Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135, and Calmon v. Saraille, 142 Cal. 638, 642, 76 Pac. 486, require the conclusion we have reached.

In the absence of a finding upon the issue we have been discussing, the subsequent settlement between the parties of their differences cannot avail defendant. According to the findings said settlement was procured by the positive statement of defendant to plaintiff that the offer of $15,000 had been withdrawn by the proposed purchaser "because of the delay in the receipt by the defendant of plaintiff's reply to said telegram," which statement, it appears from what has already been said, was untrue, and by the further material positive statement of defendant that he had not been able to sell said property to any person prior to the 1st day of January, 1907, for any sum greater than $15,000, as to the truth of which we have no finding, although that matter was directly in issue under the pleadings.

We consider it unnecessary for the purpose of this appeal to discuss the other points made, further than to say that we cannot, upon the record, order judgment entered for plaintiff upon the findings. Defendant's liability, if any, for any sum in excess of what would have been realized by plaintiff upon a resale for $15,000, depends upon the determination of the question whether by reasonable and proper effort defendant could have made a sale for any higher sum, and if so, then for what amount. This matter, as we have seen, is not settled by the findings as they stand.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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157 Cal. 1

KEECH v. JOPLIN, County Treasurer.

(L. A. 2,358.)

(Supreme Court of California. Dec. 17, 1909. Rehearing Denied Jan. 13, 1910.)

1. COURTS (§ 212*)—APPELLATE JURISDICTION—COURTS OF CALIFORNIA.

Const. 1904, art. 6, § 4, provides that the Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in justices' courts, and in all cases at law involving the title or possession of real estate, or the legality of any tax, or in which the demand, exclusive of interest or the value of the property in controversy, amounts to $2,000, and gives the District Courts of Appeal jurisdiction in all cases at law in which the demand amounts to $300, and does not amount to $2,000, and in mandamus, certiorari, and prohibition proceedings. *Held*, that the District Courts of Appeal have appellate jurisdiction in all cases specifically mentioned as belonging to its jurisdiction, although they may incidentally involve the questions over which the Supreme Court has been given jurisdiction, and that a proceeding by mandamus to compel the county treasurer to pay a warrant is appealable to the District Court of Appeal, though a defense was interposed on the ground of the invalidity of the tax by which the fund was raised out of which the warrant was payable.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

2. COURTS (§ 488*)—SUPREME COURT—TRANSFER FROM DISTRICT COURT OF APPEAL.

A proceeding by mandamus, to enforce payment of a warrant drawn on the funds of a protection district, was properly appealed to the District Court of Appeal, but was erroneously transferred to the Supreme Court because the validity of a tax was involved. The case was regularly ordered submitted to the Supreme Court by agreement of parties at a prior term, to take effect when briefs were filed; the Supreme Court not being then informed that the appeal had been first taken to the other court. *Held* that, the briefs having been filed, and the case being ready for disposition, the Supreme Court would retain the appeal, and formally order a transfer from the District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 488.*]

3. STATUTES (§§ 107, 123*)—SUBJECTS AND TITLES OF ACTS—EXPRESSION OF SUBJECT IN TITLE.

An act, approved February 23, 1907 (St. 1907, p. 16, c. 25), entitled "An act providing for the organization and government of districts for the protection of lands of farming or other communities or neighborhoods within this state from overflow or damage from the waters of any unnavigable stream, water course, canyon or wash extending by, through or over such communities or neighborhoods and to provide for the acquisition of lands, rights of way and other property by purchase, gift or condemnation and for extending, straightening, locating, improving, and maintaining the channels of such streams, water courses, canyons or washes and confining said waters in such channels and preventing the overflow thereof and for the construction by such districts of the necessary works for such purposes," is not unconstitutional either on the ground that the title embraces more than one subject, or that the subjects in the act are not expressed in the title, because there is no mention in the title of the calling and holding of elections, levying and collection of taxes, assessment of property, voting and issuing of bonds, qualifications of electors, and certain matters of procedure in civil actions, which are provided for in the act; the details not mentioned in the title being merely incidental to the main subject.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. §§ 107, 123.*]

4. CONSTITUTIONAL LAW (§ 65*)—DISTRIBUTION OF GOVERNMENTAL POWERS—DELEGATION OF LEGISLATIVE POWERS.

An act, approved February 23, 1907 (St. 1907, p. 16, c. 25), to provide, govern, and maintain local districts for the protection of lands from overflow or damage from the waters of an unnavigable stream, which provides that, "This act is not intended to supersede or repeal any other act for the organization of reclamation or protection districts or for protection purposes, but is intended as an independent and alternative means of effecting the protection herein provided for, where the provisions of this act are most favorable or desirable to the parties interested," is not rendered void by such provision on the ground that it makes the existence of the law as a statute in force depend on the action or nonaction of the persons who may be concerned, so as to be an unauthorized delegation of the legislative power, as this is not the effect of such provision, but its purpose is merely to prevent complications which arise from the enactment of a new law upon the subject to which previous laws also apply.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 65.*]

5. CONSTITUTIONAL LAW (§ 46*)—VALIDITY OF STATUTE—QUESTIONS CONSIDERED—MATTERS NOT NECESSARY TO DECISION.

The validity of an amendment to the act approved February 23, 1907 (St. 1907, p. 16, c. 25), which provides that any owner of land in a district for protection of lands from the overflow of an unnavigable stream may vote, although he may not be a resident therein, will not be considered on appeal in mandamus proceedings to compel the county treasurer to pay a warrant issued on the fund of one of those districts, where it is conceded that the election in question was not affected by the votes of landowners not residing in the district.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 46.*]

6. STATUTES (§ 143*)—AMENDMENT—VALIDITY—EFFECT ON ACT AMENDED.

Act Feb. 23, 1907 (St. 1907, p. 16, c. 25), providing for the establishment, government, and maintenance of local districts for the protection of lands from overflow or damage from the waters of unnavigable streams, was amended in section 6 (St. 1907, p. 850, c. 464) so as to permit an owner of land in such district, though not resident therein, to vote at elections held under the act. *Held* that, even if the amendment were invalid for any reason, its invalidity would not affect the act which it purported to amend.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 211; Dec. Dig. § 143.*]

7. STATUTES (§ 97*)—GENERAL OR SPECIAL LAWS—CREATION OF SPECIAL DISTRICTS.

Act approved February 23, 1907 (St. 1907, p. 16, c. 25), to provide, govern, and maintain local districts for the protection of lands from overflow or damage from the waters of any unnavigable stream, is not invalid as special legislation, by reason of the fact that districts may not be organized in every county, and that the rules of procedure are fixed for the class of actions authorized by the act, as it is no violation of the constitutional provision against special legislation to provide particular rules of procedure applicable only to peculiar proceedings; and, if these provisions were invalid, they would not render the statute void, as they are not vital to the main purposes of the statute, nor essential to its practical operation.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 97.*]

8. LEVEES (§ 7*)—FLOWAGE—ORGANIZATION OF PROTECTION DISTRICTS—"COMMUNITY"—"NEIGHBORHOOD."

Act approved February 23, 1907 (St. 1907, p. 16, c. 25), provides that whenever 50 or a majority of the owners, who are also the owners of a majority of the lands of any farming or other community or neighborhood within this state, which lands lie in one body, and are liable to overflow or damage from the waters of any unnavigable stream, and may be protected by the same system of works, desire to provide for the protection of such lands, they may petition the board of supervisors in the county in which the lands of the community or neighborhood and within the proposed district or the greater portion thereof are situated for the organization of such protection district. *Held*, that these provisions do not limit the area of any district to a territory which might afterwards be determined by a court to be a single community or neighborhood, or give the court power to declare the district organization invalid if it should find that the boundaries included two or more such communities or neighborhoods, as the term "community" refers rather to the people who reside in a given locality, in more or less proximity, than to the territory which includes them, and the term "neighborhood" describes a territory of indefinite size and without fixed limits, and therefore a district may be organized which embraces two or more communities or neighborhoods, provided the lands lie in one body, and are liable to damage from the same stream and may be protected therefrom by the same system of works.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 2, pp. 1342, 1343; vol. 5, pp. 4773-4775.]

9. LEVEES (§ 6*)—FLOWAGE—ORGANIZATION OF PROTECTION DISTRICTS.

Act approved February 23, 1907 (St. 1907, p. 16, c. 25), provides for the organization and maintenance of local districts for the protection of lands from overflow or damage from the waters of any unnavigable stream, and requires that the petition for the organization of such district "shall pray that the same be organized under the provisions of this act." A petition for the organization of a district stated that the petitioners proposed the organization of a district under an act "duly approved February 22, 1907," and set out the title of the act in full. There was no other statute of the state so entitled, and there was no statute of any kind approved on February 22, 1907. *Held*, that the identification of the act was complete and the error in the date immaterial.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 6.*]

10. LEVEES (§ 32*)—APPORTIONMENT OF TAXES—LEVEE FUNDS—POWER OF TREASURER.

Act Feb. 23, 1907 (St. 1907, p. 16, c. 25), which is an act to provide, govern, and maintain local districts for the protection of lands from overflow or damage from the waters of any unnavigable stream, in section 45 directs the creation of a bond fund, a construction fund, a general fund, and a funding fund, and declares that the moneys properly belonging to these funds shall be apportioned to them by the treasurer. A district levied a certain rate of tax for the bond fund, and an additional rate for the general fund, but the treasurer arbitrarily transferred to the bond fund the whole amount collected. *Held*, that he exceeded his power, as his authority was simply to apportion to the funds the moneys properly belonging to them, and give to each the proper proportion of the money received in the payment of the general taxes calculated upon the rate fixed for that fund.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 32.*]

11. LEVEES (§ 22*)—VALIDITY OF TAX.

Act approved February 23, 1907 (St. 1907, p. 16, c. 25), which provides for the organization and maintenance of local districts for the protection of lands from overflow or damage from the waters of an unnavigable stream, in section 45 directs the creation of a bond fund, a construction fund, a general fund, and a funding fund, and declares that moneys properly belonging to these funds shall be apportioned to them by the treasurer. *Held* that, if the tax laid to pay the interest on the bonds is illegal because at the time of its levy and collection no bonds had been sold, the legality of the tax for the general fund will not be affected thereby.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 22.*]

12. LEVEES (§ 6*)—LEVEE DISTRICT—ORGANIZATION—COLLATERAL ATTACK.

In mandamus proceedings to compel a county treasurer to pay a warrant on the general fund of a district organized under act approved February 23, 1907 (St. 1907, p. 16, c. 25), for the purpose of protecting lands from overflow or damage from the waters of an unnavigable stream, the defendant cannot show that the signers to the original petition for the organization of the district did not own a majority of the lands of the district, where the recital in the record of the proceedings before the board upon the petition is that the board determined that the petition complied in all respects with the law, as the validity of the organization can be questioned only in a proceeding in quo warranto at suit of the state.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 6.*]

In Bank. Appeal from Superior Court Orange County; S. W. West, Judge.

E. E. Keech brought mandamus proceedings against J. C. Joplin, County Treasurer of Orange County. From a judgment for plaintiff, defendant appeals. Affirmed.

Transferred from Court of Appeal to Supreme Court. 9 Cal. App. 217, 101 Pac. 417.

H. C. Head, B. T. Williams, and Hutton & Williams, for appellant. E. E. Keech, in pro. per.

SHAW, J. The defendant appeals from a judgment in mandamus directing him to pay to the plaintiff the sum of $500 out of the money in his hands as county treasurer, belonging to the general fund of the Newbert Protection District, in satisfaction of a warrant for that sum issued to the plaintiff by the directors of said district. The appeal was taken to the District Court of Appeal for the Second District. The fund of the district, alleged to be in defendant's hands and applicable to the payment of the plaintiff's warrant, was raised by taxation of the property within the district. The Newbert Protection District was organized under the provisions of an act approved February 23, 1907 (St. 1907, p. 16, c. 25), and is a public corporation, or state agency, designed to make and maintain such protective works and structures as may be necessary and convenient to prevent damage to land and property from the waters of streams. One of the alleged defenses to the action is that the tax aforesaid was invalid because it was levied at the same time and by the same order as an additional levy to raise money to pay interest on bonds of the district. This additional levy is said to be invalid because at the time it was ordered no bonds had been issued, and the argument is that the invalidity of the bond interest tax vitiates the tax for the general fund. The district court, deeming itself without jurisdiction because the validity of this tax was involved, transferred the case to this court. We will first consider whether or not that court had jurisdiction.

The successive provisions of the state Constitution giving appellate jurisdiction to the Supreme Court have been productive of not a little difficulty in their application and construction. The Constitution of 1849 (article 6, § 4) gave it appellate jurisdiction "in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax (etc.) is in question, and in all criminal cases" of felony. It was held that the first clause of this sentence was independent of the second, so that the court had jurisdiction where the matter in dispute exceeded $200, whether the legality of a tax was involved or not. Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717. In 1862 the article was amended so as to give the Supreme Court appellate jurisdiction "in all cases in equity; also in all cases at law which involve the title or possession of real estate, or the legality of any tax (etc.), or in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars." In the same language it gave the former district trial courts original jurisdiction of the same matters. Section 6. There are cases formerly cognizable in the common-law courts, and therefore "cases at law," which do not involve real estate, or the legality of any tax, etc., or property or rights measurable in money, or of the value of $300. The question arose whether the district courts had jurisdiction of cases in mandamus, certiorari, and prohibition, as they had theretofore had; the specific case being mandamus to compel payment of a warrant for less than $300. The court was driven to hold that the above language must be construed to include all cases at law, and not merely cases at law of the character thereby described. Perry v. Ames, 26 Cal. 383. In People v. Rosborough, 29 Cal. 415, this interpretation was applied to the provision concerning the Supreme Court, and was extended so as to give the Supreme Court appellate jurisdiction in cases of insolvency which were classed among "cases at law." In Knowles v. Yates, 31 Cal. 84, it was further enlarged so as to include appellate jurisdiction of contests of election. In the separate opinions of Justices Temple and Wallace in Houghton's Appeal, 42 Cal. 60, 64, the reasoning of Knowles v. Yates is sharply criticised, but the point was not involved, and the previous cases were not overruled. The Supreme Court continued thereafter to exercise appellate jurisdiction in accordance with the principle established in Knowles v. Yates and People v. Rosborough. The Constitution of 1879 (article 6, § 4), so far as this point is concerned, was in the same language as the amendment of 1862 to the Constitution of 1849, and necessarily had the same meaning. This was the condition when the amendment of 1904, to section 4, which we are now considering, was adopted. The provision regarding the Supreme Court was not changed by this amendment, unless its meaning is modified by the subsequent clause prescribing the jurisdiction of the District Courts of Appeal created by that amendment.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Section 4, upon this subject, and with respect to the Supreme Court, now reads thus: "The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars." The corresponding provision, giving jurisdiction to the District Courts of Appeal is as follows: "The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars; also in all cases of forcible and unlawful entry and detainer (except such as arise in justices' courts), in proceedings in insolvency, and in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, and prohibition, usurpation of office, contesting elections and eminent domain, and in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the Supreme Court)."

It is a matter of history that the reason which led to the creation of the District Courts of Appeal by this amendment was the great congestion of cases constantly accumulating in the Supreme Court, which that court could not dispose of within a reasonable time, a condition then rapidly growing worse. The object was to provide courts to which should be given a part of the appellate jurisdiction previously vested in the Supreme Court; to divide the burden of litigation and increase the force working to dispose of it. The obvious intention of the clauses above quoted was to apportion the cases so that each court would have a share of the work proportioned to its capacity to dispatch it; to so divide the labor that one court would not be idle while another was overburdened with the cases properly assignable to it under the classification that was made. It was recognized that an absolutely correct apportionment was difficult, in the absence of any statistics of the average number of cases belonging to the respective classes, and in view of the varying conditions which might arise in the future tending to increase one kind of litigation and decrease another. To obviate the effects of any inequality in the apportionment of the jurisdiction between the respective courts, or in delimiting the districts of the state assigned to the several Courts of Appeal, which might render the burdens unequal, the amendment made the wise provision that the Supreme Court should have control of the entire work of both courts, and should have power at will to transfer cases pending from one district court to another, from a district court to the Supreme Court, or from the Supreme Court to a district court, and to change the limits of the several districts, thus enabling it to keep the work properly distributed in case experience proved that the constitutional distribution was unequal.

It is plain from these circumstances that the clause prescribing the jurisdiction of the District Courts of Appeal was intended to modify the previous construction of the clause relating to Supreme Court jurisdiction, and to diminish the jurisdiction formerly vested in the Supreme Court. The provision regarding the Supreme Court jurisdiction, though unchanged in its verbiage on the point here involved, must be considered as having now a meaning somewhat different from that formerly ascribed to it. It is modified to the extent necessary to give the district courts full jurisdiction of the classes of cases expressly assigned to them. The result will be what the framers of the amendment evidently intended, namely, that the District Court of Appeal will have appellate jurisdiction in all cases which the amendment specifically mentions as belonging to its jurisdiction, although they may incidentally involve the title or possession of real estate, or the legality of a tax, impost, assessment, toll, or municipal fine. These things, or some of them, may be involved in cases of certiorari, mandamus, prohibition, unlawful and forcible entry and detainer, insolvency, condemnation proceedings, or in actions to prevent or abate a nuisance, but the fact that they are so involved in such a case will not deprive the District Courts of Appeal of appellate jurisdiction thereof. This construction has the additional advantages of being the most easily understood, and the most practical in operation.

The conclusion necessarily follows that the District Court of Appeal had jurisdiction of the appeal in this case, and that it should not have transferred the case to this court. The case was regularly ordered submitted to this court by agreement of the parties at the April session of 1909, to take effect when the briefs should be filed. This court was not then informed of the fact that the appeal was originally taken to the District Court of Appeal. The briefs have all been filed, and the case is now ready for disposition. In view of these circumstances we think it advisable to retain the case in this court. It is now ordered that the case be transferred from the District Court of Appeal of the Second District, to the Supreme Court, for determination and judgment. Perhaps the order of submission would have like effect, but to prevent question we make the formal order.

The defendant contends that the law under which the district was organized is unconstitutional, that the district was not legally organized under it, and that the court erred in excluding evidence offered by the defendant. It is claimed that the act is void because it embraces more than one subject, and that the subjects are not expressed in the title. The title is as follows: "An act providing for the organization and government of districts for the protection of the lands of farming or other communities or neighborhoods within this state from overflow or damage from the waters of any unnavigable stream, water course, canyon, or wash extending by, through, or over such communities or neighborhoods, and to provide for the acquisition of lands, rights of way, and other property by purchase, gift, or condemnation, and for extending, straightening, locating, improving and maintaining the channels of such streams, water courses, canyons, or washes, and confining said waters in such channels and preventing the overflow thereof, and for the construction by such districts of the necessary works for said purposes." If we were inclined to criticise this title, we should say that it was faulty because of its unnecessary prolixity in giving the details of the subject to which the act relates. If the title had been simply, "An act to provide, govern and maintain local districts for the protection of lands from overflow or damage from the waters of any unnavigable stream," its sufficiency might not have been questioned. But because of the unnecessary subdivision of the main subject, objection is now made to it because it does not also mention all the other particulars, such as the calling and holding of elections, levying and collecting of taxes, assessment of property, voting and issuing of bonds, the qualifications of electors, and certain matters of procedure in civil actions, all of which, being incidental to the main purpose of the act, are provided for in its various sections. We are of the opinion that the title expresses the subject of the act with unnecessary particularity, and that the details provided for in the act, but not expressed in the title, are incidental to the main subject which is expressed, and that the act is not void because of any fault in its title.

It is further contended that the act is inoperative because of the provisions of section 92 (page 42), which reads as follows: "This act is not intended to supersede or repeal any other act for the organization of reclamation or protection districts or for protection purposes, but is intended as an independent and alternative means of effecting the protection herein provided for where the provisions of this act are most applicable or desirable to the parties interested." This section it is urged, makes the act entirely inoperative until the landowners of some district desire to avail themselves of its provisions. It is argued that this makes the existence of the law as a statute in force, depend on the action or nonaction of the persons who may be concerned, and that this is an unauthorized delegation of the legislative power. This, however, is not the effect of the section. Its purpose was merely to prevent the complications which frequently arise from the enactment of a new law upon a subject to which previous laws also apply. Doubts often arise whether or not there is an implied repeal of previous laws. To remove all these doubts section 92 was enacted, declaring that it does not repeal or supersede previous acts. It has no other effect, and it does not make the act invalid.

Section 6 of the act was amended shortly after the passage of the main act (St. 1907, p. 850, c. 464), the amendment providing that any owner of land in the district may vote, although he may not be a resident therein. It is unnecessary to determine whether this amendment is valid or invalid. The appellant concedes that the election was not affected by votes of landowners not residing in the district. If the amendment is invalid, it would not affect the act which it purports to amend.

Another objection is that the act violates the Constitution because it prescribes certain rules of procedure in certain actions, authorized by the act, to contest elections therein provided for, and to establish the validity of bonds of the district, also because it prescribes certain duties for county officers of the counties in which such districts are located, not required of other county officers, all of which, it is argued, is local and special legislation. There is no force in these objections. The act is general because it applies generally throughout the state. It is not made special or local by reason of the fact that districts may not be organized in every county. The rules of procedure are fixed for the class of actions authorized by the act. These actions are in the nature of special proceedings; they are of a class by themselves and it is no violation of the constitutional provisions against special legislation to provide particular rules of procedure applicable only to these peculiar proceedings. Furthermore even if these provisions were invalid for this reason they are not vital to the main purposes of the statute, nor essential to its practical operation, but are only incidental and auxiliary thereto. It is evident that if the act had been passed with these features omitted, its usefulness would not have been seriously impaired by the omission. The invalidity of such unimportant provisions would not destroy the other parts of the act.

Numerous objections are made to the validity of the proceedings taken for the organization of the district. The first one we will notice is that the whole proceeding was void because the district described in the petition, and which by the final order was declared to be a protection district, embraces more than one farming neighborhood. This, it is claimed, is contrary to the provisions of the act. On this subject the act provides as follows:

"Section 1. Whenever fifty, or a majority of the owners who are also the owners of a majority of the lands of any farming or other community or neighborhood within this state, which lands lie in one body and are liable to overflow or damage from the waters of any unnavigable stream, water course, canyon, or wash extending by, through, or over such community or neighborhood, and may be protected by the same system of works, desire to provide for the protection of such lands from said damage, they may propose the organization of a protection district under the provisions of this act, and when so organized, such district shall have the powers, rights and duties conferred, or which may be conferred by law upon such protection districts. * * *

"Sec 2. In order to propose the organization of a protection district, a petition shall be presented to the board of supervisors in the county in which the lands of the community or neighborhood and within the proposed district, or the greater portion thereof, are situated, signed by the required number of owners of lands within such proposed district, as above provided, which petition shall set forth and particularly describe the proposed boundaries of such district and the purposes of such organization, and shall pray that the same be organized under the provisions of this act."

We are of the opinion that these provisions are not to be construed to limit the area of any district to a territory which might afterwards be ascertained and determined by a court to be a single community or neighborhood, or so as to give a court power to declare the district organization invalid if it should find that the boundaries included what it deemed to constitute two or more such communities or neighborhoods.

In this state, where the mountain canyons discharge streams upon the more gently sloping plains, the effect always is that the sand and gravel, which the rapid torrent of the canyon carries in suspension, begin to be deposited in the stream bed as soon as it reaches the less precipitous plain. The result is a constant tendency to fill the bed of the stream, causing the water to overflow and find other channels, running over and through lands occupied by orchards, vineyards, and grain fields, to the great damage of the lands in its course. Damage also comes from the water being too rapidly carried to the lower lands. It is not lawful or just for the owners above to change the natural course of the stream to the detriment of those below. To give adequate, practical, and lawful protection against the stream, it is necessary that all whose lands are likely to be affected by changes in its course should unite to keep the channel open and clear to some point below, a point where the water can be discharged without serious damage, and that all subject to flood shall have a common plan for protection therefrom; otherwise there would be endless conflict between the upper and lower systems. The act in question deals with conditions such as these, and its main purpose, so far as the boundaries of the districts are concerned, is to put into a single district all the lands which are so situated with reference to the stream that they are liable to damage therefrom, or from its departure from its channel, and which may be protected from such damage by the same system of works, so that the respective landowners can unite their efforts and funds for their mutual and more effectual protection, without detriment to any. The term "community," properly speaking, refers rather to the people who reside in a given locality, in more or less proximity, than to the territory which includes them. The term "neighborhood" describes a territory of indefinite size, and without fixed limits. What one person would consider a single community or neighborhood another might believe to embrace two or more communities or neighborhoods. It was the two considerations of identity of the cause of danger and feasibility of protection by the same means or system which were intended to constitute the controlling factors in determining the area and boundaries of the districts to be organized under the act. The mention of a community and neighborhood is to be taken as matter of description, but not of limitation, and the other factors are to be given controlling force. In view of the evident object of the act, the conditions to which it was intended to apply, the remedy it was designed to afford, and the immediate context relating to the same point, the rule that the singular includes the plural should be applied to the words, "community or neighborhood," in the respective introductory sentences of sections 1 and 2 of the act. Thus understood, a district may be organized which embraces what may, in a sense, be considered two or more communities or neighborhoods, provided the lands lie in one body, are liable to damage from the same stream, and may be protected therefrom by the same system of works. The petition in the present instance stated the necessary facts to bring it within the scope of the act as thus construed, and it was therefore sufficient in this particular.

Another objection is that the petition states that the petitioners propose the organization of the district "under the provisions of an act of the Legislature of the state of California, entitled [Here the petition gives the title of the act in full as heretofore quoted.], duly approved February 22, 1907." The act appears to have been approved on February 23, 1907. Section 2 (page 17) of the act requires that the petition "shall pray that the same be organized under the provisions of this act." It is claimed that the inaccuracy in the date of the approval of the act, as recited in the petition, makes the proceeding void. There is no sound reason for giving it such effect. It is sufficient if the petition, in some reasonably certain manner, identifies the said act as the one under which it is proposed that the district shall be organized. The extremely long and prolix title of the act is set out in full in the petition. There is no other statute of this state so entitled, and there is no statute of any kind that was approved on February 22, 1907. The identification of the act is complete and unmistakable, and the error in the date is immaterial.

The defendant refused to pay the warrant upon the ground that there were no funds with which to pay the same. The district had levied a certain rate of tax for the bond fund and an additional rate for the general fund. The warrant of the plaintiff was payable out of the general fund. Collections had been made of these taxes from time to time, amounting to something near $4,000. The defendant, as county treasurer, had arbitrarily transferred to the bond fund the whole amount collected, and upon that fact he based his statement that there was no money in the general fund out of which to pay this warrant. The taxes collected consisted of general payments by property owners of the taxes upon their property within the district, including both the amount levied, for the general fund and that for the bond fund. The act (section 45 [page 30]) directs the creation of the bond fund, construction fund, general fund, and funding fund, and declares that the moneys properly belonging to these funds shall be apportioned to them by the treasurer. This does not give the treasurer an arbitrary power to apportion the money all to one fund. What is meant by the direction to him to apportion to the funds the moneys properly belonging to them is that he shall give to each the proper proportion of the money received in the payment of the general taxes, calculated upon the rate fixed for that fund. When apportioned in this manner, there was money enough in the treasury belonging to the general fund to pay the warrant of the plaintiff.

It is claimed that the tax is illegal because a large proportion of the levy was for purposes of raising money to pay the interest on bonds authorized to be issued by the district, and that at the time of the levy and collection of the tax no bonds had been sold. It is immaterial whether the levy for the bond fund was valid or not. It is not asserted that the levy for the general fund is in any respect irregular; and, as the plaintiff's claim is against the general fund, and he seeks payment out of that fund alone, the invalidity of the levy for the bond fund is no defense to the payment of his claim.

Upon the trial the defendant offered to prove that the signers to the original petition for the organization of the district did not own a majority of the lands of the district, but only a little over one-third thereof. This proof was offered for the purpose of having the district declared invalid. The recital in the record of the proceedings before the board, upon the petition, is that the board determined that the petition complied in all respects with the law. We do not think it necessary to determine what effect such proof would have upon the validity of the district, or whether it would be admissible in any collateral attack thereon. The present action is an action against the treasurer of the county to compel the payment of a claim. The evidence abundantly shows that the district has been organized, and that it has been acting as a district. In other words, that it is a de facto district. It is a public corporation of a similar character to irrigation districts and reclamation districts. The law is well settled that the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in quo warranto at the suit of the state. Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514, 777; Reclamation Dist. v. Turner, 104 Cal. 335, 37 Pac. 1038. The evidence was properly rejected by the court below. It may be here remarked that several other objections which we have considered might have been dismissed upon the same ground, but we deemed it best to decide them upon the merits. There are no other points requiring consideration.

The judgment and order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

157 Cal. 15.

TIMMONS v. JOPLIN, County Treasurer.
(L. A. 2,373.)

(Supreme Court of California. Dec. 17, 1909.)

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

J. A. Timmons brought mandamus proceedings against J. C. Joplin, County Treasurer of Orange County. From a judgment for defendant, plaintiff appeals. Transferred to the District Court of Appeal for the Second District for further proceedings.

Hutton & Williams, B. T. Williams, and H. C. Head, for appellant. E. E. Keech, for respondent.

PER CURIAM. This is an appeal from a judgment of the superior court in mandamus, and also from an order denying plaintiff's motion for a new trial.

The points involved are, for the most part, identical with those discussed and decided by this court in Keech v. Joplin (L. A. No. 2,358) 106 Pac. 222. The appeals, as is shown in that decision, were erroneously taken to this court.

It is therefore ordered that this cause be transferred to the District Court of Appeal for the Second District for further proceedings.

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157 Cal. 14

LAMB et al. v. McMULLEN et al.

(L. A. 2,319.)

(Supreme Court of California. Dec. 17, 1909.)

COURTS (§ 212*)—APPELLATE JURISDICTION.

The District Court of Appeal, under Const. art. 6, § 4, giving District Courts of Appeal jurisdiction in certiorari proceedings, has appellate jurisdiction in certiorari proceedings to review the acts of a county board of supervisors in organizing a protection district under the act approved February 23, 1907 (St. 1907, p. 16, c. 25).

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Certiorari proceedings brought by W. D. Lamb and others against D. A. McMullen and others. From a judgment for defendants, plaintiffs appeal. Transferred to the District Court of Appeal of the Second District for further proceedings.

Hutton & Williams, B. T. Williams, and H. C. Head, for appellants. S. M. Davis and E. E. Keech, for respondents.

PER CURIAM. This case is an appeal from a judgment of the superior court in a proceeding in certiorari to review the proceedings of the board of supervisors of Orange county, whereby the Newbert Protection District was organized under the act approved February 23, 1907. St. 1907, p. 16, c. 25.

The points raised are substantially the same as those considered and decided by this court in Keech v. Joplin (L. A. No. 2,358) 106 Pac. 222. The appeal purports to have been taken directly to the Supreme Court. For the reasons given in the opinion in Keech v. Joplin, it should have been taken to the District Court of Appeal. That court has the appellate jurisdiction in certiorari proceedings.

It is ordered that this cause be transferred to the District Court of Appeal of the Second District for further proceedings.

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157 Cal. 26

Ex parte McCAPES. (Cr. 1,526.)

(Supreme Court of California. Dec. 22, 1909.)

1. CONSTITUTIONAL LAW (§ 87*)—RIGHT TO ENJOY PROPERTY.

Though it is within the police power of the state to enact laws to prevent the spread of fires, Pen. Code, § 384, subd. 3, making it a misdemeanor for any person to build a fire on his own land to burn brush, stumps, logs, or any other things whatsoever, provided that any state or district fire warden may give him a written permit to build fires, is an unreasonable interference with the right of property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156–171; Dec. Dig. § 87.*]

2. CONSTITUTIONAL LAW (§ 67*)—DISTRIBUTION OF POWERS—JUDICIAL QUESTION.

While the right to exercise the police power is acknowledged by the courts, the question whether the constitutional rights of a citizen as to his person or property have been unduly invaded in a particular instance is always a judicial question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 123; Dec. Dig. § 67.*]

In Bank. Application by one McCapes for a writ of habeas corpus. Writ granted, and prisoner discharged.

W. H. Larew, for petitioner. G. G. Goucher, Dist. Atty., U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy, for respondent.

HENSHAW, J. Petitioner was charged with and convicted of a violation of subdivision 3 of section 384 of the Penal Code. That section declares it to be a misdemeanor if any person shall willfully or negligently "build a fire on his own land for the purpose of burning brush, stumps, logs, rubbish, fallen timber, fallows, grass or any other thing whatsoever, * * * provided that any state or district fire warden may in his reasonable discretion give a written permit to any person desiring to build fires," etc. He earnestly contends that the section under which he is charged is unreasonable and oppressive, that it unduly and unwarrantedly interferes with his right to the enjoyment and use of his property, and that thus and therefore it is in violation of section 1 of the fourteenth amendment of the Constitution of the United States and of section 1 of article I of the Constitution of this state. The contention of the petitioner, we think, must be upheld.

It is to be noted that the act is designed to prevent the destruction of property, and particularly of forests, by the careless setting of fires. In its purview and purpose, therefore, the act is within the police power of the state. No one at this day can be unaware of the great havoc wrought by forest fires, and, indeed, in states such as this, which undergo long periods of drouth, of the loss which results from fires sweeping over the farming lands and destroying the crops. The purpose of the law being for the general good of the state to prevent the destruction of property by fires carelessly set and allowed to escape control, not only brings the act strictly within the police power, but the purpose must commend the act to every court. Nevertheless, in the accomplishment of that purpose, it is quite plain that the Legislature has transgressed all reasonable bounds. It is an exemplification of what this court said in Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

32 L. R. A. 664: "So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurk no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."

We are here concerned only with the validity or invalidity of subdivision 3 of section 384, under which this petitioner is charged. But a consideration of other sections will serve to illumine the discussion. Section 1 makes it a misdemeanor to set fire to any forest, woodland, brush, prairie, grass, grain, stubble, or any other material being or growing on lands not owned by the person who may set the fire without the permission of the owner of such land. But the same section permits one to build camp fires upon lands not his own without the permission of the owner, or anybody else, if the lands are uninclosed, if the camp fire is built "in a careful manner," and if, before departing from the place where such camp fire has been built, the builder "first totally extinguishes the same." But by section 3 a man cannot build a fire on his own land for the purpose of burning brush, stumps, logs, rubbish, fallen timber, fallows, grass, or any other thing whatsoever, without first obtaining a permit so to do, or unless the fire be built (subdivision 5) in good faith and with reasonable care as a "back fire" for the purpose of stopping the progress of a fire then actually burning. Railroad companies, in the dry season, frequently burn the weeds along their rights of way for the very purpose of preventing fires. Road overseers and supervisors do the same thing along the highways. Yet under this law, not only may this not be done, but a farmer may not burn a brush pile or a rubbish heap in his back yard without first obtaining permission from some fire warden, and if in his county there be no such fire warden he may not make a fire at all, until in due course one shall have been appointed, to whom he may make petition. The language of this section is so broad as to have little or no relation to the real purpose of the act. It prevents the setting of any fire without permission from a fire warden, though the fire be set with scrupulous care, and by no possibiltiy could work the destruction of property. Such a law upon the face of it is an unreasonable interference with the rights of property. But if it be said that, notwithstanding the language, the law will be given a construction which will avoid hardship, it must be answered that by its terms it makes it a crime for any man to light a fire on his land for the purpose of burning "anything whatsoever," and declares the person who does so a criminal, regardless of the fact that the fire was carefully set and guarded, and regardless of the fact that no injury to anybody resulted from the setting. In other words, every person so setting a fire would be guilty of a crime, and the question as to whether he should be punished or not would rest largely in the friendship or hostility of his neighbors, or of the informer who by this law receives one-half of the fines upon conviction. The facts in the case at bar may be referred to in illustration of the working of such a law. The petitioner was digging a well upon his own land. It became necessary for him to blast rock. Fearful lest a burning fuse hurled by the exploding blast might set fire to the grass in the vicinage, he prudently and carefully burned off this dry grass without causing the slightest damage to any property. He built this fire, however, without obtaining permission from a district fire warden. Indeed, at the time that he set it there was no district fire warden. Subsequently the county of Madera caused the appointment of a fire warden, and this fire warden procured the arrest of the defendant for a violation of the law. This brief statement will better serve to illustrate the unreasonableness of the law than would many pages of exposition.

It is unnecessary to elaborate upon the principle involved in this determination, namely, that while the right to legislate in the exercise of the police power is fully acknowledged by the courts, in each instance the question as to whether or not the constitutional rights of the citizen as to his person or property have been unduly invaded is always a judicial question. It is sufficient upon this to refer to such cases as Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; Ex parte Dickey, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82; Ex parte Hayden, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183; Ex parte Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588; Ex parte Dietrich, 149 Cal. 104, 84 Pac. 770, 5 L. R. A. (N. S.) 873; In re Kelso, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178.

For the foregoing reasons, the prisoner is discharged.

We concur: LORIGAN, J.; MELVIN, J.; ANGELLOTTI, J.; SHAW, J.

157 Cal. 63

In re MURPHY'S ESTATE et al.

(S. F. 5,137.)

(Supreme Court of California. Dec. 24, 1909. Rehearing Denied Jan. 20, 1910.)

1. WILLS (§ 522*)—DEVISE TO CLASS.

A testamentary gift to a class is a gift of an aggregate sum to a body of persons uncertain

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions; the share of each being dependent for its amount upon the ultimate number.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1114; Dec. Dig. § 522.*]

2. Wills (§ 523*)—Construction—Devise to Class.

Where a gift is to devisees nominatim and the particular share they shall each receive is mentioned, the devise is deemed a gift to individuals as tenants in common, and not to a class.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

3. Wills (§ 523*)—Construction—Devise to Class.

If words, which, standing alone, would create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers that the devisees are to take individually, and that the descriptive portion of the clause is for identification.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

4. Wills (§ 439*) — Construction as a Whole.

Rules of construction of wills are not absolute, but must give way to the manifest intention of testator, gathered from the whole will, and which, when the language of the will is not sufficiently clear, may be ascertained from the circumstances surrounding the making of it under the express provisions of Civ. Code, § 1318.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952–957; Dec. Dig. § 439.*]

5. Wills (§ 775*) — Lapse of Devise — Construction to Prevent Intestacy—Application of Rules.

Civ. Code, § 1343, providing that, if a devisee die during testator's lifetime, a devise to him fails unless an intention appears to substitute some other in his place, with immaterial exceptions, the canon of construction that such an interpretation should be given to a will as will prevent intestacy as to any portion of the estate cannot be invoked to set aside the statute declaring such effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1997–2000; Dec. Dig. § 775.*]

6. Wills (§ 523*)—Construction—Devise to Class.

A will gave all the residue of testator's personal property and all his real estate to be divided equally among the four children of a named deceased sister, naming the children. One of the children died during testator's lifetime. There was nothing in extraneous facts to show an intention to substitute some other person in the place of any child who might die in testator's lifetime. *Held*, that there being nothing on the face of the devise indicating any uncertainty in the number of persons who were to take the property, or that they were to be ascertained at a future time, or that the share of the estate which the devisees were to have was to be determined as to the amount by the number of those who would survive testator, the devisees took not as a class, but individually and as tenants in common under Civ. Code, § 683, providing that a joint interest created by will exists only when expressly declared in the will to be a joint tenancy, and under section 685, declaring that every interest created in favor of several persons with certain immaterial exceptions is an interest in common unless declared in its creation to be a joint interest, and as to the share which would have gone to the devisee dying in testator's lifetime testator died intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by Timothy J. Flynn and others, executors of Denis B. Murphy, for distribution of the estate, to which Katherine Murphy and others objected. From the decree of distribution, the contestants appeal. Reversed.

Sullivan & Sullivan and Theo. J. Roche, for appellants. Mastick & Partridge and E. J. Mize, for respondents.

LORIGAN, J. The will of Denis B. Murphy contained, among other provisions, the following residuary clause: "Fourth. It is my will and desire that all the rest of my property both real estate and personal property shall go to, and be equally divided among the four children of my late sister Catherine F. Flynn, deceased; that is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and wheresoever situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast." The will was admitted to probate, and in due time the executors thereof petitioned for a distribution of the estate. The petition set forth the will of deceased, and referring to the clause thereof above quoted alleged that William D. Flynn, named therein as one of the residuary legatees of the estate of decedent, had died prior to the death of the testator, and then with reference to said clause in the will it was alleged: "That the intention of said decedent in said will was to devise and bequeath the residue of his estate to the said Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast as a class, namely, as the children of his said sister, and to those of said class only who should be living at the death of the said decedent, and upon the death of the said William D. Flynn during the life of the said decedent, the said Timothy J. Flynn, Mary Jane Logan, and Kate I. Prendergast became and are the sole survivors of said class, and are entitled to the whole of said residue."

Certain nieces and nephews of the deceased, claiming to be among his heirs at law, answered the petition for distribution denying all the foregoing allegations as to the intent of the testator to devise the residue of his estate to the devisees named in said fourth clause as a class, and averring that, on the contrary, said William D. Flynn, named in said will as a devisee, died prior to the death of the testator without issue; that as to the portion of his estate devised to said

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

William D. Flynn the testator died intestate; and that they, with other heirs at law of the testator, were entitled to participate in the distribution thereof. A hearing was had on the petition and the court made findings of fact wherein it found, as alleged in the petition for distribution, that the intention of the decedent was to devise the residue of his estate to the devisees named in said fourth clause of his will as a class, namely, to the children of his said sister and to those of said class who would be living at the death of said decedent. In accordance with this finding, the court distributed the property to the survivors of those mentioned in the residuary clause of the will, namely, Timothy J. Flynn, Mary J. Hyde (formerly Logan), and Kate I. Prendergast, share and share alike.

This appeal is by those heirs at law of decedent—the nieces and nephews—who contested the distribution of the estate to the devisees named in the residuary clause as a class, and is taken from the decree of distribution accompanied by a bill of exceptions.

It must be conceded upon this appeal that under the testamentary clause in question the devise to William D. Flynn lapsed upon his death without leaving lineal descendants, before the testator (Civ. Code, § 1343), and that as to the portion of the estate devised to him the testator died intestate, unless from the clause in the will creating the devise in which he was to participate, considered by itself, it is apparent that the testator intended the devise of the residue of his estate to go to the children of his sister Catherine as a class, or that such intention appears from extraneous evidence properly admissible to disclose it. While the lower court reached the conclusion that the devise in question was to a class consisting of the children of the deceased sister of testator who might survive him, we are of the opinion, in the light of the established rules of construction and authorities, that this conclusion was not justified either from the express terms of the devise itself or aided by extrinsic evidence.

It is declared by the Civil Code, § 683, that a joint interest created by a will exists only "when expressly declared in the will to be a joint tenancy," and by section 685 of the same Code it is declared that every interest created in favor of several persons (except acquired under certain conditions not involved here) is an interest in common unless declared in its creation to be a joint interest. It is quite apparent from an examination of the testamentary clause in question that this devise does not expressly declare a joint tenancy with its accompanying right of survivorship in the devisees named therein, and, unless there is some rule capable of application so as to prevent it, the interest which each devisee took under the devise was an interest in common.

It is not contended by the respondents that the clause does create any joint tenancy, nor do they predicate their right to take the whole devise as survivors by reason of any expressly created joint tenancy. They base their claim solely on the ground that the devise, while not in terms creating a joint tenancy, still is a devise to a class—the children of the deceased sister of testator—and that under a well-recognized rule of law, where a devise is made to a class, the death of one of the class prior to the death of the testator does not have the effect of causing the legacy to lapse, but those of the class who survive the testator take the whole devise. The rule contended for by respondents is correct, but we cannot agree with them, or the trial court, in the conclusion that either the terms of the devise disclose an intention on the part of the testator to devise to a class, or that, accepting the extraneous testimony admitted as bearing on his intention, it discloses any such intention. As to a gift to a class, the rule is stated as follows: "In legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number." Jarman on Wills (6th Ed.) § 232; Matter of Kimberly, 150 N. Y. 90, 44 N. E. 945; Matter of Russell, 168 N. Y. 169, 61 N. E. 166; Kent v. Kent, 106 Va. 199, 55 S. E. 564. Tested under this rule, there is nothing in the devise which would indicate that the intention of the testator was that the devisees should take as a class, or in any other way than as individuals, and under our Code provision as tenants in common. There is nothing on the face of the devise indicating any uncertainty in the number of persons who were to take the property, or that they were to be ascertained at a future time, or that the share of the residuary estate which the devisees were ultimately to have was to be determined as to the amount by the number of those who would survive the testator. All the persons who are to take were specifically named and the share of each was designated. In fact, it is not only quite apparent that under the rule relied on this devise cannot be said to contain any of the elements which should characterize a gift to a class, but the plain impression which one would receive by reading the clause is that the testator intended to give to each individual an equal portion of his estate. It is true that the testator uses language in the clause of his will which would, if it stood alone, amount to a devise to a class. This would be the result if the devise had been to "the four children of my late sister Catherine" without further words. But here the terms of the bequest—the designation of the number of the children, followed by a repeated and express devise to them by name and in an equal share—cannot be ignored so as to make the other words in the will constitute a class.

And in determining whether a devise is to a class or to individuals great importance is attached in the solution of the question to the fact that the gift is to the devisees nominatim and that the particular share they shall each receive is mentioned, and, when this appears, the bequest is held to constitute a gift and devise individually as tenants in common, and not as a devise to a class. Savage v. Burnham, 17 N. Y. 561; Hornberger v. Miller, 28 App. Div. 199, 50 N. Y. Supp. 1085; Rockwell v. Bradshaw, 67 Conn. 8, 34 Atl. 758. But, assuming, however, that the language used in the clause in question is capable of two different legal meanings resulting from the testator devising his estate to the four children of his late sister, followed by other words of express devise to each of the children by name and in equal proportions, still this mention of them by name and a devise to them in equal shares will control the description of them as children of his deceased sister. If words, which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause (children of a deceased sister) is intended merely as matter of identification. Hoppock v. Tucker, 59 N. Y. 202; Hornberger v. Miller, supra.

In the Estate of Hittell, 141 Cal. 432, 75 Pac. 53, which was a case similar in some respects to the one at bar, the devise there in question was of the testator's property "to Anna P. Greer and Mary M. Greer, with whom I live at this house, * * * and whom I regard and treat as my adopted daughters." It was contended that this was a devise to a class, and the lower court so decreed. In reversing the decree this court discussed the rule of construction which we have been considering, and said: "A common instance of a devise to a class is where a testator gives property, generally to the 'children' of a certain person, without naming them—as to 'the children of my brother John'; and in such a case it is held that the devise is to such children of John as will be in existence at the time of the testator's death. There are cases where in the devise the individuals and the class are both named—as, for instance, where it is 'Charles, James, and Robert, children of my brother John'—and in such cases courts have had some difficulty in determining whether the devise was to the individuals named or to the class. In such a case, the general rule is that the persons named take as individuals and not as a class, unless some other clause of the will, or some evidence outside of it calls for a different construction. The result of the authorities—and counsel for each side have cited a large number of them—is correctly stated in Page on Wills, § 543, as follows: 'Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held prima facie to be a distributive gift and not a gift to a class.' And, after citations in his notes, he says: 'In such cases if one of the beneficiaries dies before the testator, there is therefore no right of survivorship to the other named beneficiaries.' * * * Therefore in the case at bar, even if a class had been named, the gift would have been to the individuals, because there is nothing in the other parts of the will, or in any extrinsic evidence, showing a different intent, and there are no operative words creating any right of survivorship."

It is true that these rules of construction are not absolute, but must give way to the manifest intention of the testator, which is always paramount, as that intention may be gathered from a consideration of all provisions of the will, or when the language of the will is not sufficiently clear to remove all doubt as to its intention, by a consideration of the circumstances surrounding the making of it (exclusive of the oral declarations of the testator) in so far as they may throw light on that intention. Civ. Code, § 1318; Estate of Langdon, 129 Cal. 451, 62 Pac. 73.

It is not pretended that there are any other provisions of the will bearing on the subject, and the only circumstances appearing from the extrinsic evidence are that the testator had lived with his sister, the mother of the devisees mentioned in the clause of the will in question, and who constituted all her children; that he had lived with this sister, paying for room and board, from the childhood of said devisees up to the death of their mother; that he had a deep affection for these four children and took great interest in them and in their welfare; also, that he had other nieces and nephews not mentioned in his will. But these facts throw no more light on the intention of the testator than appears upon the face of the devise itself. All that this evidence discloses is just what the clause of the will does. It furnishes a reason generally why the testator devised his estate to these four devisees in preference to his other nieces and nephews, and a particular reason why, having an equal affection for all of them, he made no distinction between them in his bequest, but gave to each an equal share in his estate. Giving this evidence the greatest force that can be claimed for it, it discloses at most that the intention of the testator was just as compatible with the devise to these children individually as to them as a class. But this cannot aid the respondents. It would simply leave the intention of the testator as much in doubt after a consideration of these intrinsic facts as before. This evidence throws no more light on the intention of the testator than appears upon the face of the devise itself, and so we are still remitted to the application of the general rule that when in a devise a class and individuals are both mentioned, and nothing appears from other clauses of the will or extraneous evidence requiring a different construction, the devise will be construed as one to devisees individually and not to them collectively—to them as tenants in common and not to them as survivors of a class.

Nor is the claim of respondents that the devise should be held to be one to a class strengthened by invoking the canon of construction that such an interpretation should be given to a will as will prevent intestacy as to any portion of the testator's estate. The Code provides that where a devisee dies before the testator the devise to him lapses unless an intention appears on the face of the will to substitute some other person in his place. So that the question presented here is not: Did the testator by the terms of his will intend to prevent intestacy as to any portion of his estate, but whether in the terms of this particular clause of his will did he use language disclosing an intention to leave his estate to the devisee individually or to them collectively? The question is one of intention to be derived from the language used in the devising clause itself, there being nothing in other provisions of the will bearing on it. By the clause in question the testator undoubtedly intended when he made his will to dispose of all the residue of his property and to dispose of it in favor of the devisees therein named, because he expressly said so. The language, however, which he used, naming the devisees individually and giving to each an equal portion of all the residue of his estate, is construed under well-settled rules of law, to which we have heretofore referred, to be a devise to the devisees named as individuals and as tenants in common, and not as a class. The law declares this to be the meaning of the language which he has used, and a canon of interpretation applicable to prevent intestacy cannot be invoked to set aside plain rules of law declaring the legal meaning and effect to be given to language used in such a devise as is here under consideration.

In the Estate of Hittell, supra, 141 Cal. 436, 75 Pac. 54, from which we have heretofore quoted, practically the same contention as the one which is urged now was made, and it was said: "The will was made in view of conditions existing at the time of its execution; and as he gave all of his property to the two women, both of them living, of course, he intended at that time and under existing circumstances that his heirs should take nothing. * * * As in the case of innumerable wills, the testator did not anticipate changed conditions, and did not provide for the event of the death during his lifetime of one of the named devisees, which he could easily have done, if he so desired, by giving the property to them or to the survivor of them. What his actual intent may have been after the conditions were changed by the death of Mary we have no means of knowing, except from the fact that he allowed the will to stand as originally executed. He may have thought that one-half of his estate would be sufficient for the wants of the remaining woman. At all events, we must apply the law to the will as it reads, and to the fact of the death of Mary before that of the testator, and, thus applying it, the conclusion clearly follows that the living devisee, Anna, took one undivided half of the estate, and that the other half vested in the heirs at law."

In support of their claim that this devise was properly construed by the trial court as a devise to a class, respondents rely on Schaffer v. Kettell, 14 Allen (Mass.) 528; Stedman v. Priest, 103 Mass. 293; Swallow v. Swallow, 166 Mass. 241, 44 N. E. 132; Bolles v. Smith, 39 Conn. 217; Warner's Appeal, 39 Conn. 253; Springer v. Congleton, 30 Ga. 976. But in none of those cases was any different rule of construction announced. All of them—save Bolles v. Smith and Swallow v. Swallow—are commented on in Church v. Church, 15 R. I. 138, 23 Atl. 302, and with reference to them it is said: "In these cases, however, the general rule that a gift to persons named is a gift to them individually is recognized, and reasons are found in the language or structure of the will, or in the circumstances, for deciding that the intent of the testator, which is, of course, paramount to the rule, would be best subserved by disregarding it." In all these cases, too, while the gift was to individuals named, language was used which might imply a gift to them as a class, and as it appeared, either from other parts of the will or from extraneous facts, that it was the manifest intention of the testator to make a gift to the devisees named as representing some particular member or branch of the family as a class, it was held that the presumption of a devise individually must give way to the paramount intention of the testator. But here there is nothing in the will or in the extraneous facts to overcome the presumption of a devise to each of the devisees individually under the general rule; and hence it must apply.

There is nothing further to be said on this subject. We do not discuss the claim of appellants that the court improperly admitted testimony showing the relationship between the testator and the devisees when the will was made. It is not necessary. Assuming it was properly admitted, it proved nothing as to intention more than the devising clause did. Under the law, that clause must be construed as a devise to the devisees individually and as tenants in common. By it each devisee was given one-fourth of the residue of the testator's estate, and, had all lived, each would have been entitled to that proportion on distribution. One of the devisees, William D. Flynn, having died prior to the testator, the devise of one-fourth of the residue of the estate to him lapsed. No provision being made in the will otherwise disposing of this portion of his estate, the testator died intestate as to it and it vested in his heirs at law, and should have been distributed to them and not to the surviving devisees as a class.

The decree of distribution is reversed.

We concur: MELVIN, J.; HENSHAW, J.

157 Cal. 51

Ex parte MARTIN. (Cr. 1,539.)

(Supreme Court of California. Dec. 23, 1909. Rehearing Denied Jan. 20, 1910.)

1. Master and Servant (§ 13*) — Statutes Limiting Hours of Labor.

In determining whether an act limiting the hours of labor in any occupation is in violation of the federal Constitution, the primary consideration is whether the occupation possesses such characteristics of danger to those engaged in it as to justify the Legislature in concluding that the welfare of the community demands a restriction.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*]

2. Statutes (§§ 74, 76, 87*)—Constitutional Law (§ 205*)—Special Laws—Punishment of Crimes.

St. 1909, p. 279, c. 181, provides that the period of employment for all persons employed in underground mines or in smelters and in institutions for the reduction or refining of ores or metals shall not exceed eight hours within any 24, and that the hours shall be consecutive, and makes a violation of the statute a misdemeanor punishable by a fine or imprisonment. *Held*, that the statute does not violate Const. art. 4, § 25, subd. 2, prohibiting the Legislature from passing any local or special law for the punishment of crimes and misdemeanors, nor subdivision 33, prohibiting a special or local law where a general law can be made applicable, nor article 1, § 21, in that it grants to citizens or classes of citizens privileges or immunities which are not on the same terms granted to all, nor article 1, § 11, as not being of uniform operation.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. §§ 74, 76, 87*; Constitutional Law, Dec. § 205.*]

3. Statutes (§ 71*)—"General" Laws—Uniformity.

A law is not special or lacking in uniformity merely because it does not apply to every person or subject within the state. An act to be "general" in its scope need not include all classes of individuals, but it is enough if it relates to and operates uniformly upon the whole of any single class, though the classification must be a reasonable one.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 71; Dec. Dig. § 71.*

For other definitions, see Words and Phrases, vol. 4, pp. 3065–3071; vol. 8, pp. 7669, 7670.]

4. Constitutional Law (§ 70*)—Powers of Government.

The selection of businesses requiring regulations or restrictions as to the hours of labor is a matter of legislative discretion and not subject to judicial review unless it clearly appears to have been exercised arbitrarily and without any show of good reason.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. § 70.*]

5. Statutes (§ 114*)—Subjects and Titles.

St. 1909, p. 279, c. 181, entitled "An act regulating the hours of employment in underground mines and in smelting and reduction works," provides that the period of employment for all persons engaged in underground mines or in smelters and institutions for the reduction or refining of ores should not exceed 8 hours within any 24. *Held*, that the statute is not invalid on the ground that the act and title embrace more than one subject in violation of Const. art. 4, § 24.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 114.*]

6. Constitutional Law (§ 70*)—Powers of Government.

St. 1909, p. 279, c. 181, provides that the period of employment for all persons employed in underground mines or in smelters shall not exceed 8 hours within any 24, and that the hours of such employment shall be consecutive, excluding intermission for lunch or meals. *Held*, that the provision that the hours should be consecutive was a matter of legislative policy not reviewable by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. § 70.*]

In Bank. Application by Fred J. Martin for a writ of habeas corpus to obtain petitioner's release from custody on a charge of violating St. 1909, p. 279, c. 181. Writ dismissed.

Solinsky & Wehe and Paul C. Morf, for petitioner. James Keith, Dist. Atty., for respondent.

SLOSS, J. Upon the application of Fred J. Martin, a writ of habeas corpus was issued by this court. Martin had been arrested upon a charge of violating the terms of a statute entitled "An act regulating the hours of employment in underground mines and in smelting and reduction works" (St. 1909, p. 279, c. 181), approved March 10, 1909. The provisions of the act are as follows:

"Section 1. That the period of employment for all persons who are employed or engaged in work in underground mines in search of minerals, whether base or precious, or who are engaged in such underground mines for other purposes, or who are employed or engaged in other underground workings whether for the purpose of tunneling, making excavations or to accomplish any other purpose or design, or who are employed in smelters and other institutions for the reduction or refining of ores or metals, shall not exceed eight hours within any twenty-four hours, and the hours of employment in such employment or work day shall be consecutive, excluding, however, any intermission of time for lunch or meals; provided that, in the case of emergency where life or property is in imminent danger, the period may be a longer time during the continuance of the exigency or emergency.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Sec. 2. Any person who shall violate any provision of this act, and any person who as foreman, manager, director or officer of a corporation, or as the employer or superior officer of any person, shall command, persuade or allow any person to violate any provision of this act, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars ($50.00) nor more than three hundred dollars ($300.00), or by imprisonment of not more than three months. And the court shall have discretion to impose both fine and imprisonment as herein provided.

"Sec. 3. All acts and parts of acts inconsistent with this act are hereby repealed."

It is not questioned by the petitioner that the complaint which furnished the basis for his arrest stated a violation of the terms of the act. His position is, however, that the act is void as being in contravention of constitutional provisions.

The ground of attack usually advanced in cases of this character, namely, that the statute is in conflict with the guaranties of the fourteenth amendment to the Constitution of the United States, is not here urged. Indeed, such contention is hardly open to the petitioner in view of the decision in Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, where the Supreme Court of the United States decided that a statute of Utah, substantially identical in its main features with the one before us, did not deprive persons affected by it of any right conferred by the federal Constitution. Conceding the binding force of that decision as an adjudication of all federal questions involved, the petitioner here bases his claim to immunity from prosecution upon certain provisions of the Constitution of this state.

Before proceeding to a consideration of the particular points made in this connection, it may be well to briefly state the basis of the decision in Holden v. Hardy, since, in our opinion, the points there decided go far toward answering the main objections predicated upon the state Constitution. The right on the part of the state to restrict the freedom of citizens to make contracts concerning their callings or occupations was there upheld with respect to the particular callings covered by the Utah statute, i. e., mining and working in smelting and reduction works, upon the ground that the restriction in question was a proper exercise of the police power for the preservation of the public health. "The right of contract," says the court, "is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employés as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held * * * that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." Again, in the same opinion, it is said that: "While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting." The right to limit the hours of labor generally was not involved in Holden v. Hardy. No such right was asserted. It was, however, decided that the particular occupations affected by the act possessed such elements of danger and risk to the employé that the Legislature might reasonably conclude that in such occupations a restriction of the time of labor was necessary for the protection of those engaged in such labor.

The limitations of the doctrine are well illustrated by the subsequent decision in Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, in which the court, reversing the decision of the Court of Appeals of New York in People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, declared invalid a law limiting the hours of labor of bakers. The real ground of that decision is, we think, to be found in the following extract from the opinion of Mr. Justice Peckham: "We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the Legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé." The decision in the Lochner Case was by a bare majority of the court, but the majority itself recognized the correctness of the decision in Holden v. Hardy and distinguished that case upon the ground that the callings involved in the two statutes were essentially different.

It follows, from a comparison of these two decisions, that, in determining whether an act limiting the hours of labor in any occupation is in violation of the provisions of the federal Constitution, the primary consideration is whether or not the occupation possesses such characteristics of danger to the health of those engaged in it as to justify the Legislature in concluding that the welfare of the community demands a restriction.

And this brings us to the petitioner's contention that the act is violative of the provisions of the state Constitution respecting special legislation. It is contended that the act violates subdivision 2 of section 25 of article 4, in that it is a special law for the punishment of a crime or misdemeanor created by said act; that it violates subdivision 33 of said section, in that it is a special law passed in a case where a general law can be made applicable; that it violates section 21 of article 1, in that it grants to citizens or classes of citizens privileges or immunities which are not, upon the same terms, granted to all citizens; that it violates section 11 of article 1 as not being of uniform operation. These various specifications are in effect directed to the same point, namely, that the law arbitrarily selects for its operation a special class of persons. It is, we think, unnecessary at this date to cite many authorities in support of the proposition that a law is not special or lacking in uniformity merely because it does not apply to every person or subject within the state. "An act to be general in its scope need not include all classes of individuals in the state; it answers the constitutional requirements if it relates to and operates uniformly upon the whole of any single class." Abeel v. Clark, 84 Cal. 226, 24 Pac. 383. The classification created for the purposes of legislation must, of course, be a reasonable one. The test of its propriety is well stated in City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, where the court declared "that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." But in view of the decision in Holden v. Hardy, based as it was upon the fact that the occupations covered by this act were so peculiarly dangerous as to justify special regulation, how can it be said that the Legislature in selecting these occupations and applying to them provisions designed to protect the health of those engaged in them was making "a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law"? The very grounds which led the Supreme Court of the United States to hold that the Utah statute did not deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws, requires the conclusion that the legislation was not special within the meaning of our state Constitution. See Julien v. Model B. L. & I. Co., 116 Wis. 79, 92 N. W. 561, 61 L. R. A. 668. For if it could be said that the limitation of the hours of labor of miners and those engaged in smelting and reduction works could not be supported by any natural or intrinsic distinction between those occupations and others, the legislation would, for the reasons declared in Lochner v. New York, necessarily fall before the provisions of the federal Constitution.

The appellant relies with great confidence upon the decision of the Supreme Court of Colorado in Re Morgan, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269. In that case it was held that an act similar to the one under consideration was unconstitutional, this conclusion being based upon the ground, among others, that the law was "class legislation." We have not had access to the Constitution of Colorado and are not informed of its precise terms regarding general and special legislation. It may be observed, however, that some of the grounds relied on by the Colorado court for its decision are clearly in conflict with the views of the Supreme Court of the United States in the Holden Case. In other states, having constitutional provisions directed against the passing of special laws, legislation of this character has been upheld. Ex parte Boyce, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47; Ex parte Kair, 28 Nev. 127, 80 Pac. 463, 113 Am. St. Rep. 817; State v. Cantwell, 179 Mo. 245, 78 S. W. 569.

It is argued by the appellant that the act is special because it does not include in its scope many occupations other than mining which are equally dangerous to the health of the persons engaged in them. Reference is made, for example, to marble cutters and marble drillers, diamond cutters, workers in furnaces and laundries, men employed in wine cellars, breweries, and ice houses, men in boiler works, match makers, cleaners of clothes, makers of white lead, of china and earthenware, and many others. The argument is, apparently, that any law is special which does not include all of these occupations. This view is obviously unsound. Whether these other occupations present the same dangers to health as those involved in mining, etc., and whether, if they do, these dangers can best be met by restricting the hours of labor, are primarily questions for the Legislature. The Legislature has determined one or both of them in the negative by enacting this law. The selection of the businesses requiring regulation is confided to the legislative discretion, and this discretion is not subject to judicial review unless it clearly appears to have been exercised arbitrarily and without any show of good reason. It certainly cannot be justly said to be apparent that each or any of the trades instanced by counsel is, in its effect upon the health of workers, identical with the occupations covered by the act under discussion, nor that the most appropriate method of counteracting any injurious effects pertaining to any of them is necessarily the same as that found to be suitable for miners and men working in smelting and reduction works. In other words, the law is not rendered special by the mere fact that it does not cover every subject which the Legislature might conceivably have included in it. It is enough that the subjects covered possess such intrinsic peculiarities as to justify the legislative determination that those subjects require special enactment.

It may be questioned whether, in view of the title of the act, the limitation of hours applies to all underground work or only to that performed in mines. But if we assume, with petitioner, that only work in mines is covered, the act is not thereby rendered obnoxious to the constitutional provision against special legislation. This point was made in State v. Cantwell, supra, and was met by the answer that the discrimination between work in mines, and that in other underground diggings was justified by the fact that mining is a permanent business in which men are engaged steadily for long periods of time, whereas other underground diggings are ordinarily temporary and irregular in duration and for that reason do not require the same measure of regulation.

The act and the title thereof do not embrace more than one subject. Const. art. 4, § 24; Ex parte Boyce, supra. It is designed, as we have said, for the protection of the health of persons engaged in occupations regarded by the Legislature as dangerous. Such occupations as in the legislative view were subject to the same kind of danger and which required the same kind of regulation could properly be joined together in one act. We may remark the inconsistency between the argument that the act is void because it covers different kinds of employment and petitioner's other contention that the act is void because it does not cover a greater number of employments.

Petitioner attacks the provision of the act that the hours of employment shall be consecutive (excluding, however, any intermission of time for lunch or meals). We are not prepared to say that this limitation bears no reasonable relation to the protection of the health of the workmen. The Legislature may have considered that persons working in underground mines, in smelters, or in reduction works required for their protection, not only that the total number of hours of employment in a day should be limited, but that the hours of labor should be so adjusted as to allow the employé a long consecutive period for rest and recreation. This is a question of legislative policy with which the courts have no concern.

Upon the whole case, we are satisfied that the act is a valid exercise of the legislative power, and that the petitioner is properly held.

It is ordered that the writ be dismissed and the petitioner remanded to the custody of the constable.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

157 Cal. 59

Ex parte MARTIN. (Cr. 1,540.)

(Supreme Court of California. Dec. 23, 1909.)

MASTER AND SERVANT (§ 13*) — STATUTORY PROVISIONS—RESTRICTION OF HOURS OF EMPLOYMENT.

St. 1909, p. 279, c. 181, provides that the period of employment for persons engaged in work in underground mines shall not exceed 8 hours within any 24. *Held*, that the limitation of time is to be construed as referring to the time when men are actually engaged in work, and not when they are going to or from their work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*]

In Bank. Application by Fred J. Martin for a writ of habeas corpus to obtain his release from custody on a charge of violating St. 1909, p. 279, c. 181. Petitioner discharged.

Solinsky & Wehe and Paul C. Morf, for petitioner. James Keith, Dist. Atty., for respondent.

SLOSS, J. The petitioner in this case was also petitioner in Cr. No. 1,539, just decided (106 Pac. 235), and is held under a complaint purporting to charge him with a violation of the terms of the act regulating the hours of employment in underground mines and in smelting and reduction works, approved March 10, 1909 (St. 1909, p. 279, c. 181). The validity of the act as a whole was considered and upheld in the foregoing case. The present proceeding presents solely a question of construction. The petitioner is charged in the complaint with having required a miner to work eight full and consecutive hours at the face of a drift in a mine in addition to the time necessarily occupied in traversing the shaft, underground drifts, and tunnels between the surface of the mine and the face of said drift. The time so occupied in going to and from the place of work was in excess of 30 minutes.

We think the petitioner's contention that no violation of the act is here charged is correct and should be sustained. The act provides that the period of employment of persons employed or engaged in work in underground mines, etc., shall not exceed 8 hours in any 24 hours. The purpose of the act is, as has been pointed out in the opinion in Cr. No. 1,539, the protection of the health of men working in underground mines. The injury to health which seems to have been apprehended is that which would be encountered by one subjected to the strain of performing manual labor under detrimental conditions. Giving to the words of the act their ordinary and reasonable meaning, the limitation of time is to be construed as referring to the time when men are actually engaged in work, not when they are going to or from their work. There is nothing in the language of the act which would justify a more restricted interpretation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A somewhat similar question has arisen under the federal statute (5 Fed. St. Ann. p. 819 [U. S. Comp. St. 1901, p. 2637]), providing that "if any letter-carrier is employed a greater number of hours per day than eight he shall be paid extra for the same in proportion to the salary now fixed by law." The "employment" which entitles a carrier to extra pay under this law is held to be employment "in work that is not inconsistent with his general business under his employment as a letter-carrier." United States v. Post, 148 U. S. 124, 13 Sup. Ct. 567, 37 L. Ed. 392. It does not include short intervals, nor "swings," between trips, when the carrier is not actually employed in work, and not required to remain in or about the post office. United States v. Langston, 85 Fed. 613, 29 C. C. A. 379; United States v. McCrory, 119 Fed. 861, 56 C. C. A. 373.

The petitioner is discharged.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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157 Cal. 60

Ex parte MARTIN. (Cr. 1,541.)

(Supreme Court of California. Dec. 23, 1909. Rehearing Denied Jan. 10, 1910.)

1. WORDS AND PHRASES—"REDUCE."

As applied to mining, the word "reduce" means to bring to a specified form or condition, as to reduce rock to powder, or to deprive an ore of nonmetallic constituents.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6025.]

2. WORDS AND PHRASES—"REDUCTION."

The word "reduction," as applied to mining, means the separation of metals from their ore.

3. MASTER AND SERVANT (§ 13*)—STATUTORY REGULATION—PERIOD OF EMPLOYMENT.

St. 1909, p. 279, c. 181, provides that the period of employment of all persons engaged in work in smelters and other institutions for the reduction or refining of ore shall not exceed 8 hours within any 24. *Held*, that a quartz mill is within the meaning of the statute, though the metal is extracted solely by the process of pulverizing and crushing.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*]

4. MASTER AND SERVANT (§ 13*)—STATUTORY REGULATION—POLICE POWER.

St. 1909, p. 279, c. 181, prohibits the occupation of any one in a quartz mill more than 8 hours within any 24. *Held* that, as the air in the vicinity of the crusher frequently becomes filled with fine particles of rock in the form of dust, it cannot be held that such occupation is not detrimental to health to such an extent as to place the statute within the police power.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*]

In Bank. Application by Fred J. Martin for a writ of habeas corpus to obtain his release from custody on a charge of having violated St. 1909, p. 279, c. 181. Petition dismissed.

Solinsky & Wehe and Paul C. Morf, for petitioner. James Keith, Dist. Atty., for respondent.

SHAW, J. This case was submitted upon the same briefs and at the same time as the two cases with the same title, numbered, respectively, 1,539 (106 Pac. 235), and 1,540 (106 Pac. 238). The only point wherein it differs from the other two cases is that in this case the petitioner was charged with having commanded a workman to work more than eight hours in one day, upon a mill in control of the petitioner and then in operation crushing and pulverizing quartz for the purpose of extracting precious metals therefrom; in other words, in an ordinary stamp mill.

The only arguments in favor of the writ, not answered in the opinions in the other two cases, are: First, that the mill in question is working free milling ore, and the metal is extracted solely by the process of pulverizing and washing, which, it is claimed, is not embraced within the phrase "smelters and other institutions for the reduction or refining of ores or metals," contained in the act; and, second, that the occupation of laboring in a quartz mill of this kind is not sufficiently injurious to health to bring it within the scope of the police power.

As applied to mining, the word "reduce" means to bring to a specified form or condition, as, to reduce a rock to powder, or, to deprive an ore of nonmetallic constituents, and the word "reduction" means the separation of metals from their ores. Standard Dic. The application of heat to flux the ore is not necessary in order to make the establishment an "institution for the reduction of ore." A quartz mill comes as clearly within the meaning of that phrase as a smelter. We cannot agree to the proposition that the insertion of the word "smelters," at the beginning of the phrase used in the statute, brings it within the rule noscitur a sociis, so as to confine the application of the statute to institutions wherein ores are reduced by smelting.

The Legislature has by this act declared that in its judgment the occupation of laboring in reduction works of this character is so dangerous to the health of those engaged in it as to make it a proper subject of regulation. As was remarked in the opinion in case No. 1,539, supra, the legislative judgment upon a matter of fact such as this "is not subject to judicial review unless it clearly appears to have been exercised arbitrarily and without any show of good reason." In a quartz mill the ore is first crushed and then washed in order to separate the metal from the rock. In this process it is obvious that frequently the air in the vicinity of the crusher will become filled with fine particles of the rock in the form of dust, which the workmen in breathing must draw into their lungs. We cannot say that this will not be detrimental to their health to such an extent as to make it advisable to shorten the hours of labor therein. It has been so held in cases in other states, with respect to similar statutes. Ex parte Boyce, 27 Nev. 299, 75 Pac. 3, 65 L. R. A. 47; Ex parte Kair, 28 Nev. 141, 80 Pac. 465, 113 Am. St. Rep. 817; State v. Holden, 14 Utah, 98, 46 Pac. 1105, 37 L. R. A. 108; Holden v. Hardy, 169 U. S. 396, 18 Sup. Ct. 383, 42 L. Ed. 780.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

For these reasons we are of the opinion that the facts charged in the complaint against the petitioner state an offense defined in the statute, and that the statute is, in this particular, a constitutional enactment. The process upon which he is in custody is therefore valid.

It is ordered that the petition be dismissed, and that the petitioner be remanded to the custody of the officer.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(157 Cal. 73)

CLUTE et al. v. TURNER, Superintendent of Streets, et al. (S. F. 5,158.)

(Supreme Court of California. Dec. 24, 1909. Rehearing Denied Jan. 20, 1910.)

1. STATUTES (§ 71*) — GENERAL LAWS — UNIFORMITY OF OPERATION.

If a law operates equally upon all the objects embraced within it that may come within the scope of its authority, the uniformity of operation contemplated by the Constitution by article 1, § 11, is attained, and St. 1889, p. 70, c. 76, being an act for laying out, opening, etc., any street, alley, court, etc., within municipalities, and to condemn and acquire property necessary or convenient for that purpose, providing a complete scheme for carrying out purposes stated in its title, including assessment of lands benefited within the improvement district established, is uniform in operation; the class to which it applies, municipalities, being a well-recognized class to which general legislation of such character may be addressed, and the subject of the legislation being one usually committed to such municipalities either by charter or general laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 71; Dec. Dig. § 71.*]

2. STATUTES (§ 123*) — TITLE — SUBJECT EMBRACED IN TITLE.

The act is not a violation of Const. art. 4, § 24, because the subject of assessment is not mentioned in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 130, 132, 177, 181; Dec. Dig. § 123.*]

3. EMINENT DOMAIN (§ 2*)—TAKING PRIVATE PROPERTY FOR PUBLIC USE — SOVEREIGN POWER.

Under the Constitution, private property may be taken for public use either by the exercise of eminent domain or by taxation, which powers are separate and distinct.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*]

4. STATUTES (§ 97*)—SPECIAL OR LOCAL LAWS.

St. 1889, p. 70, c. 76, being an act for laying out, opening, etc., any street, square, alley, etc., within municipalities, and to condemn and acquire property necessary or convenient for that purpose, and providing for the assessment of lands benefited within the improvement district established, is not an eminent domain act, and, so far as it provides for an assessment for benefits, merely grants the power of taxation, and no property of those within the district created to pay for the benefits conferred is taken, and hence the act is not unconstitutional as being a special or local eminent domain law relating to municipalities only.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 109; Dec. Dig. § 97.*]

5. EMINENT DOMAIN (§ 2*) — STATUTES — VALIDITY—OPENING STREETS.

The act was not violative of Const. art. 1, § 14, prohibiting the taking of private property for public use without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3, 11; Dec. Dig. § 2.*]

6. EMINENT DOMAIN (§ 2*)—LOCAL IMPROVEMENTS—ASSESSMENTS—DELEGATION OF POWER TO MUNICIPALITY.

Under the power of taxation the Legislature may confer upon municipalities the authority to require local improvements, such as the laying out or widening of streets, to be borne by those owning property in the vicinity of the improvement, and who are specially benefited by it, and the exercise of such power does not contravene the constitutional provision respecting the exercise of the power of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*]

7. CONSTITUTIONAL LAW (§ 233*) — EQUAL PROTECTION OF LAWS.

St. 1889, p. 70, c. 76, providing for the laying out, opening, etc., of any street, alley, etc., within municipalities, and providing for the assessment of lands benefited within the improvement district established, is not violative of Const. U. S. Amend. 14, guaranteeing to all the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 686; Dec. Dig. § 233.*]

8. MUNICIPAL CORPORATIONS (§ 408*)—OPENING AND LAYING OUT STREETS—REPEAL OF STATUTE.

The act was not repealed by St. 1903, p. 376, c. 268, on the same subject; that act simply providing an alternative method of proceedings for opening and laying out streets, etc., and expressly providing, by section 35 thereof, that its provisions should in no way affect the act of 1889 (St. 1889, p. 70, c. 76).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1005; Dec. Dig. § 408.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. Municipal Corporations (§ 408*)—Opening and Laying Out Streets—Repeal of Statute.

The act, being one providing for taxation for special benefits as far as the lands within the improvement district are concerned, and having nothing to do with eminent domain, was not repealed by the amendment in 1907 (St. 1907, p. 742, c. 399) of Code Civ. Proc. § 1238, relative to the exercise of eminent domain as to roads and streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1005; Dec. Dig. § 408.*]

Department 2. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by A. B. Clute and others against E. Q. Turner, Superintendent of Streets, and others. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. Redmond C. Staats and J. M. Koford (F. D. Stringham and Geo. L. Hughes, of counsel), for respondents.

LORIGAN, J. The trustees of the town of Berkeley instituted proceedings under the act of 1889 to open and extend Eighth street in that town. The lands of plaintiffs were included within the district established by the board, under the act, as among those to be benefited or affected by the opening of the street, and which were to be assessed to pay the damages, costs, and expenses thereof. In due course an assessment was levied against the lands of plaintiffs and others by the commissioners appointed by the board of trustees for that purpose, for benefits to their lands by reason of the opening of the street. The assessment against the lands of plaintiffs having become delinquent, the superintendent of streets was proceeding to sell their lands within said district to collect it, when they brought this action against the superintendent and the board of trustees of the town to obtain an injunction restraining the sale, and a decree declaring the assessment invalid. A demurrer to the complaint was sustained, and a motion of plaintiffs for a preliminary injunction denied. The plaintiffs declining to amend their complaint, judgment was entered against them, and they appeal therefrom and from the order denying their motion; the principal question on the appeal being the correctness of the ruling of the court sustaining the demurrer to the complaint.

We have not set forth in particular the allegations of the complaint because the action is not based on any claim of invalidity in any of the proceedings taken by the board of trustees for nonconformity to the provisions of the act under which they were instituted. Their regularity is practically conceded, and the attack on the assessment is made exclusively upon the ground that the act itself, under which the proceedings for opening the street were brought, is invalid because violative of certain provisions of both the state and federal Constitutions, and, if not invalid for those reasons, that the act had, nevertheless, been repealed before the proceedings in question were instituted.

As to the constitutional objections, it is claimed that the act in question is void under article 1, sections 11 and 14, of our Constitution, providing, respectively, that all laws of a general nature shall have a uniform operation, and that private property shall not be taken or damaged for public use without just compensation having been first paid to the owner; that the act is not a general law, particularly when compared with the general act of eminent domain; and that it also conflicts with article 4, § 24, of the same organic law, which requires the subject of an act to be expressed in its title, the point in this regard being that the subject of "assessment," to pay for the lands taken for the opening of the street, is not mentioned in the title to the act. As to the federal Constitution, it is claimed that the act denies to plaintiffs "the equal protection of the laws" guaranteed to them by article 14 of that Constitution (Const. U. S. Amend. 14).

Upon the subject of repeal of the act, it is insisted that it was repealed by the passage of the subsequent act of 1903 (St. 1903, p. 376, c. 268) on the same subject of opening and laying out streets, and also by the amendment in 1907 (St. 1907, p. 742, c. 399) of section 1238, Code Civ. Proc., relative to the exercise of the right of eminent domain as to roads and streets. The constitutionality of this particular act of 1889 has repeatedly been attacked under constitutional objections, and as repeatedly sustained, and in the present assault, where an objection is now urged, which it is claimed has not been heretofore made against the act itself, it will be found to have been urged against legislation of a similar character and determined to be untenable. The act in question is entitled "An act to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane, alley, court or place within municipalities and to condemn and acquire any and all land and property necessary or convenient for that purpose." St. 1889, p. 70, c. 76. The act provides for a complete scheme for carrying out the purposes stated in its title, and, among other things (alone necessary to be referred to in connection with the points made on this appeal), provides for the passage of a resolution of intention, describing the work or improvement to be carried out, the land necessary to be taken therefor, and a specification of the exterior boundaries of the district of land to be affected or benefited by said work or improvement and to be assessed to pay the damages, costs, and expenses thereof; that commissioners shall be appointed to determine the value of the land to be taken and the damages to improvements and property affected thereby; the said commissioners also to determine the amount of expenses incident to the work or improvement contemplated, and to assess the same upon the district of lands declared to be benefited thereby, in proportion to the benefits to be derived therefrom. It provides for a report of these matters by the commissioners to the municipal body, and for public notice of the making thereof, and for a hearing thereon, at which objections to said report may be made by any person interested. It empowers the commissioners after confirmation of the report to collect the assessments made, and authorizes the sale of the lands assessed for benefits after payment of the assessments becomes delinquent. It further provides that when sufficient money is in the hands of the city treasurer, in the fund devoted to the proposed improvement, to pay for the lands and improvements to be taken or damaged, the owner of said land be notified of the readiness of the municipality to make payment on tender of a conveyance by him, and, in the event of his refusal to accept, provides that the commissioners may cause proceedings, in the name of the municipality, to be taken for the condemnation of the land, as provided by law, under the right of eminent domain.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Now, to a consideration of the points urged by appellants against the act. It is claimed that the act is unconstitutional, because it is not a general law, that it is not uniform in its operation, and that the subject upon which it legislates—the assessment—is not expressed in its title.

As to the first point referred to, it has been expressly decided adversely to appellant in Davies v. Los Angeles, 86 Cal. 37, 24 Pac. 771, which involved a consideration of this very act of 1889. It was there insisted that the act was not a general law within the constitutional provision. But the court held to the contrary, saying: "The only question upon which there could be any reasonable doubt is whether the statute under consideration is a general law or not, and that question has been firmly settled by several well-considered cases, above cited, and should be equally beyond controversy in the courts of this state." The constitutionality of the act was again sustained in Cohen v. County of Alameda, 124 Cal. 504, 57 Pac. 377, and in Alameda v. Cohen, 133 Cal. 6, 65 Pac. 127, both following the Davies Case.

As to the point that the act is unconstitutional because the subject of assessment is not mentioned in the title, this point was particularly discussed in the Davies Case, and expressly decided to be untenable.

It is insisted, however, that, conceding the act to be a general law, it is not uniform in its operation. But upon the face of the act, at least, there can be no merit in this claim. "If the law operates equally upon all the objects embraced within it, when they come within the circle or scope of its authority, the uniformity of operation contemplated by the Constitution is attained." People v. Henshaw, 76 Cal. 436, 18 Pac. 413. The class to which the act applies is a well-recognized class, to which general legislation of the character mentioned in the title of the act may be addressed, namely, municipalities, and the subject of that legislation, the laying out and opening of streets and other public places, is one usually committed to such municipalities, either by charter or general laws, as matter of municipal concern, and a law which provides for all municipalities a system for opening and extending streets and kindred matters, such as are embraced in the title to the act, is uniform in its operation. Hellman v. Shoulter, 114 Cal. 137, 44 Pac. 915, 45 Pac. 1057.

But it is claimed, notwithstanding these decisions, that the act is not a general law, but local and special, when compared with the provisions of the Code of Civil Procedure relative to the exercise of the right of eminent domain. The particular claim in that respect is that the provisions relative to eminent domain constitute a general law in the fullest acceptation of the term, and apply to all cases where private property may be taken or damaged for public use, including the matter of opening and extending streets, while the act in question is special and local in its application and directed, as counsel contends, to the taking of private property for public use in municipalities only. In this connection it is further insisted that by the proceedings authorized under the act a person is deprived of his property without due process of law, or the protection of equal laws in this, that the taking of private property for opening the streets in a municipality is segregated from the taking of such property outside the municipality, and of all other property, without the benefit conferred in all other cases under proceedings in eminent domain, of having a judicial determination in an action brought for that purpose of the compensation to be paid for the taking, with the right of appeal, and also subjecting the owner of property so taken to be specially taxed under the act for benefits to his property, which, it is contended under the decision in Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188, could not, under proceedings in eminent domain, be allowed as an offset in determining the compensation to be paid. And, generally, it is claimed that the act is in violation of article 1 of section 14 of our Constitution against taking private property for public use without just compensation, and the legislation thereunder.

While we have set forth the main claims

of counsel on this latter point, we perceive no reason why we should discuss them. They are all based upon the assumption that the act in question, as far as its provisions pertain to the assessment of the lands in the district for special benefits, are in the nature of taking the property of plaintiffs for public use, or, at least, that all the provisions of the act on that subject are referable to the exercise of the power of eminent domain. Of course, if this assumption is wrong, and the exercise of the power of eminent domain is not at all involved in proceedings under the act, the attack upon it, based on that assumption, falls. And that the proceedings authorized by the act have no relation to the exercise of this right of eminent domain at all is, under the authorities, quite clear. The act is not in any respect an eminent domain act, nor does it contain any of its features, and, as far as it provides (which as to the lands of plaintiff and others in the district is all it does) for an assessment for benefits against the lands embraced within the exterior limits of the district declared by the municipal authorities to be benefited by the contemplated street improvement, the right of eminent domain is not being exercised at all; there is no taking of the lands, assessed under the act for special benefits, in either a general or constitutional sense. Under our Constitution, private property may be taken for public use, either by the exercise of the right of eminent domain or by taxation. These are sovereign powers which are separate and distinct from each other, and the power which is conferred upon municipalities under the proceedings authorized by the act in question, as far as assessing the lands for special benefits are concerned, are referable solely to the exercise by the state of its sovereign power of taxation conferred upon municipalities as its governmental agents. As said by Dillon, in his work on Municipal Corporations ([4th Ed.] § 617): "The compulsory acquisition of property for streets or other public purposes involves the exercise of two different and high prerogative or sovereign powers, namely, that of eminent domain, so called, by which the property is taken, and that of taxation (which includes assessments upon the property specially benefited, or perhaps upon such as is legislatively deemed to be thus benefited), by which compensation is made to those whose property has been thus appropriated." Within the declaration of that authority, the power which has been conferred upon the municipality under this act, namely, to assess for special benefits, is the power of taxation, power to assess the lands within the district for those special benefits which they will receive above the benefits which may result to the community generally through such improvement; authority from the Legislature to create a district which, in the judgment of the municipal authorities, will be specially benefited by the opening or widening of a street or other public improvement contemplated by the act. The theory upon which such legislation is enacted is that the lands in the vicinity of a public improvement, and which are specially benefited by it, should pay the expenses of the making of the improvement, in proportion to the benefits received therefrom. This is all that the act contemplates and provides for. No property of those within the district created to pay for the benefits conferred is taken. Such owners are taxed in proportion to benefits to create a fund to be paid the owner for the land which is actually taken for the street and the damages and costs of the improvement. Should the owner refuse to take the amount awarded him by the commissioners, then, as the act provides, proceedings under the law relative to the exercise of the right of eminent domain must be brought against him to condemn his land. This, however, is the only occasion when the law of eminent domain has any application under the act, and does not concern the owners of land assessed for special benefits. As to them, the state, through its public agency —the municipality—is exercising the right of taxation and not eminent domain. The act in question contemplates the exercise of both powers; eminent domain as against the owner of the land to be taken for the improvement if he does not agree to take the award made by the commissioners, and taxation of the owners of land in the district, who are specially benefited by the improvement, to pay for the land taken and the expenses of making the improvement. Having pointed out the distinction in the constitutional powers provided to be exercised under the act, it is only necessary to say that it is generally agreed among the authorities, and in this state distinctly decided, that the Legislature has the right, under the power of taxation, to confer upon municipalities the authority to require local improvements, such as the laying out or widening of streets, to be borne by those owning property in the vicinity of the improvement, and who are specially benefited by reason of it; that this is a legitimate exercise of the taxing power which the Legislature may confer upon municipalities in making local improvements, and does not contravene the constitutional provision respecting the exercise of eminent domain. Emery v. S. F. Gas Co., 28 Cal. 345; Hagar v. Supervisors Yolo County, 47 Cal. 222; Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661. See, also, French v. Barber Asphalt Pav. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, and People v. Mayor of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266, where these matters are exhaustively discussed.

It is apparent, therefore, that an act which confers authority upon municipalities to tax for local improvements cannot be said to be local or special when compared with legislation providing for the exercise of the right of eminent domain, where the act has no relation to the exercise of such latter power, but applies to and is justified under the exercise of an entirely different and distinct power—that of taxation.

It would also appear from a reading of the opinion in Davies v. Los Angeles, supra, page 48 of 86 Cal. (24 Pac. 771), that the same points just considered were urged on that appeal, or, at least, objections against the validity of the act on substantially the same grounds were made, and, while not extensively discussed by the court, were considered and decided to be untenable.

Under these views and authorities cited, there can be no merit in the claim that plaintiffs by the provisions of the act are denied equal protection of the law as is guaranteed by article 14 of the federal Constitution. There is nothing in the case of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, relied on by appellants, which holds that the assessment of lands in a district for special benefits in the opening and improvement of streets by a municipality is invalid because in contravention of any provisions of the federal Constitution. That it decides nothing of the kind is pointed out in French v. Barber Asphalt Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, and Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900. See, also, Duncan v. Ramish, 142 Cal. 682, 76 Pac. 661.

As to the other points made by appellants: There is nothing in the claim that the act of 1889 was repealed by the subsequent act of 1903 on the same subject of opening and laying out streets. A sufficient answer to this claim is that the act of 1903 simply provides an alternative method of proceedings for opening and laying out streets, etc., and expressly provides, by section 35 thereof, that its provisions shall in no way affect the act of 1889. The point that the act in question was repealed by the enactment in 1907 of amendments to the Code of Civil Procedure relative to eminent domain requires no discussion, in view of the fact that the act, being one providing for taxation for special benefits as far as the lands within the district are concerned, has nothing to do with eminent domain.

As the demurrer was properly sustained, the application for a preliminary injunction was properly denied.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

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11 Cal. App. 774

MOTT v. MINOR. (Civ. 660.)

(Court of Appeal, Third District, California. Nov. 16, 1909.)

1. Brokers (§ 82*)—Action for Compensation—Defenses That Must be Specially Pleaded.

In an action by a broker for compensation for having procured a purchaser for land, under a contract of employment between himself and defendant, the defense that plaintiff's authority had been rescinded before his alleged performance was admissible, though defendant did not specially plead it.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 103; Dec. Dig. § 82.*]

2. Appeal and Error (§ 843*)—Review—Objections to Evidence.

Though an objection by appellant to the introduction of evidence was not sufficiently specific to raise the question, but it appears to have been clearly admissible, the form of the objection is unimportant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. § 843.*]

3. Brokers (§ 82*)—Action for Compensation—Issues and Proof.

Where, in an action by a broker for compensation for having procured a purchaser for defendant's land, the complaint alleged that he procured a certain person as purchaser, and the evidence showed that such person was acting as agent for an undisclosed principal, there was a variance.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 103; Dec. Dig. § 82.*]

4. Brokers (§ 55*)—Compensation—Services of Broker.

Where the real party in interest is not disclosed to the vendor, the broker should not be allowed to prevail on the theory that he has produced the agent of an undisclosed principal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 82; Dec. Dig. § 55.*]

5. Brokers (§ 88*)—Action for Compensation—Instruction.

In an action by a broker for compensation for finding a purchaser for defendant's land, it appeared that the broker procured one who was agent for an undisclosed principal, and that, on the meeting of such person and defendant, defendant refused to sell, and the court instructed that in order for plaintiff to recover he must show that the person procured by him made an offer to purchase. *Held*, that the instruction was proper.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121–127; Dec. Dig. § 88.*]

6. Appeal and Error (§ 1068*)—Instructions—Harmless Error.

In an action by a broker for compensation for finding a purchaser for defendant's land, an instruction as to the facts which must be shown by plaintiff concerning the offer, if erroneous, was harmless, where it appeared that the broker's authority had been rescinded at the time of his alleged performance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4227; Dec. Dig. § 1068.*]

7. Brokers (§ 86*)—Action for Compensation—Services.

In an action by a broker for compensation for finding a purchaser for defendant's land, evidence *held* sufficient to justify a finding that his authority had been canceled prior to his alleged performance.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 118; Dec. Dig. § 86.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Charles W. Mott against Isaac Minor. Appeal by plaintiff from an order denying a motion for a new trial. Affirmed.

Arthur H. Barendt, for appellant. F. A. Cutler, Geo. D. Murray, and McGowan, Squires & Westlake, for respondent.

BURNETT, J. The cause, involving a broker's commission for securing a purchaser for timber land, was tried before a jury, and a general verdict was rendered in favor of defendant. The appeal is from an order denying plaintiff's motion for a new trial.

The written instrument which, it is claimed, created the agency, is in the form of a letter signed by defendant, and in the following language: "San Francisco, Cal., July 27th, 1903. Chas. W. Mott, Esq., San Francisco, Calif.—Dear Sir: I own about 20,000 acres of sugar and yellow pine land (more or less) situated in Tuolumne county, California, and being located in townships 1 and 2 south, ranges 18, 19 and 20 east, M. D. M. and will sell the same for twenty dollars per acre. If you procure me a buyer for the above mentioned tract, or are instrumental in selling same, I hereby agree in consideration of such service, to allow you ten per cent commission on the above price, or any less price that I may agree to accept in the event of a sale being made under within conditions."

The complaint, after alleging the employment of plaintiff by virtue of said written agreement, continues: "That thereupon plaintiff entered upon said service and made every endeavor to procure a buyer for the said land, and his efforts in that behalf were such that on or about October 1, 1903, plaintiff procured one Thomas Friant as a buyer for the said tract of land at the said price and introduced him to the defendant and informed the defendant that the said Thomas Friant was then and there ready, able, and willing to purchase the whole of the said tract of land for the said price, and he, the said Thomas Friant, was then and there able, ready, and willing to purchase of the defendant, the whole or any part of the said tract of land at the said price of $20 per acre; that the negotiations thus initiated continued, and on or about July 13, 1904, the said Thomas Friant offered the said defendant $23 per acre for the said tract of land, and he was then and there able, ready, and willing to purchase the said tract of land and pay therefor the said sum of $23 per acre to defendant."

The defendant denied "that on the 27th day of July, 1903, or at any other time, the defendant employed the plaintiff, as a broker or otherwise, to sell for him certain or any real estate, except as hereinafter stated; that is to say, that at the time last mentioned the said plaintiff represented and asserted to the said defendant that he had secured a purchaser for the lands and premises referred to and mentioned in the said complaint, and that, if he had some instrument to show his authority to make a sale therefor to the said intending purchaser, he, the said plaintiff, would be in a better position to consummate a sale, and thereupon for the purpose of showing the authority of the said plaintiff, as aforesaid, and not otherwise, the said defendant made and executed the instrument set forth in the complaint herein." All the other allegations of the complaint are specifically denied.

The first contention of appellant is that the court erred in admitting evidence of the rescission of the plaintiff's authority as agent for defendant. It is said in the brief: "The answer does not disclose any such defense as cancellation. There is no general denial in the answer. It is, in fact, a confession and avoidance, an admission that the contract was made and a denial of its apparent intent, coupled with a denial that plaintiff performed the services so as to entitle him to the commissions for which he sues." It is urged, therefore, that the cancellation was new matter and should have been pleaded in accordance with the rule laid down in Bliss on Code Pleading (2d Ed.) p. 519, as follows: "It has been supposed by some that the defendant should still be permitted, under the Code, to prove any facts, under a denial merely, which admit it was invalid. But it has been shown that the defendant is at liberty, without having especially pleaded them, to give evidence of facts only which tend to disprove the facts alleged and denied; that is, to disprove their existence as facts, and not the liability they create. The permission goes no further. The rule has been thus stated: 'A general traverse under the Code authorizes the introduction of no evidence except such as tends directly to disprove some fact alleged in the complaint.' Whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out. 'The general rule is that any fact which avoids the action, and which the plaintiff is not bound to prove in the first instance in support of it, is new matter; but a fact which merely negatives the averments of the petition is not new matter and need not be replied to.'"

Upon reflection it will appear that defendant has brought himself clearly within the rule as announced in the foregoing quotations. In order to prevail it was necessary for plaintiff to show two things: First, that he secured a purchaser for the land; and, second, that when he did so he was the duly authorized agent of the defendant for that purpose. It is clear that unless these two circumstances concurred no cause of action existed. The complaint, it is true, does not specifically allege that plaintiff's authority continued till the time when the offer was made; but this is nevertheless admittedly a material factor, and it does at least inferentially appear. Otherwise the complaint would be fatally defective. The complaint, as we have seen, alleges that on the 27th day of July, 1903, the defendant employed the plaintiff to sell the property, and thereupon plaintiff entered upon said service and procured one Thomas Friant as a buyer. While not very clearly stated, we think the complaint necessarily implies that the purchaser was secured while plaintiff was in the service as broker of defendant. At any rate, it is conceded that this is the scheme of the complaint and the evidence to the effect that plaintiff's authority had been canceled, in other words, that he was not in the service of defendant at the time mentioned, goes directly to the foundation of plaintiff's claim. The evidence tended thus to show that no cause of action ever existed in favor of plaintiff and was as clearly admissible as evidence negativing plaintiff's authority in the first instance, or any other material fact denied by the answer. There can be no controversy about the rule, concerning which the authorities are agreed. It is succinctly stated by Prof. Pomeroy (section 549, Civ. Rem. [4th Ed.]) as follows: "Any facts which tend to disprove some one of the material allegations of the complaint may be given in evidence under the denial; any fact which does not thus directly tend to disprove some one or more of these allegations cannot be given in evidence under the denial. It follows that if such fact is in itself a defense, or, in combination with others aids in establishing a defense, this defense must be based upon the assumption, that so far as it is concerned, all the material allegations made by the plaintiff are either admitted or proven to be true. The facts which constitute or aid in constituting such a defense are 'new matter.'" See, also, Landis v. Morrison, 69 Cal. 83, 10 Pac. 258; Heaten v. Arper, 145 Cal. 284, 78 Pac. 721.

The point is also made by respondent that the objection to the evidence was not sufficiently specific to raise the question which we have been considering. There is merit in the contention; but, as it seems clear to us that the evidence was admissible, the form of the objection becomes unimportant.

It is claimed that "there is not a scintilla of testimony to show that Mr. Friant was not able, ready, and willing to buy the defendant's lands at the contract price of $20 per acre." It is sufficient to say that plaintiff in his testimony did not claim that Friant was to be the purchaser of the land. Although he was so introduced, plaintiff declares that "Mr. Friant was a member of the White & Friant Lumber Company. * * * That it was the company that wanted to buy the lands. Nothing was said about his company. Mr. Friant at all times was acting for the White & Friant Lumber Company. They were the ones that wanted to purchase the lands." Considering the whole record, it is therefrom apparent that said Friant was not able and willing to buy said land, but he was acting for an undisclosed principal. There was clearly a variance in this respect between the complaint and the proof. It is no answer to say, "Qui facit per alium facit per se," as it is not a question of authority to act, but of the identity of the would-be purchaser. In Gunn v. Bank of California, 99 Cal. 352, 33 Pac. 1106, it is said: "It is, of course, well settled that when a broker employed simply to negotiate a sale of real estate has found a purchaser able, ready, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and does not depend upon the final acceptance by the purchaser of a conveyance of the property sold. * * * But the question here is: What is finding or producing a purchaser within the meaning of the rule of law declared in this and the other cases cited? Is it sufficient for a broker to merely find a person financially able, and who verbally agrees with him to purchase upon the terms of the vendor and makes a deposit, but who neither signs a binding agreement to purchase upon such terms nor is produced before the vendor as a person ready and willing to enter into such a contract? It seems to us very clear that this question must be answered in the negative. The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect; or if, he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement." The case of Hayden v. Grillo, 35 Mo. App. 647, is quoted to the same effect, wherein it is said: "But the necessity of a written contract of sale may be rendered unnecessary if the agent bring the vendor and vendee together, and the latter is able and willing and offers to complete the contract provided the vendor will make the conveyance." The same doctrine is declared in Mattingly v. Pennie, 105 Cal. 519, 39 Pac. 202 (45 Am. St. Rep. 87), and it is held that: "The readiness and willingness of a person to purchase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase or has offered to the vendor and not merely to the broker to enter into such a contract he cannot be considered a purchaser."

As the question of readiness and good faith are important factors in a case of this kind, it is no more than reasonable that a plaintiff should be held to strict proof in reference to the purchaser, and where the real party in interest is not disclosed to the vendor the broker should not be allowed to prevail upon the theory that he has produced the agent of the undiscovered principal.

But, aside from the foregoing, the general verdict of the jury finds support in the evidence that plaintiff's authority had been canceled before the purchaser was found.

The finding that plaintiff was not in the service of defendant would render immaterial the other consideration as to the purchaser. A finding as to either against plaintiff would obviously support a judgment in behalf of defendant.

Complaint is made also that the court instructed the jury that in order for plaintiff to recover it was incumbent upon him, under the allegations of the complaint, to establish the fact that Thomas Friant made an offer to the defendant to purchase the land at the sum of at least $20 per acre, and that if the jury found from the evidence that Thomas Friant did not offer the defendant the sum of at least $20 per acre then they should find for the defendant, ignoring the defendant's "refusal to enter into any negotiations with the buyer by peremptorily announcing, immediately on meeting the buyer, that he would not sell at the figure named." One of these instructions given by the court was: "I charge you that the readiness or willingness of a person to purchase property can be shown only by an offer on his part to purchase, and, unless you find from the evidence that plaintiff procured a purchaser who offered to purchase all the land described in the agreement, then I charge you that there was no sufficient offer made to the defendant, and you must find a verdict for said defendant." This instruction really follows the allegations of the complaint, but it is claimed by appellant that it was not necessary to show an offer in view of defendant's peremptory refusal to sell. Many authorities are cited to the effect that the broker is entitled to the commission when he has procured a purchaser able, ready, and willing to purchase, therefore holding by implication, so it is claimed, that it is not necessary to prove an offer in order to recover.

However, there seems to be a difference between a bilateral contract binding both parties and a unilateral promise like the one here. This is pointed out in the Mattingly Case, supra, wherein it is said, on page 520 of 105 Cal., and page 202 of 39 Pac. (45 Am. St. Rep. 87), that: "Counsel for plaintiff contend that the evidence showed that Blythe unequivocally refused to perform his contract; and they claim that, under section 1512 of the Civil Code, his refusal to perform entitled plaintiff to all the benefits which he would have obtained if the contract had been performed by both parties. Such is not the law. In some cases of bilateral contracts a refusal on the part of one party to perform the contract has been held to amount to a prevention of performance by the other party. But where, as here, the contract is unilateral, the party to whom the promise is made cannot recover without proof of performance of the condition upon which the promise depends; and in such a case a mere refusal by the promisor to perform, or even an entire repudiation by him of the contract, does not of itself amount to prevention." This must be especially so where, as here, the purchaser was not introduced or made known to the defendant. If he is to be bound by the action of a third party representing an undisclosed principal, there ought at least to be a bona fide offer to purchase on the part of said representative.

But, again, the theory of the complaint is that the negotiations were initiated on October 1st, and that they continued, and on or about July 13, 1904, an offer was made of $23 per acre. According to the allegations of the complaint, therefore, the cause of action was not complete till the latter date, and defendant at any time prior thereto had a right to terminate the agency. But it is admitted that on March 30th preceding defendant addressed a letter to plaintiff, which the latter admits he received, revoking the authority of plaintiff to sell the property. Hence it would seem that, if the instruction as to the "offer" was erroneous, it was without prejudice, as the relation of agency had been terminated.

The closing brief of appellant is devoted to the contention that the evidence is insufficient to show that defendant canceled plaintiff's authority prior to October 1, 1903. In view of the foregoing allegation of the complaint as to July 13, 1904, it would seem to be immaterial whether the authority was canceled prior to said October 1st; but it may be observed that defendant and his daughter so testified, and hence it cannot be asserted that a finding to that effect would be unsupported.

We think there is no prejudicial error in the record, and the order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

11 Cal. App. 762

PEOPLE v. NEWTON. (Cr. 202.)

(Court of Appeal, First District, California. Nov. 16, 1909.)

1. Abduction (§ 15*) — Jury Question — Intent of Abduction.

In a prosecution under Pen. Code, § 267, punishing one who takes away any female under 16 years old from her father, mother, etc., without their consent, for the purpose of prostitution, the purpose and intent of the abduction is peculiarly for the jury.

[Ed. Note.—For other cases, see Abduction, Dec. Dig. § 15.*]

2. ABDUCTION (§ 12*)—PROSECUTIONS—SUFFICIENCY OF EVIDENCE—PURPOSE OF ABDUCTION—PROSTITUTION.

In a prosecution for abducting a female under 16 years old for the purpose of prostitution, evidence *held* to support a finding that the girl was taken away for the purpose of prostitution.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. § 22; Dec. Dig. § 12.*]

3. ABDUCTION (§ 1*)—CRIMINAL RESPONSIBILITY—UNMARRIED FEMALE—NECESSITY OF MARRIAGE.

The female abducted need not have been unmarried in order to justify a conviction under Pen. Code, § 267, punishing one who takes away any female under 16 years old from her father, mother, etc., without their consent, for the purpose of prostitution.

[Ed. Note.—For other cases, see Abduction, Dec. Dig. § 1.*]

4. INDICTMENT AND INFORMATION (§ 167*)—PROOF—UNNECESSARY AVERMENT.

Alleging the unnecessary fact that the female was unmarried, in a prosecution under Pen. Code, § 267, punishing one who takes away any female under 16 years old from her father, etc., without his consent for the purpose of prostitution, did not make such fact material and necessary to be proved; the name of the girl and her father being correctly alleged and she being identified.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 531; Dec. Dig. § 167.*]

5. INDICTMENT AND INFORMATION (§ 167*)—PROOF—SUFFICIENCY—UNNECESSARY ALLEGATIONS.

Unnecessary allegations in the indictment, even if necessary to be proven, need not be proven with the strictness required of allegations essential to the crime charged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 531; Dec. Dig. § 167.*]

6. ABDUCTION (§ 9*)—PROSECUTIONS—ADMISSION OF EVIDENCE.

In a prosecution for abduction for the purpose of prostitution, a question to the police officer who stopped accused and the girl when accused was taking her to a house of prostitution whether, knowing accused was of bad reputation, it was not his duty to take the girl home, was properly excluded; the officer not being tried for breach of duty.

[Ed. Note.—For other cases, see Abduction, Dec. Dig. § 9.*]

7. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE.

The question also called for the officer's opinion as to his duty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1034-1058; Dec. Dig. § 448.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Clara Newton was convicted of abduction for the purpose of prostitution, and she appeals. Affirmed.

Mervyn J. Samuels, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was charged with the crime of abduction as defined by section 267 of the Penal Code, and upon trial was convicted. Upon this her appeal, taken from the judgment rendered against her, it is claimed that the evidence is insufficient to sustain the verdict (1) because it is not shown that the abduction was for the purpose of prostitution; and (2) because there is no proof of the allegation that the person alleged to have been abducted was unmarried.

The section under which the prosecution was had requires that the abduction be "for the purpose of prostitution," and accordingly it was so charged. The purpose or intent with which the abduction was done is peculiarly a matter for the determination of the jury. In this case we think the evidence in the record amply supports the determination of the jury upon this point. It was in proof that the defendant met the girl alleged to have been abducted on the evening of June 14, 1909, and induced her to go with defendant to the home of defendant. Defendant caused the girl to comb and arrange her hair. The girl testified that while she was combing her hair defendant told her that she, defendant, had from 18 to 19 men coming to visit her, and that it was hard for her to attend to them all, and, if she could get some one to work for her, "why, I could make good money." That "she, defendant, could telephone to the Chinese to buy me a silk kimona and chemise. * * * She said we would put our heads out of the window, and she said if I was with her the night before I could have made $10 with her." Defendant sprinkled the girl with perfumery and caused her to put on a coat of defendant's, and at about 11 o'clock at night took her to a house of prostitution. On the way some police officers spoke to defendant, and asked her where she was going, and about the girl. Defendant said the girl was named O'Brien, and had been raised by defendant's mother. In fact, her name was Lizzie Wright, and she was a stranger to defendant. The defendant told the officers that she was going to collect some money of a woman known to the officers to be a prostitute. The officers allowed defendant and the girl to pass on after cautioning defendant not to take the girl into the house. Defendant, however, took the girl into the house of prostitution, entering by the rear door. When the officers applied for admission shortly afterwards, defendant told the girl not to let them see her, and she accordingly hid in the toilet. These circumstances we think ample to support the theory that the defendant abducted the girl for the purpose of prostitution.

The section under which the information was laid does not require the abducted female to be unmarried. It simply provides that: "Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc. Nevertheless the information describes the girl abducted as "Lizzie Wright, then and there being an unmarried female under the age of eighteen years, to wit, of the age of sixteen years." It is now claimed that, though the allegation that she was unmarried was quite unnecessary, yet, it being so alleged, the fact became a matter of essential description and must be proved. It may not always be easy to determine whether a particular fact, by being alleged, has become thereby a material fact necessary to be proved or not. In the case at bar the girl was correctly named, and the name of her father also correctly given. She was thus certainly identified. Whether she was married or not did not in any manner qualify the crime or go to its identity. The word "unmarried" could be stricken from the information without affecting the validity of the information in any respect. We think it may well be treated as surplusage. Such treatment finds ample support in the adjudicated cases. In Mobley v. State, 46 Miss. 501, it was alleged that the female upon whom it was charged a rape was committed was over the age of 10 years. It was held that this allegation, being unnecessary, need not be proved. "As rape may be committed upon a female of any age, the averment that the injured person is 'over the age of ten years' is unnecessary, and, not being a constituent of the crime, need not be contained in the indictment, or, if inserted, need not be proved, as the offense is complete without these words." This case is cited with approval in Sutton v. People, 145 Ill. 279, 34 N. E. 420, where it was held unnecessary to prove an allegation that the accused, charged with rape, was "of the age of fourteen years and upwards." In State v. Ean, 90 Iowa, 534, 58 N. W. 898, the defendant was charged with having committed the crime of adultery with a woman whose name was unknown to the grand jury, and who was over 18 years of age. It was held that the allegation as to the age of the woman with whom it was charged that the defendant committed the adultery was surplusage, and need not be proven. In State v. Perrin, 1 Tread. Const. (S. C.) 446, it was alleged that the person libeled was the only daughter of the widow Roach, and it was held that it was unnecessary to prove that she was the only daughter of such widow. In Allen v. State, 52 Ind. 486, it was held that an allegation that liquor was given to Robert McNeal, Jr., was sufficiently supported by proof that it was given to Robert McNeal without any evidence as to whether he was junior or senior. "Whenever a description or averment can be stricken out, without affecting the charge against the prisoner, and without vitiating the indictment, it may on the trial be treated as surplusage and rejected." Durham v. People, 4 Scam. (Ill.) 172, 39 Am. Dec. 407. In State v. Burt, 25 Vt. 373, upon a charge for assault "upon one Andrew Reafrew, then and there being, constable and collector for the town of Newberry aforesaid," it was held that "the allegations in regard to the character of the person assaulted are not necessary to be proved, being mere description of the person."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

The case at bar comes clearly within the rule as laid down in the cases above cited. Describing the person abducted as an unmarried female is not different from writing after her name the word "spinster," which would simply be descriptive of the person, and would not go to any material element or fact of the crime. But, even if it could be held that the allegation that Lizzie Wright was an unmarried female should have been proven, it is the rule that allegations of this character are not required to be proven with the strictness insisted on as to allegations that are material and essential to the crime. 22 Cyc. 448; Murphy v. State, 28 Miss. 637. See, also, Mobley v. State, supra, where it is said that in such cases slight proof is sufficient. The evidence is that the true name of the girl is Lizzie Wright, and that she was at the time of the trial 16 years of age. The father's name was Edward Wright, and her mother's Barbara Wright, and that she had ever since her birth lived with her father and mother and in their care and custody. It is thus apparent that she still bore her maiden name, that she had always lived in the care and custody of her parents. These conditions are inconsistent with the fact that she had ever been married. Though it sometimes happens that a woman's name is not changed by marriage, it is the exception, and not the rule. She was constantly referred to both by the witnesses and by counsel for the defense as this child. There is absolutely no suggestion of evidence that she was a married woman. It is not at all clear that these circumstances are not sufficient to support the unnecessary descriptive averment that she was an unmarried female.

Some criticism is made of the ruling of the court sustaining an objection made by the district attorney to a question asked by a juror of the officer as follows: "When you met the girl along with the defendant, and you, knowing that the defendant was of bad reputation, wasn't it your duty to protect and take her home?" The objection was properly sustained. The officer was not on trial for dereliction of duty, and the question called for his opinion as well.

Under the heading of "Erroneous Instructions" counsel set forth an instruction given by the court, but fails to point out any error therein. We are unable to discover any fault in the instruction.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

11 Cal. App. 750

VAN LOAN et al. v. GLAZE. (Civ. 692.)

(Court of Appeal, Second District, California. Nov. 13, 1909.)

1. Vendor and Purchaser (§ 3*)—Requisites of Contract—Distinguished from Contract of Agent.

Defendant executed a writing by which he agreed to sell to plaintiffs, or any one whom they might name, at any time before or including a certain date, the real estate described on the terms stated, and further agreed "to pay to the above named agents $1,000 as commission upon the above amount for their services" out of the first money received. *Held*, that the instrument merely authorizes plaintiff to sell the property for defendant as agent, and was not a contract to sell it to plaintiffs.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. Vendor and Purchaser (§ 113*)—Performance.

A purchaser may refuse to take a less acreage of land than that which the vendor agreed to sell him, if the sale was made by the acre.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 201; Dec. Dig. § 113.*]

3. Vendor and Purchaser (§ 31*)—Requisites—Meeting of Minds.

If defendant offered his orchard, irrespective of its acreage, for a certain sum, and the prospective purchaser thought that he was to receive a certain number of acres, which was more than the orchard contained, the minds of the parties never met so as to constitute a binding contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 36; Dec. Dig. § 31.*]

4. Reformation of Instruments (§ 25*)—Defenses—Relief Ineffectual.

Where defendant agreed to sell his orchard as a whole to a purchaser procured by plaintiff, and not by the acre, in plaintiff's action for commissions, it would be idle to reform the contract by changing the description of the land therein by fractional sections, though it was incorrect, where the purchaser refused to take the land because of a shortage in the quantity.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 85; Dec. Dig. § 25.*]

5. Trial (§ 397*)—Trial by Court—Findings—Failure to Find on Particular Issues.

Where defendant agreed to sell his orchard, as a whole, to a purchaser procured by plaintiff, and not by the acre, whether any mistake as to the number of acres therein was mutual did not affect plaintiff's right to recover commissions, so that the failure to find on that issue, in an action for commissions for procuring a purchaser, was not a mistrial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by R. A. Van Loan and another against J. M. Glaze. From a judgment for defendant and an order denying a motion for new trial, plaintiffs appeal. Affirmed.

Larkins & Feemster, for appellants. Power & McFadzean, for respondent.

TAGGART, J. Action to recover commissions for sale of real estate. Judgment for defendant, and plaintiffs appeal from judgment and order denying their motion for a new trial.

Defendant, who resided at San Jose, was the owner of an orange orchard in Tulare county. Plaintiffs, who were real estate agents doing business at Visalia in that county, having in mind a prospective purchaser for the orchard, procured from defendant the following writing: "May 28th, 1907. I agree to sell to R. A. Van Loan and R. L. Berry, or any one whom they may name at any time, and up to and including June 2nd, 1907, the following real estate: 28 acres in the northwest quarter of the northwest quarter of the southeast quarter of section twelve, township twenty south, range twenty-six east, M. D. B. & M., for the sum of $30,000.00, on the following terms, to wit: One-third cash on or before the 15th day of June, 1907, balance on or before the 1st day of January, 1908, with interest at the rate of 8 per cent. per annum. I also agree to pay to the above named agents $1,000.00 as commission upon the above amount for their services, out of the first money received, and further agree to furnish a clear title and abstract to above property as soon as required. This contract and all its provisions shall be irrevocable. J. M. Glaze."

On June 3d (June 2d being a holiday) C. H. Brampton, the purchaser mentioned, gave one of the plaintiffs a check for $50 as a deposit to bind the sale and to apply on the first payment on the property. On June 4th defendant was notified by telegraph: "Deal closed; but buyer prefers Jan. 1st, 1909, instead of Jan. 1st, 1908, as per your contract, as date of last payment. If satisfactory, deliver abstract of title to me at once. [Signed] R. A. Van Loan." Some further correspondence ensued. The change of time of payment was not agreed to by defendant, but the abstract was forwarded and the transaction was assumed by all parties to be in progress toward a transfer of the property, but no agreement to purchase was ever reduced to writing or signed by the purchaser. On June 11th defendant called at the office of Van Loan in Visalia, talked over the trade, learned that the continuation of the abstract was not completed, and prepared and mailed a deed of the property to San Jose for his wife to sign. The next day the abstract was handed to Brampton, who discovered that the orchard contained but 26.72 acres, instead of 28 acres, and declined to pay $30,000 for it, but made an offer for 26.72 acres at the rate per acre that it would have cost him if there had been 28 acres. Defendant refused to make this reduction or accept this offer, but, according to his own testimony (which is contradicted by Van Loan), he asked to see the purchaser, whom he had never met, that if possible an adjustment might be made, but

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Van Loan declined to bring them together, saying that he (defendant) was doing business with him (Van Loan) and had no right to see Brampton. This was on June 14th, and defendant left Visalia the day before the first payment was due and did not return.

There is apparently some confusion in the minds of appellants as to the relations between them and the defendant, growing out of the writing above mentioned. They assume to be the purchaser for some purposes, brokers for another, and Van Loan testified that he intended to sign a written contract with Brampton on behalf of defendant. But there seems to be no question that the instrument was intended to be an authorization of plaintiffs to sell the property for defendant for a commission of $1,000. No sale was ever made, because they sold Mr. Brampton 28 acres for $30,000, and he refused to take 26.72 acres as a compliance with this agreement, as he had a right to do. It is equally true that if the defendant offered his orchard as an entirety, regardless of its acreage, for the sum of $30,000, then his mind and that of Brampton never met, and defendant could not be compelled to carry out a contract which he never made.

Plaintiffs contend that defendant authorized them to sell 28 acres, and point to the writing in support of this. The court finds that while the defendant believed, and stated at the time the instrument was prepared, that the orchard contained 28 acres of land, "it was the intent and purpose of said plaintiffs and said defendant to describe in said contract and provide for the sale of said orchard of defendant without reference to the exact number of acres which it contained." There is evidence to sustain this finding. It appears that the exact description of the tract of land was unknown to either of the plaintiffs or the defendant at the time the writing was prepared. The description in it was obtained from a wall map in the office of Mr. Berry by the latter, according to the defendant, and by Berry and defendant, according to the plaintiffs. It was intended to serve the purpose of this preliminary contract, and was not assumed to be exact. The evidence of Berry, which is conceded to be true, discloses that the description was not correct even as to government fractional sections mentioned, and defendant testified that the orchard was generally known as containing 28 acres, and so known to plaintiffs. This, with other evidence as to the circumstances surrounding the preparation of the writing and the information of the parties as to the property, justified the trial court in concluding that the use of the figures 28 was as a means of identification of the particular orchard, rather than as a statement of warranty of the quantity to be sold.

The same inference answers plaintiffs' specifications of the insufficiency of the evidence to sustain the other findings attacked on this appeal. Sitting as a court of equity to reform the instrument, the superior court would have done an idle thing if it had decreed a reformation of the description in the contract by changing the designation of the fractions of the section. This was entirely immaterial after it was found that the orchard was to be sold as a whole and not by the quantity or upon a guarantee as to the area, and that the sale to Brampton failed because of a shortage in the acreage alone. It is immaterial whether this mistake was mutual or not, as it in no way affects the right of recovery of plaintiffs under the findings of the trial court in respect to the other questions. The failure to find upon this issue therefore was not a mistrial.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 759

PEOPLE v. STOKES. (Cr. 185.)

(Court of Appeal, First District, California. Nov. 15, 1909.)

1. Criminal Law (§ 822*)—Instructions—Construction as a Whole.

In a prosecution for homicide, where the information charged the killing to have been willful and unlawful, the court instructed that if defendant, in a sudden quarrel or heat of passion, or in the commission of an unlawful act not amounting to a felony, killed decedent, as charged in the information, the jury should convict of manslaughter, and further instructed that homicide was excusable when committed by accident or misfortune in lawfully correcting a child, etc., or in doing any other lawful act by lawful means, with ordinary caution and without unlawful intent, and when committed by accident and misfortune in the heat of passion upon any sudden provocation, when no undue advantage is taken, nor any dangerous weapon is used, and if the jury believed beyond a reasonable doubt that accused unlawfully killed decedent in the commission of an unlawful act, not amounting to a felony, the killing was not excusable, and defendant should be found guilty as charged in the information. *Held* that, while the first sentence of the instruction did not fully state the circumstances excusing a homicide, it was sufficient when construed in connection with other charges.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990–1995; Dec. Dig. § 822.*]

2. Criminal Law (§ 829*)—Trial—Instructions—Request—Charges Already Given.

Requested charges which were substantially covered by those given, so far as material, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. Criminal Law (§ 822*)—Trial—Instructions — Construction — Construing as Whole.

The appellate court must consider the charges as a whole, and, if they fairly state the law under the facts when so construed, cannot base a reversal thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990–1995; Dec. Dig. § 822.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Alexander Stokes was convicted of manslaughter, and, from the judgment of conviction and an order denying a motion for a new trial, he appeals. Affirmed.

F. P. Feliz, for appellant. Attorney General Webb, for the People.

COOPER, P. J. Defendant was convicted of the crime of manslaughter, and sentenced to imprisonment in the state prison for a term of five years. This appeal is from the judgment and from the order denying the defendant's motion for a new trial.

The claim urged by defendant's counsel that the evidence is insufficient to support the verdict is without merit. While the evidence shows that the defendant and the deceased had prior to the homicide been friends, and had been drinking heavily during the evening and night on which the homicide occurred, and were both intoxicated, it further shows that the death was caused by the head of deceased striking the pavement or hard sidewalk as the result of a fall from a blow inflicted by defendant, and that the parties had been quarreling, and there is evidence to the effect that the deceased called defendant a name and struck or pushed him back; but considering the fact that the deceased was so intoxicated at the time that he could hardly stand, and that the question as to whether or not the blow inflicted by defendant was or was not in necessary self-defense was one peculiarly for the jury under all the evidence and circumstances of the case, we do not deem it our duty to interfere. The jury recommended defendant to the mercy of the court, and the recommendation appears to have been acted upon, as the sentence was for only one-half of the term that the court might have imposed upon him.

Counsel for appellant states that the most vital error committed by the court was the giving to the jury of the following instruction: "If you believe from the evidence beyond a reasonable doubt that the defendant, upon a sudden quarrel or heat of passion, or in the commission of an unlawful act not amounting to a felony, killed the said Thomas C. Rowley as charged in the information, you should find the defendant guilty of the crime of manslaughter." The instruction refers to the killing as charged in the information; and the information charges the killing to have been willful and unlawful. It is true that the instruction standing alone does not fully state the circumstances under which a homicide is excusable, but it was immediately followed by other instructions which were as follows: "Homicide is excusable in the following cases: First. When committed by accident or misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with the usual and ordinary caution and without any unlawful intent. Second. When committed by accident and misfortune in the heat of passion upon any sudden and sufficient provocation, or upon a sudden combat when no undue advantage is taken nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner. But if you believe from the evidence beyond a reasonable doubt that the defendant unlawfully killed Thomas C. Rowley in the commission of an unlawful act, not amounting to a felony, then the homicide is not excusable, and you should find the defendant guilty as charged in the information." It is sufficient to say that the instruction complained of, when coupled with the instructions immediately following, correctly states the law.

There was no error in refusing to give instructions numbered 2 and 23, which were requested by defendant. In so far as they were material, they were substantially given elsewhere. We must consider the instructions as a whole; and if, when so considered, they fairly state the law as applied to the facts of the case, and as applied to any plausible claim made by defendant based upon the evidence, we cannot interfere. The defendant appears to have had a fair and impartial trial, and we find no error that would justify a reversal.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

11 Cal. App. 767

NIROAD v. FARNELL et al. (Civ. 575.)

(Court of Appeal, Third District, California. Nov. 16, 1909.)

1. PARTNERSHIP (§ 47*)—EXISTENCE OF RELATION—EVIDENCE.

Civ. Code, § 2395, defines a "partnership" as the association of two or more for carrying on business together and dividing the profits, and section 2397 declares that a partnership can be formed only by the consent of all the parties thereto. *Held*, that a partnership may be shown by acts and declarations of the parties; an express agreement to form a partnership not being necessary.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 69–71; Dec. Dig. § 47.*

For other definitions, see Words and Phrases, vol. 6, pp. 5191–5202; vol. 8, pp. 7746, 7747.]

2. PARTNERSHIP (§ 53*)—EXISTENCE OF RELATION—EVIDENCE.

On an issue as to whether defendant and plaintiff were partners in the construction and operation of a boat, defendant testified that he and plaintiff worked together on the building of the boat, that the money that paid for it came from plaintiff's mother, who said she would advance it "as the boys were going in together," that the parties lived together and were supported by the proceeds of the boat, that defendant was not paid any wages, and that the operating expenses were paid from the revenues of the boat. *Held* to show the existence of a partnership in the construction and operation of the boat.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 53.*]

3. PARTNERSHIP (§ 104*)—REPLEVIN.

One member of a firm may not recover firm property from the other, in an action of claim and delivery, as defendant would have an equal right to its possession.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 161; Dec. Dig. § 104.*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by G. F. Niroad against F. F. Farnell and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

T. J. Butts, for appellant. W. F. Cowan and W. E. McConnell, for respondents.

BURNETT, J. This is an action in claim and delivery to obtain the possession of a certain gasoline boat used for conveying passengers on Russian river between Russian River Landing and Monte Rio in Sonoma county, and the complaint is in the usual form. The answer denies the ownership of plaintiff or his right to the possession of the property, and alleges ownership in defendant Farnell and sets up as a separate defense that said defendant has a lien upon the property by virtue of services performed and materials furnished for said launch with the knowledge and consent of plaintiff. There is also an averment that, by reason of an execution issued upon a judgment in favor of one Hoag against said defendant, the sheriff of Sonoma county had levied upon and taken possession of the property; but this feature may be dismissed from further consideration, as the court found that "before the commencement of this action said process lapsed and expired and said defendant John K. Smith (the sheriff) and William Loftus (the deputy) at the time of the commencement of this action did not have possession of said property," and besides, admittedly, the process could reach only whatever interest that defendant Farnell might have in the boat.

The decisive question in the cause is involved in the findings of the court that the plaintiff was not the owner of the property, and "that about the month of April, 1905, plaintiff and defendant F. F. Farnell, as copartners, and not otherwise, purchased and constructed said boat and thereafter as such copartners operated the same for hire until about the month of April, 1906, when plaintiff left said Sonoma county, refused to contribute further to said copartnership or assist in care or management of said business thereof, and declined to be further responsible for any of the obligations thereof, and thereafter said last-named defendant continued to care for said boat and expended large sums in the repair and care thereof and operated said boat under his own management and has not been remunerated therefor by plaintiff, and that the said F. F. Farnell, with the knowledge and consent of plaintiff, agreed to pay and discharge the obligations due Mrs. Niroad for the sum of $517 moneys advanced by her to said copartnership for the purchase of the engine in said boat, on the understanding and agreement that said plaintiff had ceased to contribute to other obligations of said copartnership." In fact, the finding that there was a partnership, if there is sufficient evidence to support it, is all that need be considered, since in that event the plaintiff could not recover in an action of claim and delivery, as the defendant would have an equal right to the possession. This proposition is not disputed, but it is claimed that the evidence is insufficient to justify said finding. It may be remarked that no specific allegation of partnership is made in the answer, but no point is made as to this, and it is assumed that the proof is within the general issue. We think the court's conclusion as to the partnership is amply supported. A "partnership," as defined by section 2395 of the Civil Code, is "the association of two or more persons for the purpose of carrying on business together and dividing the profits between them." This necessarily implies that it must be with the consent of the parties, but we have in section 2397, Civ. Code, the legislative declaration that "a partnership can be formed only by the consent of all the parties thereto, and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof."

It is evident, though, that this voluntary association may be shown without proving an express agreement to form a partnership, The court may well base its finding upon a rational consideration of the acts and declarations of the parties. In the case at bar, giving full credit to the testimony favorable to respondent, as we are required to do, the inference is fair and reasonable that a partnership existed in the boat and the business incident thereto. Although there are other testimony and circumstances lending aid to the court's conclusion, the following quotation from Farnell's testimony ought to set the matter at rest: "I came with my wife to Monte Rio in April, 1905, and lived with her mother and plaintiff. Niroad started to build the boat two weeks afterwards. Niroad and I worked together all the time. The money that paid for this boat came from Mrs. Niroad, plaintiff's mother. She said she would advance the money for the engine as the 'boys,' as she called it, were going in together. We all lived together as one family and were supported by the proceeds of the boat. I was not paid wages. Niroad left in April, 1906, and didn't come back till July, 1907. During all his absence I cared for the boat.

I expended $120 in 1906 and $75 in 1907 for repairs. In December, 1905, or January, 1906, he offered to sell his interest in the boat to me for $225. The operating expenses were paid from the revenue of the boat. The lumber, driving gear, countershaft, friction gear, and engine tools were paid out of the earnings of the boat. After these were paid the earnings for the first year were divided between plaintiff and myself, after taking out house fund of $1 per day. Before we started to build the boat, Niroad proposed that we build one and put it on the river, and we could make some money, and I said, 'All right.' Mrs. Niroad said she would advance the money. Niroad never offered to pay me for the care of the boat or the moneys I expended in repairing it." The foregoing carries with it the necessary inference that the parties understood they were partners, acted entirely as such, and, indeed, that they expressly agreed to build and operate the boat together.

The other portion of the finding which we have set out also finds support in the evidence, but the establishment of the partnership is controlling and renders unnecessary any further consideration of the evidence.

The argument of appellant and the authorities cited have received our careful attention, but they have not disturbed our confidence in the soundness of respondent's position.

We find no prejudicial error in the record, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

11 Cal. App. 717

THOMAS v. LAMB. (Civ. 624.)

(Court of Appeal, Third District, California. Nov. 12, 1909. Rehearing Denied by Supreme Court Jan. 10, 1910.)

1. Trusts (§ 30½*)—Parol Trusts—Personal Property.

Decedent shortly before her death gave her brother the key to her safe, requesting him to open it after her death, take the money therein, pay her funeral expenses and doctor bills and buy a monument for her grave out of it, and send the remainder to her sister. The brother agreed to do as requested. *Held* that, the brother having voluntarily assumed a relation of personal confidence, he became her trustee under the express provisions of Civ. Code, § 2219.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 41, 41½; Dec. Dig. § 30½.*]

2. Trusts (§ 11*)—Parol Trusts—Personal Property—Purposes.

As a contract could have been lawfully made between the parties for the desired purpose, such purpose could be the subject of a valid trust under Civ. Code, § 2220, providing that a trust may be created in such cases with immaterial exceptions.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 9; Dec. Dig. § 11.*]

3. Trusts (§ 30½*)—Parol Trusts—Personal Property.

Decedent having indicated with reasonable certainty her intention to create a trust and the subject, purpose and beneficiary thereof, a trust was created as to the trustor under the express provisions of Civ. Code, § 2221.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 41, 41½; Dec. Dig. § 30½.*]

4. Trusts (§ 37½*)—Parol Trusts—Personal Property—Delivery of Property.

In such a case the intention being clear that the trustee should have present dominion over the property for the purpose of the trust, it was immaterial whether he took immediate possession of the property or not.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 53; Dec. Dig. § 37½.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by M. A. Thomas, executor of Anna H. Slingerland, against Russell W. Lamb. From an order and a judgment for defendant, plaintiff appeals. Affirmed.

J. E. Pemberton and Robert Duncan, for appellant. Mannon & Mannon, for respondent.

BURNETT, J. Upon the undisputed facts the judgment of the trial court seems so equitable that it should not be disturbed unless clearly required by the mandate of the law.

The statement of the case, sufficient for the purpose of the decision, is made by respondent substantially as follows: The defendant and Anna H. Slingerland, who was his sister, lived in the same house on the ranch of the latter. She had a safe in which there was a sum of money. On the 24th day of October, 1906, a short time before her death—which occurred November 10th following—Mrs. Slingerland gave to the defendant the key to the safe and told him there was money in the safe, and, when she was gone, she wanted him to take it and pay her doctor's bill and funeral expenses, buy a monument for her grave at a cost of $75, and whatever was left to send to her sister, Jane Donaldson; that at the same time she told him the safe was his. Defendant said to Mrs. Slingerland that he would carry out her wishes in the matter. The morning after the funeral defendant opened the safe and found therein the sum of $442. Out of this money he paid $152 for funeral expenses, $117.50 for the doctor's bill, he purchased a monument for which the agreed to pay $65 and sent the sister, Jane Donaldson, the sum of $160, aggregating about $53 more than he received.

The other transaction of which complaint is made relates to certain hogs sold by defendant. He and the deceased had been partners in the stock business, and about August 1, 1906, they sold some hogs for $225. Deceased proposed to defendant that, if he would allow her $125 of this amount he might have the balance of the money and what hogs were left. The proposition was accepted by defendant. Subsequently he got up six or seven head of wild hogs having the Slingerland ranch mark. He fed them, and finally sold them for about $60.

The only witness at the trial was defendant, who related what occurred between him and deceased on the night of the 24th of October, 1906. We deem it advisable to state his exact language as follows: "Mrs. Slingerland said to me, 'The key of the safe is between the carpet and the wheel,' and she says, 'Get it for me.' I went and got the key, and handed it to her. She took the old key in her right hand. 'Now,' she says, 'Russ, there is nothing to administrate on when I pass away, or am gone,' words to that effect. 'You open that safe, and you will find money enough to pay my funeral expenses and my doctor's bills, and $75 for a little monument like that put at Henry's grave, and, if there is any left, whatever is left send my sister Jane.' * * * I said to her, 'I will as long as you wish it, I will attend to that for you.' She then handed me the safe key which I have to the present time." From the foregoing testimony we think the court was justified in holding that a trust was created in said money for the purposes clearly set forth in said conversation. The "relation of personal confidence" with Mrs. Slingerland was voluntarily assumed by defendant, and he therefore became her trustee. Section 2219, Civ. Code. There is no possible doubt that a contract could have been lawfully made between the parties for the desired purpose and hence it could be the subject of a valid trust. Section 2220, Civ. Code.

By her words and acts the trustor indicated with reasonable certainty her intention to create a trust and the subject, purpose, and beneficiary of the trust, and it follows that a trust was created as to the trustor. Section 2221, Civ. Code. There is no dispute that a trust as to personal property can be created by parol, but it is contended by appellant that a mere agency was created which terminated on the death of the principal, that the defendant "is trying to carry out without probate the provisions of a simple attempted nuncupative will which was absolutely void," and that respondent's theory of the transaction cannot be maintained for the additional reason that there was no actual delivery of the money, as respondent testified that he did not take manual possession of it until after the death of his said sister.

There is no controversy, and can be none, as to the intention of Mrs. Slingerland that respondent should dispose of the funds as he has done and therefore this vital question of what was intended—often embarrassing in kindred cases—is entirely eliminated. Indeed, the whole contention of appellant rests upon the assumption that the complete title to the money remained in Mrs. Slingerland until the time of her death. This, in our opinion, is born of a misconception of the trust transaction. The only reasonable construction of what was done and said is that she surrendered to respondent complete control and dominion over the property. If she had taken the money from the safe and delivered it to him with similar instructions, her act and declaration would have had no greater significance. She gave the safe to respondent, handed him the key, told him to dispose of the money after her death according to her directions, and he accepted the trust. It is difficult to understand how the transaction would have a different coloring if she had actually handed him the money, or if he had taken it from the safe before her death. He certainly had the means of securing it but there was no reason why he should not leave it in this safe place until the occasion should arise for the disposition of it, which the evidence showed was near. Suppose she had said to defendant, "There is some money in the safe which I intrust to you. Here is the key. After my death, pay the doctor's bill, my funeral expenses, erect a $75 monument over my grave, and send the balance to our sister Jane," and he had agreed to do so—would any one contend that a valid trust was not created or that it would make a particle of difference whether he actually took possession of the money prior to her death? The fact is that in case of such a trust, where the intention is clear that the trustee shall have present dominion over the property for the purposes of the trust, it is immaterial whether he take immediate possession of the property or not. The distinction as to the element of delivery between the creation of a trust in relation to personal property and a gift of the same has probably not been given due weight by appellant and has led to a misconstruction of some of the decisions. The cases cited, we think, in view of the peculiar facts and circumstances involved, are generally harmonious.

In Bedell v. Scoggins et al., 107 Cal. xvii, 40 Pac. 954, as stated in the syllabus: "Defendant gave deceased a note for money which he owed her, by which he promised to pay $400 for her funeral expenses or to return it to her on demand. During her last illness deceased handed the note to defendant, saying, 'Here is something for you.' Held that an express trust, to expend the money, after her death, for her funeral expenses, was created." The case is criticised by appellant, but it has not been overruled, and, as far as it declares the creation of a trust, it simply gives effect to the intention of the parties, and does not contravene any principle of law. In Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659, it appears that "in September, 1879, there was due to Eli W. Hawkins from the Odd Fellows' Savings Bank the sum of $14,334.73, in evidence of which Hawkins held a passbook of said bank, issued to him by the latter, showing said amount to be due. The bank was in process of liquidation. On the 8th day of September, 1879, said Hawkins requested plaintiff to allow him, the said Hawkins, to assign to plaintiff the whole amount due from the bank, to be held by plaintiff in trust for the use and benefit of the minor children of Hawkins, reserving to himself, however, the right to draw such sums of said money from the trustee as he might deem proper for his own use. Plaintiff agreed to accept the trust, and Hawkins verbally assigned to him all of said moneys to be held by him in trust as aforesaid. Hawkins delivered his passbook to plaintiff, who has since retained it." Prior to his death Hawkins drew out at divers times various sums, leaving a balance in the hands of plaintiff and also in the Odd Fellows' Bank which the court below found to be trust funds. The judgment was affirmed by the Supreme Court, and in the course of the discussion it is said: "The subject of the trust was personal property, and it was not necessary that the transfer should be in writing. Referring to the testimony, we find there was evidence tending clearly to show the intention on the part of Hawkins to create a trust in favor of his minor children, that the subject of such trust was clearly defined, and its purpose made manifest."

In Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, it is held that "a trust for the benefit of two sisters of the depositor of money in a savings bank, in the residue remaining at her death, is sufficiently proved by evidence showing that in her lifetime the deposit was changed by the bank, upon her order, so as to make it payable to the individual order of either of her sisters or of herself, for the purpose orally declared to the bank of arranging the deposit so that her sisters could draw it at her death, and have the immediate benefit of it without probate of her estate, and by her addressing them a letter stating what she had done, and that upon her death they could draw the money and divide it equally between them, and directing them where they could obtain the bank book." It is said by the court: "The evidence falls far short of establishing a completed gift from Mrs. Bell to the plaintiffs; and, although there are features in the case resembling a gift causa mortis, there are other features which distinguish it from such a gift, but these need not be discussed as there was evidence offered on behalf of the plaintiffs to show that Mrs. Bell proposed to create a trust for the benefit of the plaintiffs, and that the trust was accepted by the bank. It is well settled that a trust in personal property need not be in writing, and it is equally well settled that no set form of words are necessary to create a trust." In the late case of Cahlan et al. v. Bank of Lassen County, 105 Pac. 765, this court had occasion to re-examine the question of trusts in personal property and many of the decisions were reviewed, and the doctrine reaffirmed that "any words which indicate with sufficient certainty an intention or purpose to create a trust in personal property will be effective in so doing, without the use of the word trust or trustee."

The California cases cited by appellant are very easily distinguishable from the case at bar. In Flanagan v. Brown, 70 Cal. 254, 11 Pac. 706, the question discussed was whether the admitted agency was coupled with an interest and therefore irrevocable. In Daniel v. Smith, 75 Cal. 548, 17 Pac. 683, Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931, Knight v. Tripp, 121 Cal. 674, 54 Pac. 267, Collins v. Maud, 144 Cal. 289, 77 Pac. 945, and Beebe v. Coffin, 153 Cal. 174, 94 Pac. 766, it was decided that delivery is necessary to constitute a complete gift. In Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, it was held that a check delivered by the maker to the payee, but not presented to the bank for payment until after the death of said maker, neither amounted to a gift nor an assignment. In De Martini v. Alegretti, 146 Cal. 214, 79 Pac. 871, the decision depended upon the construction of a written instrument reciting that a sum of money had been placed in the hands of two persons to keep, care for, and invest the same for him in case of the death of the party executing it and providing for the disposition thereof by them in certain sums to persons named or the survivors of them after his death. It was held that it vested no present interest in such persons, but was testamentary in its character, and was void because not executed according to the statute of wills. It was said by the court: "The instrument from beginning to end is on its face clearly and entirely testamentary in character." There can be no doubt that by the instrument in question there was an attempt made to effect a disposition of the property after death, and therefore the intention could not legally be carried into effect in opposition to the plain requirement of the statute in reference to the execution of such instruments. But here we think a fair interpretation of the transaction leads to the conclusion that a trust was created with a present interest transferred to the trustee with direction to carry out the terms of the trust after the death of the testator. If the question were doubtful, it should be resolved in favor of respondent in view of his expenditure in good faith of the funds according to the declared will of deceased.

As far as the hogs are concerned, the court was justified in finding that they were sold by deceased to respondent and nothing of unfairness appears in respondent's conduct in relation thereto.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

11 Cal. App. 756

GUILLON et al. v. McNEAR. (Civ. 654.)

(Court of Appeal, First District, California. Nov. 15, 1909.)

SHIPPING (§ 44*)—CHARTERS—CONSTRUCTION.

A charterer in a charter party binding him to furnish cargo to a vessel within a specified time, and stating that he shall not be liable for delay caused by a matter over which he has no control, is not relieved from liability for delay by showing that he made reasonable efforts to get a railroad to furnish cars to transport the goods to the port of loading and failed, but without showing where the goods were located, or that they could not be shipped by other transportation companies.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 44.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Norbert Guillon and another against George W. McNear. From a judgment for plaintiffs and from an order denying a new trial, defendant appeals. Affirmed.

Page, McCutchen & Knight, for appellant. William Denman, for respondents.

KERRIGAN, J. This is an action for breach of contract, based on the failure of the defendant to furnish cargo to a vessel belonging to the plaintiffs, called the "Jane Guillon," in 15 weather days after the discharge of the inward cargo and notice of readiness served on defendant. The appeal is by the defendant from a judgment in favor of plaintiffs and from an order denying his motion for a new trial.

Plaintiffs allege that the defendant detained and held the vessel in demurrage beyond her lay days for a period of 16 days, and that at the rate per day specified in the charter party the plaintiffs were entitled to a named sum. The defendant admits that the vessel was delayed 16 days, but averred in his answer and claims that in due time he had purchased a full cargo of barley for loading upon said vessel, but that the great demand for railroad cars and railroad service in California in the year 1906 made it impossible to bring the barley to the port of loading at the time specified in the charter, nor until 16 days later. There is a provision in the charter to the effect, stating it broadly, that, if the cause of the delay in giving the ship her cargo is a matter over which the charterer has no control, he shall not be liable for such delay; and the defendant claims that the facts of this case bring it within that provision.

The court, in part, found as follows: "That the defendant did not have on hand in warehouse or elsewhere prior to the arrival of the said vessel at the port of San Francisco, or at any time, a full or any cargo of barley intended for loading upon the said ship in fulfillment of the said charter party or at all. That the defendant did not become, and was not, unable, by reason of any blockade, impediment, or hindrance of railroad or other transportation service, to procure all or any of any intended cargo, for loading upon the said vessel, to be brought by rail or craft or otherwise to the port of loading before the 31st day of December, 1906, or at all, that the defendant was not prevented and was not unable to deliver the same to the said vessel by reason of any matter set forth in said answer."

Defendant introduced evidence showing that he had made 33 contracts for the purchase of 25,000 tons of grain, which was to be according to a certain sample, and which was to be delivered at Port Costa from points in the interior at some time in the future. There is nothing in the record to show whether the different lots of grain were to be delivered in time to be loaded on this vessel according to its charter, nor indeed when deliveries were to be made. But granting, for the sake of argument, that the defendant was the owner of the 25,000 tons of grain, and passing the fact that 22,000 tons thereof were brought to Port Costa and loaded on other vessels, the record does not sustain the contention of defendant that it was impossible to get the grain on time to the port of loading. It is true that defendant introduced evidence to show that he made every reasonable effort to get the Southern Pacific Railway Company to furnish the necessary cars and facilities for that purpose, but there was absolutely no evidence produced to show where in the interior the different lots of grain were located, or that they could not be shipped by transportation companies other than the railroad company mentioned. It is unnecessary to give the testimony in detail. To sum up the case briefly, it is sufficient to say that it entirely fails to sustain the affirmative defense.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

11 Cal. App. 702

PEOPLE v. CYTY. (Cr. 134.)

(Court of Appeal, Second District, California Nov. 12, 1909.)

1. HOMICIDE (§ 342*)—HARMLESS ERROR.

As the offense of manslaughter is necessarily included in the charge of murder, a conviction of manslaughter acquits of the charge of murder, and defendant cannot complain because the verdict is more favorable to him than the evidence warrants.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. § 342.*]

2. CRIMINAL LAW (§ 1169*)—RECEPTION OF EVIDENCE—STRIKING OUT—EFFECT.

In a prosecution for murder, a witness for the prosecution was asked upon direct examination whether he took certain tools found near defendant, and, on replying that he did not, was asked why he did not, to which he replied: "I was not ready to die." This answer was on defendant's motion stricken out. *Held*, that the error was cured.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

3. Witnesses (§ 383*)—Impeachment—Contradictory Statements—Materiality.

In a prosecution for murder, after the dying declarations of deceased had been admitted, defendant sought to show on cross-examination of a witness that, when witness saw deceased after the shooting, the latter was delirious. On answering that it did not appear so to him, an attempt was made to lay the foundation to impeach by showing that witness had made contradictory statements to other persons. It did not appear that the time referred to in these questions was the time at which the dying declaration was made to another witness, who testified without contradiction that he was alone with deceased at the time the statement was made. *Held*, that the evidence sought to be impeached was immaterial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

4. Homicide (§ 338*)—Harmless Error—Reception of Evidence.

In a prosecution for murder, refusal to strike out testimony was not prejudicial, where it bore on the relation between defendant and deceased, and tended to sustain the view that defendant intended merely to protect himself and his rights rather than to provoke trouble with deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 709; Dec. Dig. § 338.*]

5. Homicide (§ 214*)—Dying Declarations—Subject-Matter.

Under Code Civ. Proc. § 1870, providing for the admission in evidence of the act or declaration of a dying person, made in the sense of impending death, respecting the cause of his death, the evidence so admitted should be restricted to the act of killing, and to the circumstances immediately attending it and forming a part of the res gestæ, and this embraces, not only the actual facts of the assault and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with the assault, as well as acts immediately following the assault, and so closely connected with it as to form a part of the occurrence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448–450; Dec. Dig. § 214.*]

6. Homicide (§ 214*)—Dying Declarations—Suspicions of Deceased.

Statements of deceased in his dying declaration as to his expectation of trouble with defendant are not admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 449; Dec. Dig. § 214.*]

7. Homicide (§ 325*)—Appeal—Objections in Lower Court—Evidence.

On appeal from a conviction of manslaughter, defendant cannot complain of evidence of dying declarations, where no objection was made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 693; Dec. Dig. § 325.*]

8. Homicide (§ 338*)—Appeal—Harmless Error—Evidence—Facts Otherwise Established.

In a prosecution for homicide, error in admitting evidence as to a dying declaration was not prejudicial, where the matter was before the jury, irrespective of the ruling of the court on the objection presented.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 711; Dec. Dig. § 338.*]

9. Witnesses (§ 269*)—Cross-Examination—Scope.

In a prosecution for murder, the court properly refused to permit cross-examination of a witness as to blood stains on the handles of a pick and shovel, where the direct examination did not refer to such matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949, 950; Dec. Dig. § 269.*]

10. Homicide (§ 234*)—Weight of Evidence.

In a prosecution for homicide, the jury is not bound to accept as an entirety either the dying statement of deceased or the statement of defendant, but should consider all the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 470, 482; Dec. Dig. § 234.*]

11. Homicide (§ 300*)—Instructions—Self-Defense.

An instruction as to the obligation of a person assailed to consider the question of retreat "while on his own property where he had a right to be" did not cover a requested instruction that where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony, or great bodily injury upon him, and to afford grounds for a reasonable belief that there is imminent danger, he may slay his assailant, and, where the attack is sudden and the danger imminent, he may stand his ground and slay his aggressor, even though he might more easily have gained safety by flight.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616, 617; Dec. Dig. § 300.*]

12. Homicide (§ 300*)—Instructions—Self-Defense.

In a prosecution for homicide, where the court instructed as to self-defense that it must appear to accused as a reasonable man "that, to avoid such danger, it was absolutely necessary for him to take the life of the deceased," a further requested instruction should have been given that, if defendant were without fault and the suddenness of the attack put him to the wall, the absolute necessity had arisen.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616, 617; Dec. Dig. § 300.*]

Appeal from Superior Court, Inyo County; John L. Childs, Judge.

John Cyty was convicted of manslaughter, and he appeals. Reversed.

P. W. Forbes and Wm. J. Clark, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Appellant was informed against for the crime of murder, found guilty of manslaughter, and sentenced to imprisonment in the state prison for 10 years.

It is contended in support of this appeal from the judgment and the order denying defendant a new trial that the evidence does not sustain the verdict, because the facts either establish murder or exonerate the defendant from the commission of any offense whatever; that the court erred in its rulings upon the admission and rejection of certain evidence specified; and that it also erred in giving certain instructions defining and relating to manslaughter and in relation to what acts upon the part of an assailant justify the taking of his life; also, that the court erred in refusing to give an instruction, requested by defendant, which declared the law relating to the right of a person assailed to stand his ground instead of retreating to avoid a conflict.

Appellant and the deceased, C. Kyle Smith, were miners and prospectors in Inyo county, between whom there had been disputes as to their respective rights in the mining claim upon which the defendant was working at the time of the killing, and as to the right of possession of certain miners' tools and appliances which defendant was using when he shot Smith. Smith was shot about 3 p. m. on November 21, 1908, and died at 9:30 o'clock the same night. Only Smith and defendant were present at the time of the shooting, but before Smith died he had a conversation with one Grant, who testified upon the trial to what Smith told him, and this was admitted as a dying declaration. In this statement the deceased said that "the Dago" (meaning defendant) shot him unexpectedly as he was going down the trail; that he was hit first in the back on the right hip. When told that he had hit defendant, he said he knew it, that he (Smith) was on the ground when he hit him, and that defendant ran when he was hit. This statement was supported by the testimony of the physician who made a post mortem examination of the body of deceased. The physician testified that he had found a bullet wound on the back of the right hip, and also one in the back of one of deceased's thighs. In both instances the bullet passed upward and toward the front in its course; the former passing through the abdominal cavity. This corroborated the theory of the prosecution that Smith was traveling along a trail above the defendant when he was shot; it being the theory of the people that defendant lay in wait for the deceased in a cut or excavation below where he would pass along the trail.

The defendant testified upon his own behalf to the effect that he located the mine upon which he was working in May or June, 1904, that it bore no evidence of having been previously located, and that Smith posted notices and began work on the claim in 1906. On the morning of the tragedy defendant went to work in a cut on the claim, drilling, blasting and shoveling. A trail crossed above the face of the cut six, seven, or eight, or probably ten feet higher. The first he knew of Smith's presence that morning the latter, who was on the trail four or five steps away, spoke, saying, "What are you doing here?" and something else which defendant couldn't remember. "At that time he was on top, right on the cut where I throw the tools on that trail. I was right in the face of the cut." When defendant turned around toward him, he (Smith) "is yanking gun and pointing to me." Defendant made for the east wall of the cut to climb out, when he was shot in the arm. Then he ran lengthwise of the cut to the dump (the cut was into the hillside), tumbled and fell on the dump, when Smith shot again, this time striking the defendant in the abdomen. While starting to run defendant tried to pull a magazine pistol which he carried in his pocket, but, owing to his disabled arm, had some difficulty in doing so, and when successful in this was still further delayed by the "safety," but finally succeeded in shooting, and (as described by him): "Then I begin to shoot. When I begin to shoot, the ground gave out under my feet and I fall again, I begin falling on this side and I throw myself on this because this arm was sore. When I fall, my gun fall off my hand. Of course, I had been shooting and falling my gun get away from me. Of course, I tried to catch myself, throw myself on this side like this, and the ground give out. I pick myself up and go get that gun back again. I never see Smith no more, never see him since." He further testified: "I did not know at the time I had hit him. I hurried to camp because I thought I was worse hurt than I was." The physician who dressed the defendant's wounds testified that there was a wound in the arm which was made by a bullet entering at the back and coming out at the front; also, that there was a crease across the defendant's abdomen, an abrasion of the skin.

We do not find the record entirely destitute of evidence upon which a verdict of manslaughter could be predicated, but, in the consideration of the objection that the evidence shows either that the crime of murder has been committed or that the defendant is innocent, we may, for that purpose, assume that there is some evidence tending to establish that the defendant is guilty of murder. As the offense of manslaughter is necessarily included in the charge of murder, and a conviction of the crime of manslaughter is equivalent to a verdict of not guilty of the murder (People v. Muhlner, 115 Cal. 303, 47 Pac. 128), the defendant cannot complain because the verdict is more favorable to him than the evidence warrants (People v. Coulter, 145 Cal. 66, 78 Pac. 348). Even though the verdict for the lesser offense be contrary to the instructions of the court, and for a less offense than the evidence proves—provided it be for an offense included in the charge in the information—it must be carried out, and a new trial cannot be ordered for such a reason alone. People v. Muhlner, supra, 115 Cal. 306, 47 Pac. 128, and cases cited.

One of the witnesses for the people was asked on direct examination if he took the tools which were found near where defendant was working when the trouble began, and replied that he did not. Whereupon, over the objection of defendant, the prosecuting attorney was permitted to ask him, "Why didn't you?" and to which he replied, "I wasn't ready to die." This answer was upon defendant's motion stricken out, but it is contended that this did not cure the error, and that the answer was one expected by the counsel for the people, and was elicited for the purpose of creating the impression in the minds of the jurors that the defendant was a violent and dangerous person. We find nothing in the record to justify such an inference. The circumstances are entirely unlike those in People v. Rodriguez, 134 Cal. 142, 66 Pac. 174.

After the dying declaration of the deceased had been admitted in evidence, defendant sought to show on the cross-examination of one Kelly, a witness for the people, that, when Kelly saw Smith after the shooting, the latter was delirious. Upon Kelly testifying that it did not appear so to him, an attempt was made to lay the foundation to impeach Kelly by showing that he had made contradictory statements to other persons. The court sustained an objection to this, and the ruling is assigned as error. It does not appear in any way from the evidence, or from any offer of proof made, that the time referred to in these questions propounded to Kelly was the time at which the dying declaration was made to Grant. The latter testified without contradiction that he was alone with Smith at the time the statement was made, and we are unable to see the materiality of the evidence of Kelly which it was sought to impeach.

Rulings of the court assigned as errors Nos. 3 to 7, and 9 to 14, inclusive, relate to the asking of questions by the prosecution, some of which were proper, and others which, if material at all, were not prejudicial. The refusal to grant defendant's motion to strike out certain testimony, assigned as error No. 8, was not prejudicial to the defendant. The answer desired stricken out bore upon the relations between the defendant and the deceased, and in so far as it affected the matter as to which it was material, if it were material at all, tended rather to sustain the view that the defendant intended merely to protect himself and his rights than to provoke trouble with the deceased.

Among the matters testified to in connection with the dying declaration was the following: The witness Grant was asked the question by the prosecuting attorney: "Did he [Smith] make any statement to you concerning his expectation of trouble?" This was objected to as calling for a self-serving declaration, and on the grounds that it was immaterial and irrelevant, not made in the presence of the defendant, and hearsay. The question was then withdrawn and the following propounded: "Q. Did he make any statement to you concerning whether he expected anything of that kind?" The same objections were interposed and overruled and an exception preserved by the defendant, and the witness answered: "He did." The witness was next asked: "What was that statement and in what connection was it made?" To this he replied: "He told me he didn't expect any trouble over the ground at all." No objection to this question was interposed, or motion to strike out the answer made, but when the next question was asked, to wit, "Did he make any statement to you as to how many times the defendant shot?" and this question answered, "Yes, sir," defendant asked to have the latter answer stricken out that he might interpose an objection, which motion was granted, and thereupon the objections which were made to the last question were overruled. Section 1870, Code Civ. Proc., which is the statutory provision as to dying declarations in this state, enumerates among the facts as to which evidence may be given upon a trial: "In criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death." The evidence to be so admitted has been construed to be restricted to the act of the killing, and to the circumstances immediately attending it and forming a part of the res gestæ. People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233.

While it is well settled that the res gestæ embraces, not only the actual facts of the assault and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with the assault, as well as acts immediately following the assault and so closely connected with it as to form a part of the occurrence (People v. Cipolla [Sup.] 100 Pac. 252), certainly it was never intended to embrace the recitals of past events or suspicions of the deceased, nor his expectations of trouble with the defendant. Accepting the rule as declared, and conceding that it was error to permit the introduction of evidence of the character here under consideration, the question which elicited the answer as to the expectations of the deceased was not objected to, and no motion made to strike the answer out. The question which was objected to was a mere preliminary one. In addition to this, the matter objected to was practically covered by a previous answer of the same witness to the effect that Smith had told him that the defendant had shot him unexpectedly. This testimony was not objected to and the matter was before the jury, irrespective of the ruling of the court upon the objection presented, and the ruling in this respect cannot be said to have been prejudicial to the defendant.

The assignments of error numbered 17 to 20 relate to the refusal of the court to permit the defendant to further cross-examine the witness Grant as to certain blood stains upon the handles of a pick and shovel which the cross-examination disclosed the witness had seen on the morning after the trouble at the scene of the tragedy. The questions were not addressed to any matters as to which the witness had testified in his direct examination, and the rulings of the court were correct. The matter might have been made a part of defendant's case, but was not cross-examination of this witness.

The instructions of the court defining manslaughter were properly given. The jury were not bound to accept as an entirety either the statement of the deceased or that of the defendant, but it was their duty to endeavor, from a consideration of all the evidence, to arrive at the true conditions of the shooting. Without reciting the testimony showing the relations of the defendant and deceased from which the inference might be drawn that a quarrel arose in which either might have been the aggressor, we need only say in justification of these instructions that there was evidence upon which a verdict of manslaughter could have been predicated.

The giving of instructions Nos. 4 and 6 at the request of the people is assigned as error. The part of No. 4 material to the question before us reads: "The law of self-defense is founded on necessity, and, in order to justify the taking of life upon this ground, it must not only appear to the slayer, as a reasonable man, that he had reason to believe, and did believe, that he was in imminent danger of his life, or of receiving great bodily harm, but it must also appear to his comprehension, as a reasonable man, that to avoid such danger it was absolutely necessary for him to take the life of the deceased." No. 6 is substantially the same as instruction 4 considered and approved in People v. Bruggy, 93 Cal. 478, 29 Pac. 27, with this difference: The words supplied by the court by construction in the Bruggy Case expressly appear in the instruction before us. Appellant contends that by the use of the words "absolutely necessary" in both of the instructions mentioned (4 and 6) the jury was impliedly instructed that the person assailed was forbidden to stand his ground if he could have found safety in flight, and that this is in contravention of the rule relative to retreat declared in People v. Maughs, 149 Cal. 253, 260, 86 Pac. 187.

Since the questions of law involved are practically the same, we may in this connection also consider the refusal of the court to give instruction No. 26, requested by the defendant. This instruction reads as follows: "Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony, or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant, and be justified by the appearances; and, where the attack is sudden and the danger imminent, he may stand his ground and slay his aggressor, even though it may be proved that he might more easily have gained his safety by flight." The Attorney General finds no fault with this instruction as a declaration of the law, but contends that everything contained therein material to the defendant's case was embodied in instruction 27, given by the court. With this contention we cannot agree. Instruction 27 declares the law relative to the obligation of the person assailed to consider the question of retreat "while on his own property where he had a right to be," but No. 26 is not so limited.

If, in order to justify the taking of life in self-defense, it must appear to the person assailed, as a reasonable man, that it is absolutely necessary for him to take the life of his assailant to avoid losing his own life, or receiving great bodily harm, and the rule declared in No. 26, that "he may stand his ground and slay his aggressor, even though it may be proved that he might more easily have gained his safety by flight," is also the law, then the latter should be given in every case in which the facts require it in modification or explanation of the rule of "absolute necessity" stated in Nos. 4 and 6. Instruction No. 26 is apparently taken from People v. Hecker, 109 Cal. 451, 467, 42 Pac. 307, 312, 30 L. R. A. 403, and is in the language of that opinion, except in one respect not material here. In regard to the instruction considered in People v. Bruggy, it is said in the Hecker Case: "Instruction E, which is complained of, has often been given and as often approved by this court. The cases in which it is discussed are reviewed in People v. Bruggy, 93 Cal. 476 [29 Pac. 26]. As was said by this court in People v. Herbert, 61 Cal. 544: 'To justify a homicide, there must be a necessity, actual or apparent, and this we understand to be true under our statute as well as at common law.' Those cases where the assailed is not required to look to escape as an avenue of safety arise, as has been before discussed, where the peril is swift and imminent and the necessity of action immediate. Therein the law does not weigh in too nice scales the conduct of the assailed, and say he shall not be justified because he might have resorted to other means to secure his safety. The suddenness of the attack puts him to the wall." After considering the contrariety of opinion among the authorities, the court adds: "So that while the killing must still be under an absolute necessity, actual or apparent, as a matter of law that absolute necessity is deemed to exist when an innocent person is placed in sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense."

It is apparent, then, that upon the theory that he was without fault the defendant was entitled to have instruction No. 26 given that the jury might be informed, as a matter of law, that, if he were without fault, and the suddenness of the attack put him to the wall, the "absolute necessity" required by instructions 4 and 6 had arisen. People v. Newcomer, 118 Cal. 263, 50 Pac. 405. He was also entitled to have the jury instructed as they were in No. 27. This instruction rested upon the common-law rule, which is the same as our statute, that a person attacked in his own house need retreat no further. People v. Lewis, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. Rep. 167.

We do not think the Maughs Case changes the rule as recognized above. What is said in that case upon this subject is rested upon the cases which we have cited and quoted from. The language of the instruction which was disapproved there was as follows: "Before a person can justify taking the life of a human being on the ground of self-defense he must, when attacked, employ all reasonable means within his power consistent with his safety to avoid the danger and avert the necessity for the killing." The rule quoted from People v. Hecker, supra, was recognized and is still the law of this state, and the trial court should have given instruction No. 26 requested by the defendant. On account of this error the judgment and order must be reversed.

Judgment and order appealed from reversed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 754

Ex parte HANSEN. (Cr. 148.)

(Court of Appeal, Second District, California. Nov. 15, 1909.)

INTOXICATING LIQUORS (§ 215*)—PROSECUTION—COMPLAINT.

An ordinance made it unlawful for any person to sell, distribute, or give away intoxicating drinks, and to furnish, accept, or obtain any intoxicating drinks, or in any manner aid or abet in a violation of the ordinance. A complaint charged defendant with aiding and abetting in the violation of the ordinance by purchasing and receiving intoxicating liquors and furnishing and giving away the same. *Held*, that the complaint was sufficient, though it did not charge that any misdemeanor was committed by any other person in which defendant aided and abetted others, since an offense, that of furnishing and giving away, etc., was alleged against him.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 215.*]

Application by A. J. Hansen for a writ of habeas corpus to obtain his release from custody under a commitment on a conviction of misdemeanor. Writ denied.

Conkling & Brown, for petitioner.

PER CURIAM. It appears from the application of petitioner that he is deprived of his liberty under a commitment issued upon a conviction of an alleged misdemeanor. This conviction is shown to have been based upon an affidavit filed before a magistrate which charged the defendant with willfully, unlawfully, intentionally and knowingly encouraging, aiding, and abetting in the violation of a certain ordinance, by then and there purchasing, receiving, and accepting malt and intoxicating liquor, to wit, beer, and furnishing, selling, distributing, delivering, and giving away the same to other persons unknown. The ordinance, No. 2, referred to in the affidavit, makes it unlawful for any person, firm, or corporation within the county and outside of municipalities therein contained to sell, furnish, distribute, divide, or give away intoxicating drinks in any quantity, except for certain specified purposes. By section 4 of the ordinance, it is made unlawful for any person to furnish, receive, accept, or otherwise obtain any intoxicating drinks, or in any manner to encourage, aid, abet, or assist in the violation of the ordinance.

The contention of petitioner upon this application is that it is not charged that any misdemeanor was committed by any one in the commission of which petitioner could aid, abet, or assist. As we read the affidavit of complaint, it charges the petitioner with willfully and unlawfully purchasing, receiving, and accepting a certain kind of intoxicating drink, and of furnishing, selling, and distributing the same to other persons unknown. It is true that the affidavit does allege that in doing this he was aiding, assisting, and abetting others, but inasmuch as a substantive offense, that of selling, furnishing, and giving away, etc., is alleged as against him, it would be immaterial in determining his guilt whether the act committed was individual or in the aid and assistance of others connected therewith. The selling or giving away of intoxicating drinks is made an offense under the ordinance, as well as to aid and assist others in the commission of such offense. We think a fair and reasonable construction of the language employed in the affidavit leads to the conclusion that the charge in the affidavit is sufficiently explicit to apprise the defendant of the offense charged, and to permit evidence to be received in connection therewith establishing the commission of such acts.

Writ denied.

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11 Cal. App. 712

PACIFIC COAST CASUALTY CO. v. HOME TELEPHONE & TELEGRAPH CO.

(Civ. 664.)

(Court of Appeal, Second District, California. Nov. 12, 1909.)

1. INSURANCE (§ 608*)—INDEMNITY INSURANCE—PREMIUMS—ACTIONS—NATURE OF ACTION.

An action on an indemnity insurance policy stipulating for the payment of additional premium, based on the pay roll of insured for the policy term, for additional premium, is an action for a specific sum alleged to be due under a contract, and is not a suit for an accounting, and whether any sum is due depends on the amount which insured paid to employés in specified work during the term of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1517, 1519; Dec. Dig. § 608.*]

2. INSURANCE (§ 665*)—INDEMNITY INSURANCE—PREMIUMS—ACTIONS.

Where, in an action on an indemnity policy stipulating for additional premium, based on the amount paid by insured to classes of employés during the policy term for services rendered at places designated therein, and providing that the policy should not cover loss on account of liability for injuries unless the person injured was on duty at the time of the accident and engaged in the occupation specified and at the place designated, there was no attempt to show that the sums paid by insured were paid out for services included within the policy, the court was justified in finding that the allegations of the complaint as to the amount insured had paid were untrue.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

3. Accord and Satisfaction (§ 26*)—Sufficiency—Receipt in Full—Evidence.

A receipt by insurer in an indemnity policy stipulating for additional premium based on the pay roll of insured for the policy term acknowledging payment of additional premium in full, and evidence that the payment was understood to be a full adjustment of differences as to the amount due under the policy for additional premium and that it was so received by insurer in satisfaction thereof, was sufficient to support a finding of accord and satisfaction under Civ. Code, §§ 1523, 1524, providing that acceptance by a creditor of the consideration of an accord extinguishes the obligation, etc.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 164–166; Dec. Dig. § 26.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Pacific Coast Casualty Company, Cal., against the Home Telephone & Telegraph Company. From an order denying a motion for new trial after verdict for defendant, plaintiff appeals. Affirmed.

M. E. C. Munday, for appellant. Oscar A. Trippet, for respondent.

SHAW, J. Appeal from an order denying plaintiff's motion for a new trial.

On December 31, 1903, the parties entered into a contract whereby plaintiff, for the consideration specified in the contract, agreed, for a term of one year from and after said date, to insure defendant against loss from common law or statutory liability for damages incurred on account of bodily injury accidentally sustained by employés of defendant while in the performance of their duty at the places and while engaged in the occupations specified in said contract during the period covered by the term thereof. Plaintiff fully performed the conditions of the contract on its part.

The policy covered two classes of employés; the first consisting of those engaged in the installation of overhead and underground telephone and telegraph wires, including maintenance and extension of lines and the making of service connections, as to whom the premium was $1.20 per $100, based upon the pay roll for the policy term, which premium upon the pay roll as estimated for the year amounted to $900. The second class included the operators of the telephone and telegraph exchange and office force, as to whom the premium was 13 cents per $100, based likewise upon the pay roll for the policy year, the premium upon which estimated pay roll amounted to $101.40. The total estimated premium of $1,001.40 was paid by defendant. The contract contained a provision to the effect that, if the compensation paid employés of defendant during the year exceeded the estimated sums upon which the premium was based, the defendant should pay additional premium upon such excess over and above the estimated pay rolls, and that, if such compensation should be less, plaintiff should refund the unearned premiums so paid by defendant. Plaintiff alleges that the actual sum paid during the term of the policy to employés in the second class was $71,964.90, upon which the premium amounted to $93.55; and the actual amount paid for the same period to employés in the first class was $199,621.47, upon which the premium amounted to $2,395.45, making a total of $2,489, upon which defendant paid $1,208.42, leaving an alleged balance of $1,280.58, for which plaintiff prays judgment. In its answer defendant denied that it had made expenditures to its employés in the sum alleged in the complaint; and as a further and separate defense alleged that at the expiration of the term for which said policy was issued plaintiff and defendant had an accounting as to the unliquidated account between them, wherein it was determined and agreed that, under the terms of the policy of insurance, defendant was indebted to plaintiff on account of such additional premium in the sum of $207.02, which defendant agreed to pay and plaintiff agreed to accept in full discharge of all demands against defendant under and by virtue of the contract, which sum defendant then and there paid. The court found this separate defense as alleged to be true, and also found the allegations of the complaint touching the amount defendant had paid to its employés to be untrue. The sole contention of appellant is that these findings are not supported by the evidence.

The action is not one for an accounting, but to recover a specific sum of money alleged to be due under the terms of a written contract. As to whether this alleged sum or any sum was due depended upon the amounts of money which defendant had paid to two classes of employés while engaged in certain specified work during the period covered by the contract and for services rendered at the places designated therein. As to the employés included in the first class, the place of employment was Los Angeles and vicinity; as to those in the second class, it was the Home Telephone Building, 246 South Hill street, Los Angeles. The burden of proof was therefore upon plaintiff to show the amount paid to employés during the policy year for services rendered at the building, 246 South Hill street, in the "operation of telephone and telegraph exchange and office force," as to whom the premium rate was 13 cents per $100, and also the amount paid during the same period to employés for services rendered in the installation of defendant's "overhead and underground wires, including maintenance and extension of lines, and making of service connections" in the city of Los Angeles and its vicinity, as to whom the premium rate was $1.20 per $100. The only evidence offered by plaintiff to establish such facts was that of one witness, who testified that the total sum expended by defendant for construction and maintenance during the year 1904, as shown by the pay rolls was $163,176.22, of which sum $158,820.15 was apportioned to construction account, and $4,356.07 to maintenance account; and, further, that as shown by the office pay roll the following sums were expended, namely, $18,397.50 for construction, $18,864.30 for operating the system, $17,947.75 for maintenance, and $53,010.60 specially for operators. Under the contract, plaintiff was not entitled to any premium upon the amount paid by defendant to its employés engaged in construction work, unless such labor was performed in the city of Los Angeles and its vicinity, and in its character limited to the kind of work specified in the contract, namely: "Telephone and telegraph overhead and underground wires, including maintenance and extension of lines and making of service connections." No attempt was made to show that these several sums so expended for construction, or any part thereof, were paid out for the class of construction work specified. Indeed, for all that appears to the contrary, this entire sum might have been expended in the erection of a building, or for construction work on behalf of the company, other than that specified. Neither is there any evidence tending to show that such sum, or any part thereof, was expended for services rendered in Los Angeles, or its vicinity, nor that the amount paid the office force or telephone operators was for services rendered at 246 South Hill street, in Los Angeles. The materiality of these provisions is accentuated by the fact that the contract of insurance in express terms provides that the policy shall not cover loss on account of liability for injuries unless the person injured was on duty at the time of the accident and engaged in the occupation specified in the policy and at the place or places designated therein. The failure on the part of plaintiff to prove that the expenditures were made under the provisions of the policy justifies the finding that the same were untrue.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

While according to the foregoing views the order appealed from must be affirmed, we are also of the opinion that the evidence fully supports the finding to the effect that the affirmative allegations of the answer are true in so far as they constitute a plea of accord and satisfaction. There was introduced in evidence a statement of account dated the day on which said policy expired, and by plaintiff rendered against defendant, wherein the latter was charged $207.02 for additional premium, to which was attached a receipt whereby payment in full of said account was duly acknowledged by plaintiff.

Conceding, as claimed by appellant, that this receipt standing alone is insufficient to support the finding, nevertheless, when taken in connection with the testimony of defendant's manager as to the circumstances under which it was given, it tends to show that the payment of $207.02 at the expiration of the policy was understood and intended to be a full adjustment and settlement of existing differences as to the amount due under the terms of the contract on account of additional premium, and that it was so received by plaintiff in full satisfaction thereof. Sections 1523, 1524, Civ. Code; 1 Cyc. par. 2, p. 329. The fact that the evidence is insufficient to support a finding of an account stated is immaterial. Conceding the error as claimed, the substantial rights of plaintiff could not be prejudiced thereby.

The record discloses no prejudicial error, and the order appealed from is therefore affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 771

BOYCE v. GORDON et al. (Civ. 683.)

(Court of Appeal, First District, California. Nov. 16, 1909. Rehearing Denied Dec. 15, 1909; Denied by Supreme Court, Jan. 13, 1910.)

1. PARTNERSHIP (§ 199*) — CLAIMS — ASSIGNMENT BY PARTNER TO COPARTNER—EFFECT.

A partner becoming the sole owner of a partnership claim by assignment from the copartner may sue on the claim in the absence of any question as to firm debts or equities between the partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 365; Dec. Dig. § 199.*]

2. PARTNERSHIP (§ 199*)—FIRM CLAIMS—ACTION BY ASSIGNEE—RIGHT TO MAINTAIN.

The assignee of a firm debt, though a partner, may sue thereon, though the firm could not sue because of the failure to file its articles of copartnership, as required by the Code.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 365; Dec. Dig. § 199.*]

3. TRIAL (§ 296*) — INSTRUCTIONS—MISLEADING INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

Where the court recalled the jury, and stated that there was no issue between plaintiff and defendant, and that the jury could only find a verdict for plaintiff against a codefendant or in favor of the codefendant, the error, if any, in a charge because misleading as to the liability of defendant and codefendant, was cured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–718; Dec. Dig. § 296.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by E. Jonathan Boyce against Patrick Gordon and others. From a judgment for plaintiff against Patrick Gordon, the latter appeals. Affirmed.

Devoto & Richardson, for appellant. Maurice R. Carey, for respondent Boyce. Joseph W. Patton, for respondent Kiler.

COOPER, P. J. This action was brought to recover $487.50, being the value of certain lumber alleged to have been furnished to defendant Patrick Gordon, to be used, and which was used, in the construction of a building for said Gordon, and to recover the further sum of $129 for certain millwork alleged to have been used in the erection and construction of the same building for said Gordon. The first item was included in the first cause of action as stated in the complaint, and the second in what is denominated the second cause of action. The case was tried before the court with a jury. At the close of the evidence, after being instructed by the court, the jury returned a verdict in favor of the plaintiff and against defendant Patrick Gordon for the value of the lumber as alleged in the complaint, $487.50, and upon this verdict judgment was entered. Defendant Patrick Gordon prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

It is first urged that the court erred in admitting in evidence a written assignment made by Mary J. Bates of all her right, title, and interest in and to the $487.50 due the Boyce Lumber Company for lumber furnished to Gordon. The evidence shows that the firm or copartnership known as the "Boyce Lumber Company" was at all times referred to in the complaint composed of two copartners and two only, to wit, the plaintiff and Mary J. Bates. There is no question here as to the copartnership debts, or as to any equities between the members of the firm. We then have the simple question as to two persons owning a claim as copartners, and one assigning her interest to the other. We see no reason why the partner who thus becomes the sole owner cannot maintain an action upon such claim. Baxter v. Hart, 104 Cal. 344, 37 Pac. 941.

The court did not err in sustaining the objections of plaintiff's counsel as to questions asked by appellant's counsel of plaintiff as to whether or not the copartnership had filed a certificate with the county clerk, stating the names and places of residence of the members of the copartnership, as required by the Code. The assignee of a partnership debt, even though a partner, may maintain an action to recover upon such debt, and this even though the partnership would not have been allowed to maintain such action by reason of not having complied with the law by filing its articles of copartnership. Gray v. Wells, 118 Cal. 11, 50 Pac. 23.

The appellant complains of the following instruction given to the jury: "It appears that there is no issue between the plaintiff and defendant as to both the first cause of action and the second cause of action. In the first cause of action, there is some evidence in the record to the effect that the defendant Patrick Gordon was a principal. If you find him a principal in the transaction, your verdict will be against him on the first cause of action. If you find that he was not a principal, but that the defendant Kiler was the principal, then you will not bring in a verdict against Patrick Gordon." It seems evident that the court must have intended the first part of the instruction down to the end of the sentence to apply to defendant Kiler, and that the word "Kiler" was left out after the first use of the word defendant; and this appears evident for the reason that there was no issue between the plaintiff and defendant Kiler as to either the first cause of action or the second cause of action, and it is apparent for the further reason that the court, in the latter part of the same instruction, expressly stated to the jury that, if it found appellant to be a principal as to the first cause of action, the verdict must be against him as to such cause. Even if there could be a question as to whether or not the instruction could have misled the jury, the matter was afterwards made very clear to them. It appears that after they had left the courtroom, after some conversation with counsel, the court informed counsel of its intention to recall the jury and further instruct it so as to make the said matter clear. The jury was accordingly recalled, and the court instructed them: "As I have before stated, there is no issue here between the plaintiff and the defendant Kiler. That matter is settled by the pleadings. There is no issue here as to the value of the lumber. There is no issue here as to the millwork as between the plaintiff and the defendant Patrick Gordon. Consequently your verdict is only one of two possible verdicts as follows: 'We, the jury in the above-entitled case, find a verdict in favor of plaintiff and against the defendant Patrick Gordon in the sum of $487.50,' or 'We, the jury in the above-entitled case, find a verdict in favor of Patrick Gordon.' That is all there is for you to decide." The jury therefore plainly understood that the issue for them to decide was on the first alleged cause of action and as between the plaintiff and the defendant Gordon; and not only this, but the verdict of the jury was responsive to such issue.

We find no error in the record, and no alleged error in addition to what has been discussed that is of sufficient importance to merit discussion.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

11 Cal. App. 724

HOHN v. PAULY et al. (Civ. 642.)

(Court of Appeal, Third District, California. Nov. 12, 1909.)

1. HOMESTEAD (§ 3*)—EXEMPTIONS FROM FORCED SALE—CONSTITUTIONAL PROVISIONS.

Const. art. 17, § 1, providing that the Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families, requires that, at least, heads of families shall be protected, and does not forbid the Legislature from extending the privilege to other persons.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 4; Dec. Dig. § 3.*]

2. HOMESTEAD (§ 17*) — EXEMPTIONS FROM FORCED SALE—PERSONS OTHER THAN HEADS OF FAMILIES.

Under the express provision of Civ. Code, § 1260, subd. 2, a person other than a head of a family may select and claim a homestead not exceeding $1,000 in value.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 18–20; Dec. Dig. § 17.*]

3. HOMESTEAD (§ 35*)—INCIDENTAL USE FOR BUSINESS PURPOSES.

Where a person actually resided upon premises claiming them as a homestead, her right was not affected by the fact that she used part of the building for hotel purposes.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 52, 54; Dec. Dig. § 35.*]

4. HOMESTEAD (§ 154*) — ABANDONMENT — METHOD.

A homestead can only be abandoned by a declaration of abandonment or by a grant thereof executed and acknowledged, as expressly provided by Civ. Code, § 1243.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 307; Dec. Dig. § 154.*]

5. HOMESTEAD (§ 103*)—LIABILITIES ENFORCEABLE AGAINST—JUDGMENT AND EXECUTION.

Civ. Code, § 1240, provides that the homestead is exempt from execution or forced sale except as provided in the title, and section 1241 thereof makes it subject to execution or forced sale in satisfaction of certain judgments. Code Civ. Proc. § 671, provides that from the time a judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county. *Held* that, a homestead being in full force, a judgment not within the scope of section 1241 created no lien thereon under section 671, and the attempted levy of an execution thereon upon such homestead was of no effect, and the transfer by the homestead claimant of her interest a year afterward could have no effect to vitalize such a void proceeding.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 157, 158; Dec. Dig. § 103.*]

6. ABATEMENT AND REVIVAL (§ 47*)—PLAINTIFF—TRANSFERROR OF HOMESTEAD.

Under Code Civ. Proc. § 385, providing that in case of a transfer of interest the action may be continued in the name of the original party, or the court may allow the transferee to be substituted, an action could be continued by a homestead claimant, after she had transferred her interest, to enjoin the selling of the premises to satisfy a judgment against her, and if defendants desired the substitution of the transferee they should have applied therefor.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 239, 240; Dec. Dig. § 47.*]

7. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action to enjoin the selling of a homestead in satisfaction of a judgment against the claimant, where there was no issue as to the ownership of the property, and claimant's residence thereon was uncontradictedly shown by other evidence, the admission in evidence of a United States patent conveying the land, to show claimant's residence upon it, if erroneous, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4171; Dec. Dig. § 1051.*]

8. APPEAL AND ERROR (§ 970*)—DISCRETION OF COURT—REOPENING CASE FOR ADDITIONAL EVIDENCE.

Where, after submission, the judge, after suggesting it himself, reopened the case for further evidence, it will be presumed that it was in furtherance of a desire to reach a just conclusion upon the merits, and, both parties having the same opportunity to offer additional evidence, he will be deemed to have acted within his discretion, especially where it is at least doubtful whether the additional evidence strengthens materially the successful party's case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3851; Dec. Dig. § 970.*]

9. APPEAL AND ERROR (§ 970*)—REOPENING CASE — CHANGE OF JUDGE'S MIND AFTER FIRST SUBMISSION.

The fact that the judge changed his mind after the first submission would afford no ground of complaint, where such change was not occasioned by improper influence and did not lead to prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3851; Dec. Dig. § 970.*]

10. EVIDENCE (§ 5*) — JUDICIAL NOTICE — CHARACTER OF HOUSES IN PARTICULAR COUNTY.

The court cannot take judicial notice of the manner in which buildings have been constructed and the purposes for which they have been used in any particular county.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

Appeal from Superior Court, Plumas County; J. E. Raker, Judge.

Action by Ellen Hohn against N. O. Pauly and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

L. N. Peter, for appellants. U. S. Webb, Atty. Gen., for respondent.

BURNETT, J. The plaintiff is a widow without children. At one time she was the wife of one Andrew Hersom, and after his death she married John Hohn, who died in 1898. Upon the property in controversy she filed two declarations of homestead, the first dated and recorded May 13, 1899, and the second September 23, 1901. The second differs from the first only by reason of the additional recital, "that I am now unmarried and have no children and that I am a person other than the head of a family," although the sufficiency of neither declaration is challenged. On December 30, 1901, a judgment in the superior court of Plumas county in the sum of $493.93 and costs was rendered against the said Ellen Hohn in favor of the said N. O. Pauly. This was assigned by Pauly to R. J. McKeowen and L. James, and on March 25, 1902, execution was issued thereon and placed in the hands of the sheriff, who thereupon levied upon the property and gave notice that he would sell the same on May 22, 1902. Plaintiff brought the action to enjoin the defendants and each of them "from selling, threatening to sell, or offering for sale said premises or any part thereof." The complaint was filed May 14, 1902, and a general demurrer on May 20th following, but for some reason not disclosed by the record, probably, though, because of the disqualification of the presiding judge of said superior court, the order overruling the demurrer was not made until July 31, 1905, and the answer was filed the same day. The cause was partially tried on the 6th day of December, 1905, and completed on the 16th day of November, 1906. Plaintiff prevailed, and the appeal is from the judgment and order denying the motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. It is claimed that no person other than "heads of families" is entitled to a homestead or homestead exemption. The contention is grounded upon the language of section 1 of article 17 of the Constitution, providing that "the Legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families." But, as pointed out by respondent, the Constitution does not "limit the power of the Legislature to give homestead privileges to 'heads of families' only. It leaves the entire matter of such privileges, the method of selection of the homestead, and the persons by whom the selection may be made entirely to the Legislature, demanding only that at least heads of families shall be protected." The argument of appellants might possess merit if it were addressed to a provision of the Constitution of the United States containing a grant of power to Congress; but, in view of the familiar distinction between that instrument and a state Constitution, it is apparent that the authority of the Legislature, representing the lawmaking power of the people, to extend the homestead privilege to other persons than heads of families, is not withheld nor restricted by said provision of the Constitution. It is said in Beaton v. Reid, 111 Cal. 487, 44 Pac. 167, that "the subject of homesteads is one wholly committed by the Constitution to the Legislature, with simply the general mandate that the latter shall protect it by law from forced sale. Const. art. 17. The extent of the right, therefore, and the mode of its protection, with the limitation of the rights of creditors therein, are purely matters of legislative prescription, and something with which we have nothing to do but to construe and apply."

In sections 1260 and 1266 of the Civil Code the Legislature has provided clearly and amply for the case before us. In the former the enactment is that "Homesteads may be selected and claimed: (1) Of not exceeding five thousand dollars in value by any head of a family; (2) of not exceeding one thousand dollars in value by any other person." And the latter section: "Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a 'declaration of homestead.'" And the succeeding section provides what said declaration must contain. It is admitted here that the value of the property was and is less than $1,000, and the declaration complied with the requirement of the statute. There can be, therefore, no question as to the unsoundness of the first position of appellants. Roth v. Insley, 86 Cal. 141, 24 Pac. 853.

2. We think the court did not err in denying the motion for a nonsuit. It is claimed by respondent that she might have rested upon the pleadings alone, as there is no denial in the answer of the allegations of the complaint as to her ownership of the property and her residence there, or as to the sufficiency of the declaration of homestead, and it is not denied that she "has resided upon and claims said premises as a homestead," and, furthermore, it is urged that whether or not the building within which plaintiff resided was primarily used for hotel purposes and whether her residence there was incidental to conducting such hotel business was a question of fact raised by appellants with the burden of proof devolving upon them. This need not be decided, however, as, considering the testimony in the light of the inferences most favorable to plaintiff, and keeping in view the admitted facts, it ought to be held that the motion was properly denied. That the plaintiff actually resided in the building and that it was her only home is not questioned. We must assume that the declaration of homestead was made in the utmost good faith, as there is not a particle of evidence to the contrary. It would indeed be a harsh rule that, under the circumstances disclosed here, would deprive this widow of the homestead of trifling value simply because she used it to make a precarious living. If the question is to be resolved by a determination of the comparative importance of the two, it is more reasonable to hold that the business rather than the home was the mere incident.

As we have seen, the trial took place years after the complaint was filed, and the plaintiff was not present. Her counsel therefore called a witness subpœnaed by the defense, who testified: "I know the plaintiff, Ellen Hohn; have known her about 18 years. During the time I have known her, her residence was Onion Valley, at what is commonly known as the Onion Valley House. She resided there a part of the year 1901, to my certain knowledge. During the time I knew her she did not reside anywhere else that I know of. * * * It is 15 years since I was over there. I boarded there at one time in July, 1890. At that time the general nature of the business that was being conducted there was the hotel business. * * *

When we were boarding there, the place was open to the general public. * * * After John Hohn died she continued to live there herself and conducted the place as she had formerly."

In Skinner v. Hall, 69 Cal. 198, 10 Pac. 408, it is said: "After making an actual residence upon property, one may file a homestead upon it at the end of a day as well as at the end of a month or a year. So one may file and maintain a homestead upon property which is partially rented out or used for other purposes than his residence. Ackley v. Chamberlain, 16 Cal. 181 [76 Am. Dec. 516]; Phelps v. Rooney, 9 Wis. 70 [76 Am. Dec. 244]."

In the Ackley Case, supra, it is declared, through Chief Justice Field, that: "In this case the building was intended for a dwelling house as well as a hotel. * * * The nature and extent of the business did not interfere with its general character as a dwelling house. The keeping of boarders and accommodation of lodgers and travelers were not inconsistent with the main purpose of taking up the 160 acres and the erection of the building."

Judging from the description of the building, it is quite probable that here the original purpose was to prepare for boarders and lodgers as well as for a home, but it is no different in principle from the Ackley Case.

In Heathman v. Holmes, 94 Cal. 295, 29 Pac. 405, we find this language: "It would be strange, indeed, if the occupants of a house could not use part of it for family revenue, no matter how favorable the opportunity might be to do so, without forfeiting the home itself. There is nothing in the homestead laws which prohibits such use, and it has been settled here that 'the homestead statute is a remedial measure and should be liberally construed.' Schuyler v. Broughton, 76 Cal. 524 [18 Pac. 436]; Southwick v. Davis, 78 Cal. 504 [21 Pac. 121]." The court proceeds to distinguish Laughlin v. Wright, 63 Cal. 113, upon which appellants here rely, by calling attention to the consideration that, "so far as the facts appear in that case, the family had never really made the premises their bona fide home." So in the case of Maloney v. Hefer, 75 Cal. 422, 17 Pac. 539, 7 Am. St. Rep. 180, there were two houses entirely separate and distinct from each other. The family lived in one of the houses and rented the other, and it was merely held that the homestead did not include the house in which the claimants did not live.

In re Ogburn, 105 Cal. 95, 38 Pac. 498, is in harmony with the foregoing, and holds that "the homestead character of the premises is not destroyed, either in whole or in part, by the fact that the husband and wife use part of the building for doing their work as artisans, where the work does not constitute such a pretentious business as to blot out the character of the place as a residence and home, or to make the latter merely incidental to the former."

In Estate of Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92, after a review of the earlier cases, it is stated by the court, through Mr. Justice Angellotti, that "in no case has it been decided that where a portion of a building is dedicated to residence purposes, and is actually occupied by the claimant as the home of himself and his family, and such occupation is not merely incidental to the carrying on of some business in other parts of the building, the building and the land on which it is situated cannot be legally selected as a homestead."

In the case of Harlan v. Schulze, 7 Cal. App. 287, 94 Pac. 379, this court held that "where the claim of the homestead is valid on its face, and there is nothing therein to indicate that it is to be used for any other purpose than as a residence for husband and wife, the incidental use by the wife of the home for purposes of prostitution does not destroy the right to the homestead."

The facts here, we think, bring the case within the foregoing decisions.

3. In the defendants' answer it is alleged that "since the commencement of this action plaintiff has abandoned any and all claim to said premises as a homestead, by a grant thereof executed and acknowledged by her, and by ceasing to reside upon the same." There was no finding as to the latter averment, but the allegation is immaterial, as it is well settled that the homestead can be abandoned only in the manner pointed out in section 1243 of the Civil Code; that is, by the declaration of abandonment or a grant thereof. Simonson v. Burr, 121 Cal. 582, 54 Pac. 87.

It must be clear that no valid sale could be made of premises by virtue of the levy of an execution where neither the judgment nor execution creates any lien upon the property. The homestead being in full force and effect, and there being no contention that the judgment is within the purview of section 1241, Civ. Code, the docketing of the judgment created no lien (section 671, Code Civ. Proc.; Dam v. Zink, 112 Cal. 91, 44 Pac. 331); and the same thing is true of the levy of the execution. Section 1240 of the Civil Code provides that "the homestead is exempt from execution or forced sale except as in this title provided." The attempted levy of an execution upon property that is exempt must be futile to affect any interest whatever of the homestead claimant, and the transfer of her interest a year afterward can have no effect to vitalize a void and nugatory proceeding taken to subject the property to seizure and sale.

In Lubbock v. McMann, 82 Cal. 230, 22 Pac. 1147, 16 Am. St. Rep. 108, it is declared that: "A judgment creates no lien upon property thus affected, and a levy gives no right, except to inaugurate the proceedings for the admeasurement of such excess. * * * But though the sale of a homestead under execution conveys no title, it may create a cloud and involve the homestead claimant in litigation and will therefore be enjoined."

In Beaton v. Reid, supra, it is said: "The statute has provided the instances in which the homestead may be taken on forced sale, and the right to so take it will be strictly limited to those instances." Since the sale would be without authority of law, it is entirely inconsequential that the property was transferred after the bringing of the action.

4. Complaint is also made by appellants because of the finding that "said action has been continued in the name of the original party plaintiff, and no objection thereto was made by either party to this action." As a matter of fact, the finding is true beyond question. The course pursued also seems to be authorized by section 385, Code Civ. Proc., providing that, "in case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." If the defendants desired the substitution they should have made application therefor. They certainly have not been prejudiced because a righteous judgment has been secured against them in the name of the plaintiff rather than of her successor in interest.

5. Over the objection of defendants, the court admitted in evidence the patent of the United States government to said Andrew Hersom, conveying the land in controversy. Appellants contend that this was error since there was no issue as to ownership of the property, and it "was relied upon as evidence of respondent's residence upon the land in controversy." Respondent claims that it was introduced "merely to show that said Hersom had purchased the property under the homestead laws of the United States and was some evidence of Hersom's intent with respect to the property." But, conceding that the ruling was technically erroneous, it could not have prejudiced appellants. The fact of respondent's residence was shown without conflict by other evidence, and as to ownership no one can complain of evidence in support of an admitted fact.

6. Under the decisions it cannot be held that the court abused its discretion in reopening the case for further evidence. The delay in the trial was great, but we cannot say it was inexcusable. The court, it is true, suggested the reopening of the case. This may be rather unusual, but we must assume that it was in furtherance of a desire to reach a just conclusion upon the merits, and this certainly is not to be condemned. Appellants had the same opportunity to offer additional evidence as respondent, and an earlier judgment against them would hardly have been received with greater favor. Besides, it is at least doubtful whether the additional evidence strengthened plaintiff's case in any material respect, and if the judge changed his mind after the first submission it cannot be made the subject of just animadversion unless it should be shown that it was occasioned by some improper influence or led to prejudicial error. Nothing of the kind appears, and we conclude that the court's action was justifiable and within the spirit of the following decisions: Preston v. Sonora Lodge, 39 Cal. 116, 39 Pac. 116; Miller v. Sharp, 49 Cal. 233; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493.

7. In rendering his opinion the trial judge said: "I think it is a fact the court can take judicial notice of that in these mountain counties there is hardly a home but what is built more or less in a hotel fashion, run as a hotel, stopping place for the purpose of accommodating the public; it is really a part of the history of Plumas county, so that every place you go on the road you find a hotel and farm, and the same in the other counties, where there are some with more extensive structures than others, some built like hotels, great two-story houses constructed." It is often difficult to determine what things come within the category of matters of common knowledge of which the courts can take judicial notice, but it is doubtful whether any case can be found where it has been held to include the manner in which buildings have been constructed and the purposes for which they have been used in any particular county. If the doctrine can have such an extensive application, little would be left in the average case to be established by evidence. It would seem absurd for us to hold that the courts will take judicial notice of how the houses are constructed in Plumas county when we actually have no knowledge of it nor any accessible means of ascertaining the fact.

The cases cited by respondent do not reach the point. In Mahoney v. Aurrecochea, 51 Cal. 429, the time of harvest was involved. So, also, in Haines v. Shedigar, 110 Cal. 18, 42 Pac. 462. In People v. Mayes, 113 Cal. 618, 45 Pac. 860, it was held that the court would take judicial notice of the time when the moon arose on a particular night. Ex parte Berry, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160, was in relation to the meaning of the word "automobile." These were all cases within the provisions of section 1875 of the Code of Civil Procedure. Edson v. Southern Pacific R. R. Co., 144 Cal. 189, 77 Pac. 897, is no nearer the mark, wherein it is guardedly said: "But we suppose a court may take judicial notice of facts of common knowledge, and, among others, of the fact that but a small percentage of those traveling between places of the relative situation of San Francisco and Fresno have any occasion to avail themselves of all or of any of the privileges which purchasers of limited tickets were compelled to stipulate away."

It would, of course, be unnecessary to prove, what is so obvious, that the continuous travel between two such cities would be vastly greater than the intermitted.

But notwithstanding the court's error in this regard, as we conceive it, we are of the opinion that if it had not figured in the case the conclusion would and should have been in favor of plaintiff, and that there was no prejudice to the substantial rights of the appellants.

As we think the judgment is just, it and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(156 Cal. 532)

SWAMP LAND RECLAMATION DIST. NO. 341 v. BLUMENBERG et al. (Sac. 1,656.)

(Supreme Court of California. Nov. 23, 1909.)

1. Judgment (§ 948*)—Former Adjudication—Pleading—Necessity.

The defense of res judicata cannot be considered unless pleaded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1787; Dec. Dig. § 948.*]

2. Drains (§ 90*)—Assessments—Action—Defenses.

In an action to foreclose the lien of an assessment for maintaining a swamp land reclamation district, the regularity of the assessment and its amount as compared to benefits received by the work are open to investigation if the validity of the assessment has not been established under Pol. Code, § 3493½, permitting the district board of trustees, within a year after filing of the lien of assessments for maintenance, to commence an action to determine the validity of the assessment, and making the judgment therein conclusive upon its validity.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 90.*]

3. Drains (§ 90*)—Assessments—Additional Assessments — Action — Defenses — Failure of Benefits—Wrongful Act of Districts.

Pol. Code, § 3459, provides that if swamp reclamation work is such that other work must be done after its completion to maintain it, other assessments may be made from time to time to raise funds for that purpose. Section 3462 requires the trustees to make a statement of such work and its estimated cost, which shall be assessed proportionally to the benefits from the additional work, and requires the assessments to be filed with the county treasurer. Section 3463 makes the amount assessed a lien upon the land, and section 3465 makes them delinquent after

30 days. Section 3466 authorizes a suit to foreclose the lien, if the assessments are not paid. *Held*, that the willful refusal of a reclamation district, without cause, to operate the pumps during the cropping season, which were used to remove the water, and prevent it from overflowing reclaimed land, whereby a landowner's crops were destroyed, was a defense in an action by the district to foreclose a lien for an assessment to operate the pump during that season; where the landowner is not barred by a judgment validating the assessment in a proceeding under section 3493½.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 90.*]

In Bank. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Swamp Land Reclamation District No. 341 against Caroline R. Blumenberg and others. From a judgment for plaintiff, defendants appeal. Reversed.

Hinckson & Elliott, for appellants. Henry Ross and J. Frank Brown, for respondent.

SHAW, J. The plaintiff moved in the court below for judgment in its favor upon the pleadings. The motion was granted, and judgment was rendered accordingly. This is an appeal from that judgment. The action was begun under the provisions of section 3466 of the Political Code, to foreclose the lien of a swamp land assessment. It is admitted that the assessment was in all respects regularly made, and that it was levied for work to be thereafter performed by the district. The only question presented is whether or not the facts set up in the answer constitute a defense to the enforcement of the assessment.

The law relating to districts for the reclamation of swamp lands is found in sections 3446 to 3493½, inclusive, of the Political Code. It is provided that, after the original works of reclamation are completed, if they are of such a nature that other work must be done continuously, or from year to year, to maintain them or to make them effective, other assessments may be made upon the lands of the district, from time to time, to obtain funds for that purpose. Section 3459. The trustees must for that purpose make a statement of the work to be done and of its estimated cost. The cost is to be assessed to the lands in proportion to the benefits which it is believed will be caused by the work. The list of assessments is to be filed with the treasurer of the county (section 3462); the several amounts assessed become liens upon the respective tracts of land upon which they are assessed (section 3463); payment thereof may be made at any time within 30 days (section 3465); and if not so paid, they become delinquent, and may be called for in installments by the board of trustees, and if any installment is not paid in 20 days after such call, a suit for the foreclosure of the lien to that amount, or to the whole amount of the assessment if the trustees so elect, may then be instituted by the district (section 3466).

The plaintiff district was organized on June 17, 1879, and ever since has been a legally organized reclamation district under the law. It does not appear when its reclamation works were originally constructed, nor definitely of what they consist, but from the admitted facts it is a necessary inference that they have long been in operation, and that the plan of reclamation is that pumps are to be operated during the cropping season of each year to lift the water collected by its ditches over the levee into the river, in order that it may be carried away and the land kept free so that it may be cultivated. The assessment in question here was made in the year 1907, some time prior to June 27th, and on that date the assessment list was filed with the county treasurer. The object of the assesssment was to raise funds to operate the pumps referred to, during the two years next ensuing after the levy of the assessment. Here again the allegations of the pleadings are somewhat uncertain, but we think it is to be presumed that these two years embraced the cropping seasons of 1907 and 1908. The amount assessed against the land of the defendant Caroline R. Blumenberg was $6,053.15. The other defendant is her husband, and he has no other interest. Three installments of this assessment were called by the board of trustees; one on August 23, 1907, for 15 per cent. thereof, one on September 19, 1907, for 10 per cent., and one on November 19, 1907, for 10 per cent., amounting in all to $2,118.60, The suit is for these installments. It was begun on January 10, 1908.

In defense it is alleged that, since the levy of the assessment, and "during the cropping season of 1907, said plaintiff, in violation of its duty in that behalf, failed, neglected, and refused to operate its pump aforesaid, and in consequence thereof the water from surrounding lands drained down upon the said land of defendant Caroline R. Blumenberg, and submerged and overflowed a large area of the same, and so thoroughly saturated about 120 acres" thereof that the crops growing thereon were destroyed, "and said lands rendered unfit for cultivation ever since"; that defendant "repeatedly called the attention of said plaintiff to the submerged and saturated condition of the said lands, and demanded of the plaintiff again and again that it operate its said pump for the purpose of pumping and removing said water from the said lands, but plaintiff at all times neglected and refused to operate its said pump, and wrongfully dammed up the ditches leading to said pump," whereby the crops of defendant were overflowed and destroyed—all to her damage in the sum of $5,000. It is further alleged that by reason of these misfeasances of the plaintiff she has not and will not derive any benefit whatever from the portion of the assessment sought to be recovered.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Another action for the remaining 65 per cent. of the assessment was begun afterward, and it is now before this court on appeal from a similar judgment, being the case designated as No. 1,727 on the Sacramento calendar. 106 Pac. 392. In that case it was alleged that a judgment in pursuance of section 3493½ of the Political Code, declaring the assessment valid, was rendered in the superior court of Sacramento county on October 11, 1907, and that it had become final when that action was begun. This proceeding and judgment are not mentioned in the pleadings or record in this action, and we cannot now consider what would be the effect of that judgment upon the defense here interposed.

The theory of the defense is that, as the assessment was made to pay the expense of pumping for the seasons of 1907 and 1908, and as the basis of the right and power to make such assessments is the benefit which it is estimated the property will receive from the work for which the assessment is raised, such benefit is the sole consideration for the money to be paid by the property owner, that the failure to do the work constitutes a failure of consideration, and that when such failure occurs before payment is made, or before judgment in a suit to foreclose the assessment lien, and when, because the time for doing the work has passed, it never can be done, the failure of consideration is total, and that it may be set up as a defense to such foreclosure.

Under the rule established in Reclamation District v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335, if the validity of the assessment has not been established in an action as provided in section 3493½ of the Political Code, all questions involving the regularity of the assessment proceedings, the amount of the charge as compared to the benefits conferred, and the fact that the cost was apportioned in proportion to the benefits, must remain open to investigation in defense to a suit to foreclose the assessment lien. But here no attack is made upon the regularity of the assessment, nor is there any dispute that the work to be done would have benefited the land to the amount assessed, or that the cost was properly apportioned. The regularity and original validity and binding force of the assessment is admitted by the defendant. The contention is that it has become unenforceable because, by reason of subsequent events, the landowners cannot receive the benefit to secure which alone the assessment was made, and upon which alone it can be constitutionally founded.

There are authorities which give countenance to the doctrine that such an assessment, although absolutely regular and valid when imposed, may be rendered unenforceable by subsequent events of this nature. In Davidson v. New Orleans, 34 La. Ann. 171, an assessment for drainage purposes had been declared valid by the Supreme Court of the state and by the United States Supreme Court. Subsequently the work for which the assessment was levied was abandoned, and it was said to be probable that it never would be done. A suit was begun to declare it unenforceable. This action was sustained; the court saying: "Where the consideration of a judgment is prospective and has failed, the eventual debtor is, both in law and in equity, entitled to relief and the consequent exoneration." The force of the decision is weakened by the fact that the authorities cited and quoted in support of this statement go no farther than to declare that a personal judgment cannot be rendered against the property owner in an action upon such an assessment, and that payment can be enforced only against the property benefited and assessed. In Illinois the local improvement law provides for an assessment to be collected in advance of the doing of the work, and for its validation in an action for that purpose in which the property owners are to be summoned to make such objections as they may have to its validity. The courts of that state hold that, even after such judgment, if the local authorities in charge of the performance of the work allow it to be done in a substantially different manner from that proposed in the ordinance initiating the proceeding, and accept an improvement different in plan and character, and substantially less beneficial than the one proposed, such unauthorized action, if it occurs after the validating judgment is rendered, will vitiate the assessment, and may be pleaded in defense to a suit to foreclose the lien of the assessment. Church v. People, 174 Ill. 366, 51 N. E. 747; Pells v. People, 159 Ill. 587, 42 N. E. 784; Young v. People, 196 Ill. 603, 63 N. E. 1075; Gage v. People, 193 Ill. 316, 61 N. E. 1045, 56 L. R. A. 916. These doctrines are approved in 2 Cooley on Taxation (3d Ed.) p. 1280; (2d Ed.) p. 672. In equity, also, a doctrine is established to the effect that, under some circumstances, the enforcement of a judgment may be enjoined if it was rendered upon a contract, the consideration of which is an obligation to do something in the future, and subsequent events demonstrated that the thing could not be done, the complaining party being without fault and showing due diligence, as where a judgment against a surety was enjoined because, in another action, it had been subsequently adjudged that the consideration of the contract was illegal, and for that reason the principal was thereby discharged from liability. Miller v. Gaskins, Smedes & M. Ch. (Miss.) 524. See also, Scott v. Shreeve, 12 Wheat. (25 U. S.) 605, 6 L. Ed. 744; Reese v. Walton, 4 B. Mon. (43 Ky.) 507; Buchanan v. Lorman, 3 Gill (Md.) 51; Hilleary v. Crow, 1 Har. & J. (Md.) 542.

It is apparent that if a rule of this kind is to be applied to assessments such as that here involved—assessments by a going reclamation district, with its permanent works constructed and paid for, assessments levied for the annual operations of the district necessary to be carried on to make the plan of reclamation and the organization of the district of any avail, operations of no benefit whatever unless the work is done at the proper season—there may arise insuperable obstacles to the success of such districts, and the realization of the benefits to the landowners thereof and to the commonwealth, which such agencies are designed to bring about, may be prevented by the action of a few of the persons intended to be benefited. If the district must have the money to pay in advance to get the work done, and the assessment cannot be collected until the work is done, the district would as well cease to exist at once. The statute makes the assessment payable within 30 days and delinquent thereafter. It manifestly contemplates the payment of the assessment before such annual work, or any substantial part thereof has been done. A levy for such purposes, by a district which has completed its permanent system of ditches, a district which, though not a municipal corporation, is at least a public corporation performing some of the functions of government for the local territory interested, bears a close resemblance to ordinary taxes levied to defray the expenses of a city or county. It is clear from these considerations that a rule such as that here contended for, if applied at all to such districts and to assessments for such annual work, must be carefully guarded and limited so that it will not operate to defeat the very purpose for which such organizations are created.

There is no explanation in the record of the acts of the district averred in the answer as a defense. The plaintiff has followed the somewhat hazardous course of allowing its case to be stated by its adversary. We are disposed to rest our decision upon narrow grounds. The answer, in effect, avers that the district, whose duty it was to do the work contemplated, purposely and willfully refused to do it, and that without any excuse for the nonfeasance. It may be that good cause for the failure existed; as that it was caused by lack of funds arising from the failure of the defendant and others to pay the assessments, or by reason of some disaster intervening rendering it impossible, or it may be that the purposes of the assessment are not truly or fully stated in the answer, and that the amount raised was expended for some of the other purposes. The plaintiff has submitted its case without asserting any such excuses or inaccuracies, depending solely on the contention that the assessment is valid and conclusive. It is unnecessary to say what would be the effect if such facts were shown. We can only decide the case as it is presented. We are of the opinion that the willful refusal of the district to do the work for which the assessment was levied, without just cause or excuse, the effect of such failure being that the work never can be done, and that the property owners never can receive the benefit of that work for which their money was required of them, constitutes a good defense to an action by the district to foreclose the lien of the assessment, where the landowners are not barred by a judgment validating the assessment as provided in section 3493½. We do not perceive wherein this rule would operate unjustly to the district, or that it would necessarily hamper or restrict it in the performance of its lawful functions. It is in accordance with the principle of the authorities above referred to, and it seems necessary in order to secure justice to the landowners, and to prevent their property from being taken for public use without compensation.

It may be suggested that if the money due on the assessment is paid and the work is not done, or by reason of the lapse of time the precise work contemplated by this particular levy cannot be done, the money will remain in the treasury of the district, and can be devoted to future annual work of the same character, and that in this manner the landowners will receive the full benefit of the money paid on the assessment, although not the exact benefit intended. Perhaps this might be a good answer to a failure to do the work if it were prevented in some manner other than the willful and unjustifiable refusal of the district to do it. But where the failure is thus brought about, we do not think the district should be permitted to collect the assessment for a purpose thus frustrated, and that if money is needed for future work, the district, in such circumstances, should be left to raise it by means of a new assessment.

The judgment is reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

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156 Cal. 539

SWAMP LAND RECLAMATION DIST. NO. 341 v. BLUMENBERG et al. (Sac. 1,727.)

(Supreme Court of California. Nov. 23, 1909.)

1. STIPULATIONS (§ 17*)—PERSONS BOUND—COURT.

A stipulation that a similar judgment may be rendered on appeal in the present action to that rendered in another case pending on appeal will be disregarded, where the material facts in the two actions are substantially different.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 40; Dec. Dig. § 17.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. EVIDENCE (§ 82*)—PERFORMANCE OF OFFICIAL DUTY.

Since it would be the court's duty, in an action to determine the validity of a swamp land maintenance assessment, to allow any valid defense to be shown, though not pleaded, if presented at any time before judgment, it must be presumed, in a subsequent action to foreclose the lien of such assessment, that the court would have allowed all such defenses in the former proceeding.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.*]

3. DRAINS (§ 81*) — ACTION—DEFENSES—FORMER ADJUDICATION.

Under Pol. Code, § 3493½, permitting the district board of trustees of a swamp reclamation district, within a year after filing of the lien of the assessment for maintenance, to commence action to determine the validity of the assessment and make the landowners parties, and requiring defendants to allege in their answer the reason why the assessment is illegal, and making the judgment therein conclusive upon the parties as to its validity, a landowner can make no defense to the enforcement of the assessment which he might have urged in the former proceeding, so that where he knew of damage to his crops because of the district's failure to pump water during the season for which an assessment was made for the expense of pumping before judgment in an action brought under section 3493½ to determine the validity of such assessment, he cannot set up such failure as a defense to the foreclosure of the assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 81.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Swamp Land Reclamation District No. 341 against Caroline Blumenberg and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hinckson & Elliott, for appellants. Henry Ross, and J. Frank Brown, for respondent.

SHAW, J. This is an appeal from the judgment upon the judgment roll alone. Judgment was given for the plaintiff upon a motion for judgment on the pleadings.

The case involves the same assessment as that reviewed in the case between the same parties, which was appealed to this court, and which is designated as No. 1,656 on the Sacramento calendar, 106 Pac. 389. We refer to the opinion in that case for a fuller statement of the facts. The object of the present action is to foreclose the lien of the assessment for the remaining 65 per cent. of the amount thereof; calls for that portion having been made after the former suit for the first 35 per cent. was begun. This action was begun in May, 1908. The only additional matter to be here considered arises from the fact that in this case it is alleged and admitted that, after the assessment list was filed in the office of the county treasurer, an action, under section 3493½ of the Political Code, was begun by the district in the superior court of the county, against the defendants and others as owners of lands in the district subject to the assessment, to determine the validity of said assessment, that the defendants were duly served with summons in said action, and that on October 11, 1907, judgment was duly given therein, declaring that said assessment was legal and valid, and that it constituted a lien upon the lands of the respective owners of lands in the district, to the amounts stated in the assessment list, and upon the lands of the defendant, Caroline, to the amount of $6,053.15. This judgment had become final before this action was begun. There was no appeal therefrom. These facts were not alleged in the first action. There is a stipulation on file that whatever judgment is rendered on the appeal in No. 1,656, a like judgment may be given on this appeal. Manifestly this cannot be done unless the material facts are the same in both cases. As they are substantially different, the stipulation will be disregarded.

The last clause of section 3493½ expressly declares that every judgment declaring an assessment valid, given in such action, "shall be conclusive between the parties thereto as to the validity * * * of the assessment." This section was enacted in 1893. Prior to that time there was no proceeding authorized by which the validity of the assessment could be judicially determined in advance of a suit for the foreclosure of the lien. Because of the lack of such an opportunity to dispute its validity, it was held in Reclamation Dist. v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335, and in prior decisions also, that the action of the assessment board in making the assessment, although in all respects regular, did not preclude a landowner from contesting its validity in defense to an action to foreclose the lien, and that in such foreclosure suit he would be allowed to show that his land was not benefited by the work to be done, or that the cost was not assessed in proportion to benefits, or any other objection to the collection of the assessment sufficient to render it invalid. That case arose before the enactment of section 3493½. The manifest purpose of that section was to provide for a judicial determination of such questions in advance of the enforcement of the assessment by suit. It declares the purpose of the action to be "to determine the validity of the assessment." It may be begun at any time within one year after the filing of the assessment list with the county treasurer, and it is provided that the parties summoned, if they defend the action, shall set forth in the answer the reasons why they contend that the assessment is illegal. It is provided that "the court shall decree the validity or invalidity of the assessment in accordance with what the court may determine the facts to be." This section was considered by this court in Reclamation Dist. v. Sels, 117 Cal. 164, 49 Pac. 131. In regard to the action authorized thereby the court there said: "It is designed as one of the processes to test the legal perfection of an assessment levied by a reclamation district. The property owner is entitled to a hearing at one time or another upon the question of benefits. Rec. Dist. v. Evans, 61 Cal. 104; Rec. Dist. v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; Hagar v. Rec. Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. Before the passage of section 3493½ of the Political Code he made this showing when action was brought to enforce the assessment. But to obviate difficulties and delays which thus arose this peculiar proceeding was established. By it is provided a forum before which a property owner may go and make full proof of his objections to the assessment. The final determination of the court upon the matter may be used by or against him in any future action to collect the tax." We think it must be admitted that after such a judgment has become final against any landowner, he cannot, upon a foreclosure suit to enforce the lien, again object that the lands would not have been benefited had the work been done as contemplated, or that the assessment was not in proportion to benefits, or make any objection to the collection of the assessment which he might have urged in the statutory action to test its validity.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The facts alleged in defense are more fully stated in the opinion in the other action referred to. They are, in brief, that the assessment was for work to be done thereafter, consisting of the pumping operations for the cropping seasons of 1907 and 1908, that the district willfully refused to do the work during the season of 1907, whereby the land of the defendant was submerged and damaged and rendered unfit for cultivation then and ever since, and the defendant was thereby deprived of all benefit of the assessment. Nothing is said as to the pumping operations in the year 1908. It may be conceded that the right to make such defense, after a judgment declaring the validity of the assessment, is analogous to the right of a party to enjoin the collection of a judgment for money given upon an obligation the consideration of which was the performance of a future act, where subsequent events have made the act impossible. Cases holding that such an action will lie in equity are cited in the opinion in the other case. But the right to maintain such actions is much restricted. "A bill seeking this relief is scrutinized with great jealousy, and the grounds upon which the interference will be allowed are confessedly somewhat narrow and restricted. It will not suffice to show that injustice has been done by the judgment against which relief is sought, but it must also appear that this result was not caused by any inattention or negligence on the part of the person aggrieved; and he must show a clear case of diligence to entitle himself to an injunction." 1 High on Injunctions, § 113. And, further, that author says: "Where the person aggrieved has had an opportunity of interposing his defense at law, and has had his day in court, but has failed through carelessness or inadvertence to avail himself of the opportunity of interposing such defense at law, he cannot afterwards make it the ground for relief in equity, and is barred from enjoining proceedings under the judgment. It is not the policy of the law to permit persons to slumber upon their rights when they have an opportunity to assert them in a court of law and afterward to permit their assertion in a court of equity." Section 165. To the same effect see 1 High on Inj. §§ 178, 180; 2 Story, Eq. Jur. § 896; 4 Pom. Eq. Jur. § 1361; 2 Freem. on Judg. §§ 493, 503.

Applying this doctrine to the present case, it will be seen that the objections here interposed could have been set up in defense to the action to declare the validity of the assessment. The judgment in that action was rendered on October 11, 1907. The record does not show when it was begun, but it must be presumed that if any valid defense had been presented to the court at any time before the judgment, the party presenting it would have been allowed to make a showing thereof, although it may not have been contained in his original answer. It would have been the duty of the court to permit such defense to be interposed, and we must presume in this proceeding that it would have done so. The cause of the failure of consideration alleged was the failure to pump the water off the land during the cropping season of 1907. The assessment became payable on June 27th, and became delinquent on July 27th. The act which caused the damage, and which deprived the defendant of the benefits expected, was the failure to pump water during the cropping season of 1907. That season was substantially over before the judgment of October 11, 1907, was rendered. The defendant was fully aware of such failure while it was occurring, and before that judgment was rendered she knew of the existence of the defense which she now seeks to make. She had an opportunity to present it to the court in that action. Upon the principles stated in the foregoing authorities she is now estopped by the former judgment, and she cannot again set up the defense which she then was cognizant of and failed to present to the court.

The judgment is affirmed.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.

BEATTY, C. J. I dissent. The validity of the assessment has never been questioned by defendants, but, on the contrary, expressly conceded in the former action as in this. Their defense is that the proceeds of a legal assessment were so misapplied as to do them an injury instead of conferring a benefit. The judgment in this case should follow the judgment in the other according to the stipulation.

157 Cal. 105

PERMANENT COMMITTEE OF MISSIONS OF THE PACIFIC SYNOD OF THE CUMBERLAND PRESBYTERIAN CHURCH IN THE UNITED STATES v. PACIFIC SYNOD OF THE PRESBYTERIAN CHURCH, U. S. A., et al. (S. F. 5,062.)

(Supreme Court of California. Dec. 24, 1909. Rehearing Denied Jan. 22, 1910.)

1. Religious Societies (§ 11*)—Constitution—Powers.

Under the constitution of the Cumberland Presbyterian Church, which does not fix the church name, and which gives the General Assembly power to concert measures for promoting the prosperity of the church, and which makes the General Assembly the supreme authority of the church except as limited, and which provides that the General Assembly may, with the approval of the presbyteries, change the Confession of Faith, Catechism, Constitution, and Rules of Discipline, the General Assembly alone may change the church name without the approval of the presbyteries.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 11.*]

2. Religious Societies (§ 14*)—Decisions of Church Bodies—Conclusiveness.

A declaration of the General Assembly of the Cumberland Presbyterian Church that the entire plan of union with the Presbyterian Church in the United States had been constitutionally adopted is equivalent to a declaration that a change in the church name had been approved, or that the approval of a change in the church name was not necessary, and is conclusive on the civil courts.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 101; Dec. Dig. § 14.*]

3. Religious Societies (§ 34*)—Union of Religious Denominations.

The question of reunion and union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States submitted to the presbyteries of the two churches involves the question of reunion according to the basis of union proposed, including change of church name, and the adoption of the plan of union is an adoption of the change of church name.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 211; Dec. Dig. § 34.*]

4. Religious Societies (§ 34*)—Union of Religious Denominations.

Two independent religious denominations may unite without changing the name of either and without any provision fixing the name of the united church; and, in that event, the name of the United Church is a matter for further consideration by it, to be determined in a lawful manner by the lawfully authorized bodies of the united church.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

5. Religious Societies (§ 5*)—Constitution—Powers Conferred.

The power conferred by the constitution of the Cumberland Presbyterian Church, providing that the Confession of Faith, Catechism, Constitution, and Rules of Discipline may be amended or changed by the co-operative action of two-thirds of the members of the General Assembly voting thereon and of a majority of the presbyteries, includes the power to adopt an entirely new constitution, rules of discipline, or form of government for the church, as well as to change any other of its established institutions.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 16; Dec. Dig. § 5.*]

6. Religious Societies (§ 7*)—Membership.

One joining a church under the supervision and control of church courts thereby agrees to abide by the rules of the church government and the judgments of the church courts regularly made, and agrees that all his rights as a member shall be governed by such rules and judgments.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 24; Dec. Dig. § 7.*]

7. Religious Societies (§ 34*)—Church Government—Union Between Religious Bodies.

The question of union between the Cumberland Presbyterian Church and the Presbyterian Church in the United States need not, under the Presbyterian form of church government, be submitted to a direct vote of the members of the churches; but a submission to the presbyteries thereof is sufficient.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 209; Dec. Dig. § 34.*]

8. Religious Societies (§ 11*)—Church Government—Union Between Religious Bodies.

Under the Presbyterian form of church government, the only acts of sovereignty retained by the members are the election of deacons and ruling elders, when a particular church is organized, and when vacancies occur, and the selection of a ruling elder as a representative of the particular church in the presbytery and synod; and all other powers of a sovereign character are vested in the presbyteries and the General Assembly, and such powers, when exercised, are binding on all the members, whether satisfactory to them or not.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 11.*]

9. Religious Societies (§ 34*)—Union Between Independent Religious Bodies—Effect.

The fact that the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States is equivalent to a complete destruction of the former is immaterial on the question of the validity of the union; the power, under the constitution of the former, to change and amend, being unlimited.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

10. Religious Societies (§ 34*)—Union Between Independent Bodies—Effect.

The United Church formed by the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States exists in continuity with and as a successor of both of the former denominations, and neither has a separate existence, but each particular church, presbytery, and synod established by the Cumberland Presbyterian Church retains its individual integrity and existence and property rights until some change is made by the regular authorities of the United Church having power to make it.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 211; Dec. Dig. § 34.*]

11. Religious Societies (§ 34*)—Union Between Independent Bodies—Effect.

The power of the General Assembly and presbyteries of the Cumberland Presbyterian Church to form a union with the Presbyterian Church in the United States is included in the absolute power vested in them by Presbyterian usage and declared by the constitution of the church.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12. Religious Societies (§ 34*)—Property—Trusts.

The property given generally to the church authorities of a denomination for the use of a particular church or for the whole denomination is presumptively given with full knowledge that the denomination may change its name or creed and unite with another denomination, and when that is done the property follows the United Church so long as its identity can be established, and the trust is not perverted by such change when regularly made.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 211; Dec. Dig. § 34.*]

13. Religious Societies (§ 14*)—Decisions of Church Courts—Conclusiveness.

The decisions of the authorities of a religious denomination acting regularly in ecclesiastical matters is final on the civil courts.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. § 101; Dec. Dig. § 14.*]

14. Religious Societies (§ 34*)—Union Between Independent Denominations—Effect.

The several synods, presbyteries, church sessions, and subordinate instruments of the Cumberland Presbyterian Church are bound by the action of the assembly and presbyteries uniting with the Presbyterian Church in the United States, and they are now connected with the United Church under the name of the "Presbyterian Church in the United States of America."

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 34.*]

In Bank. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by the Permanent Committee of Missions of the Pacific Synod of the Cumberland Presbyterian Church in the United States against the Pacific Synod of the Presbyterian Church in the United States of America, and others. From a judgment for defendants and from an order denying a new trial, plaintiff appeals. Affirmed.

T. E. Clark and H. L. Partridge (W. C. Caldwell, of counsel), for appellant. W. N. Rutherford and Beasley & Fry (J. M. Grant and John M. Grant, of counsel), for respondents.

SHAW, J. The plaintiff has appealed from the judgment and from an order denying its motion for a new trial.

In the year 1882 the Pacific Synod of the Cumberland Presbyterian Church formed a corporation under the corporate name of "Permanent Committee of Missions of the Pacific Synod of the Cumberland Presbyterian Church in the United States." Its main purposes, as expressed in its articles, were to handle and disburse moneys contributed for the establishment and support of church organizations of that denomination within the synod boundaries, and to acquire and hold real and personal property in trust for the use of such church organizations. Its affairs were to be carried on by seven trustees to be elected by said Pacific Synod. It has acquired and now holds various parcels of real property in trust for the use of local congregations within the synod, and also considerable personal property.

The Presbyterian Church in the United States of America has been one of the leading churches in this country for over two centuries. Certain of its ministers, being dissatisfied with parts of its creed, formed the Cumberland Presbyterian Church in 1810. From that time until May 25, 1906, the two churches continued to exist separately. It is claimed that at the last-mentioned date they reunited as one church under the name of "Presbyterian Church in the United States of America." The validity of this alleged union is the question to be decided in this case. For convenience we will herein designate the original church the "Presbyterian Church" and the other as the "Cumberland Church." The controversy in this particular case turns upon the question: Which of two rival sets of seven persons each is the lawful board of trustees of the plaintiff corporation? The persons who, assuming to act as such trustees, began this suit in its name, represent those opposed to said union, and who contend that no valid union has ever been effected. The defendants aver that certain seven persons acting under the authority of the United Church, and in its behalf as trustees of the plaintiff, constitute the lawful board. Five of the seven trustees last mentioned were duly elected by the Pacific Synod of the Cumberland Presbyterian Church prior to the alleged union. Two of them have been chosen since that union by those of the former Cumberland Church who have been acting as a Pacific Synod of the United Church. These seven are in control of the corporation and in custody of its property and records. At the session of said Cumberland Synod of 1906, the union above referred to having been, as it is claimed, then fully accomplished, a large majority of the members of that synod, after organizing, resolved to recognize the union and, in accordance with the plan of union, declared the body to be the "Pacific Synod of the Presbyterian Church, U. S. A.," and proceeded to transact business as such. Some thirteen of the persons present, only seven of whom were members of said synod, refused to recognize such union as valid or effectual, denied the authority of the majority to take a new name or act as a part of the United Church, withdrew from the meeting, and proceeded to organize and declare themselves to be the true "Pacific Synod of the Cumberland Presbyterian Church." This body assumed to decide that there were six vacancies in the board of trustees of the plaintiff corporation, one caused by change of residence and five by the fact that five of the former trustees had remained with the majority of the synod in organizing as a Pacific Synod of the Presbyterian Church, U. S. A., which conduct this protesting body construed to be a withdrawal from the Cumberland Church, and as sufficient to disqualify them from further acting as trustees. It proceeded to elect six persons to fill these alleged vacancies. The other member they believed to be in sympathy with them; in which, however, they were mistaken. These six persons, purporting to act as a board of trustees, have caused the present action to be begun in the name of said corporation, to enjoin the defendants from interfering with the use or control of any of said church property. The complaint names as defendants said Pacific Synod of the Presbyterian Church, U. S. A., the California Synod of the Presbyterian Church, U. S. A. (a synod of the original Presbyterian Church), and ten persons who, with others, it is alleged have organized and now control said Pacific Synod last named. It is averred that these ten persons, and others unknown, intend to cause all the property belonging to the plaintiff corporation as trustee, but now in control of said defendants, to be delivered over to the trustees who remained with said Pacific Synod last named, and the others afterwards elected, to be used by and for the benefit of persons and local churches affiliating with and adhering to said "California Synod of the Presbyterian Church, U. S. A.," and not by or for the benefit of congregations or members of the true Cumberland Presbyterian Church. The court below held that the union of the two churches had been regularly effected, that the trustees of plaintiff who acted with the said Pacific Synod of the Presbyterian Church, U. S. A., were rightfully in office as such trustees, and that the plaintiff had showed no injury.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The Cumberland Presbyterian Church was organized in 1810. Three ministers of the parent church were unable to believe in that part of the Westminster Confession which they understood to declare that the ultimate fate of all mankind was predetermined by Almighty God, some to free salvation after death, and others, whether dying in infancy or old age, to suffer eternal punishment because of the sin of Adam. These ministers organized their congregations into an independent presbytery, which called itself "Cumberland Presbytery." They expressly avowed a disbelief in the aforesaid fatalistic doctrines. It does not appear to have been the original design of these people to separate permanently from the Presbyterian Church, but rather to form some new relation whereby they could be allowed to retain their connection with that church, without conforming to or teaching the doctrines aforesaid. For a few years thereafter unsuccessful efforts toward forming such a relation were made. In the meantime their members increased, new church societies were formed by them, and in 1813 a synod of three presbyteries was formed, the Westminster Confession, with the objectionable doctrines eliminated, was adopted as the system of doctrine, and a new and independent church was organized, which became known as the "Cumberland Presbyterian Church." Other presbyteries and synods were added from time to time, and in 1829 a General Assembly of these presbyteries met. From and after that time the Cumberland Church was a regularly organized religious society, having a form of government and rules in all substantial particulars the same as those of the Presbyterian Church from which it sprung, and with substantially the same faith and belief, except the fatalistic doctrines above mentioned. Congregations of this church were formed in California, and were organized into presbyteries which, in accordance with Presbyterian usage, constituted the "Pacific Synod" of that church. The Presbyterian Church was also extended into California, and its churches were formed into presbyteries and a synod was organized by it called the "California Synod of the Presbyterian Church, U. S. A."

For many years there was, in the Presbyterian Church, dissatisfaction with the fatalistic doctrines above mentioned. In 1900 a movement to modify them was begun which, in 1903, culminated in an amendatory declaration of the belief of that church, in effect repudiating the offensive doctrines contained in the Westminster Confession, and declaring a belief in all substantial respects identical with that of the Cumberland Church. This change in the statement of the creed of the old church was immediately followed by overtures between the General Assemblies of the two churches for reconciliation and organic union, with the result that the measures by which it is claimed the union was accomplished were taken and carried out.

The two churches had practically the same plan of organization and form of government. Each local congregation was called a "particular church." A presbytery embraced all of these "particular churches" within a prescribed district. The "particular churches" were immediately governed by a "church session," composed of the minister in charge and "ruling elders" elected for life, or for a fixed term by the congregation. The powers of a presbytery were exercised by a body consisting of all the ordained ministers within its territorial limits and one ruling elder selected from each local church therein. The synod embraced at least three presbyteries and consisted of ministers and ruling elders from each local church. The General Assembly was the highest authority of the church. It was a representative body composed of ministers and ruling elders selected by and from each of the presbyteries. In the Cumberland Presbyterian Church these representatives were called "commissioners."

The Cumberland Church was originally formed as a single presbytery. In 1883, after that church had been in existence fully organized for many years, a written constitution was adopted, setting forth the form of government, rules of discipline, and the faith or creed of the church, and this constitution has ever since been recognized as the authorized and final statement in regard to all these matters. It was adopted in the manner then and always recognized by Presbyterians as the lawful and authorized method of fixing the form of government, rules, and creed of the whole church; that is, by a formulation thereof by the General Assembly, by an adoption thereof by that body, and by the subsequent submission to and approval thereof by a majority of all the presbyteries of which the church was then composed.

This constitution stated that the powers of the church were exercised by bodies or "courts," called, respectively, church sessions, presbyteries, synods, and the General Assembly. It declared that "the General Assembly is the highest court of this church, and represents in one body all the particular churches thereof." Its title or name was the "General Assembly of the Cumberland Presbyterian Church," and it was constituted the "bond of union, peace, correspondence and mutual confidence among all its churches and courts." It was to have jurisdiction "over such matters as concern the whole church," but limited by the express provisions of the constitution. It had power to "decide in all controversies respecting doctrine and discipline; to concert measures for promoting the prosperity and enlargement of the church; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church"; and to supervise, control, amend, or annul the action of any of the subordinate bodies. The word "court" is used in this constitution, not in the restricted sense of a tribunal exercising judicial powers alone, but in the more comprehensive sense of a body possessing all the governmental powers, legislative, executive and judicial.

With respect to changes and amendments of the constitution it provided as follows: "Upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof voting thereon, the Confession of Faith, Catechism, Constitution and the Rules of Discipline, may be amended or changed when a majority of the presbyteries, upon the same being transmitted for their action, shall approve thereof. The other parts of the government—that is to say, the General Regulations, the Directory for Worship, and the Rules of Order—may be amended or changed at any meeting of the General Assembly by a vote of two-thirds of the entire number of commissioners enrolled at that meeting, provided that such amendment or change shall not conflict, in letter or spirit, with the Confession of Faith, Catechism, or Constitution."

In May, 1903, the General Assemblies of the two churches being in session, each appointed a committee on fraternity and union, to act jointly with the committee of the other assembly in formulating and reporting a plan of union between the two churches. These committees, in joint session, prepared a written statement of the plan of union, which was reported to the General Assembly of each church in May, 1904, and was then regularly adopted by each General Assembly by a majority far exceeding the two-thirds required by the Cumberland Church constitution. The material parts of this plan of union are as follows:

"That the reunion of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church be accomplished as soon as the necessary steps can be taken, upon the basis hereinafter set forth.

"(1) The Presbyterian Church in the United States of America, whose General Assembly met in the Immanuel Church, Los Angeles, Cal., May 21st, 1903, and the Cumberland Presbyterian Church, whose General Assembly met in the First Cumberland Presbyterian Church, Nashville, Tenn., May 21st, 1903, shall be united as one church, under the name and style of the Presbyterian Church in the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess.

"(2) The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice.

"(3) Each of the assemblies shall submit the foregoing Basis of Union to its presbyteries, which shall be required to meet on or before April 30th, 1905, to express their approval or disapproval of the same by a categorical answer to this question: 'Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice?' Each presbytery shall, before the 10th day of May, 1905, forward to the stated clerk of the assembly with which it is connected a statement of its vote on the said Basis of Union.

"(4) The report of the vote of the presbyteries shall be submitted by the respective stated clerks to the General Assemblies meeting in 1905, and if the General Assemblies shall then find and declare that the foregoing Basis of Union has been approved by the constitutional majority of the presbyteries connected with each branch of the church. then the same shall be of binding force, and both Assemblies shall take action accordingly. * * *

"(2) The foregoing Basis of Union and eight concurrent declarations shall be submitted to the respective General Assemblies of 1904, and the above recommendation, numbered 1, shall be submitted to the General Assembly of the Presbyterian Church in the United States of America, meeting in 1904; and this entire plan of union shall be operative when said Basis of Union, Concurrent Declarations and Recommendation numbered 1, shall have been adopted in their entirety, and where necessary by presbyterial action."

The plan also contained certain "concurrent declarations," providing for the adjustment of details as to the standing, after the union, of the respective synods and presbyteries and other subordinate bodies of the two churches, together with other matters of detail not necessary here to mention. The "concurrent declarations" and "recommendation numbered 1," mentioned in the last paragraph (numbered 2) quoted above, referred to certain action to be taken by the General Assemblies alone, which was duly taken, and which is not essential to the existence or exercise of the power to unite.

The Basis of Union was, in the manner specified therein, regularly submitted to the presbyteries of the Cumberland Church by the proper officers of its General Assembly, and was approved by a majority of them. Prior to May 10, 1905, the presbyteries made returns of their action in the matter to the stated clerk of the assembly. The returns were reported to the General Assembly of that church which met in May, 1905. They were duly canvassed by that body, and it was ascertained and declared that a majority of the presbyteries had approved the proposed union. Said assembly thereupon formally declared that the said Basis of Union had been constitutionally adopted.

The Basis of Union was also adopted by the General Assembly and presbyteries of the Presbyterian Church, in the same manner and in the same year.

At the General Assembly of each church held in May, 1905, the matter of the union was passed without final action, to be taken up again by the respective General Assemblies in 1906. In May, 1906, the two General Assemblies again met in regular session. Each communicated to the other the fact of the adoption of the Basis of Union. The General Assembly of the Cumberland Church thereupon declared that the union was in operation and effect, that the effect thereof was that the former Cumberland Presbyterian Church had adopted the Confession of Faith of the "Presbyterian Church in the United States of America," as revised in 1903, and also the other "doctrinal and ecclesiastical standards" of that church, that the same were effective and operative upon all ministers, elders, deacons, officers, particular churches, judicatories, boards, committees, and all other ecclesiastical organizations, institutions, and agencies of the Cumberland Presbyterian Church, that the succeeding General Assembly of the Presbyterian Church, which was to meet on the third Thursday of May, 1907, should be composed of representatives from all the presbyteries of the reunited church, and that all presbyteries formerly of the Cumberland Church should elect representatives to said united General Assembly of 1907, of the Presbyterian Church. This declaration was made by the General Assembly of the Cumberland Church after a protest against the same had been made by a considerable minority of the members of the General Assembly, which protest included the main grounds upon which the union is now attacked. The protest was overruled, and the General Assembly then adjourned sine die as a separate General Assembly. Similar action in regard to the union was taken by the assembly of the Presbyterian Church in the United States of America. It is not contended that the action of that church in the accomplishment of the union in controversy was not in all respects valid and binding, so far as that church and its members were concerned. The plaintiff's attack is confined to the proceedings taken on behalf of the Cumberland Church.

The evidence shows that in California the union was approved or acquiesced in by almost the entire membership of the Cumberland Church, and that the local congregations, or "particular churches," instituted by that church are now avowedly affiliating with the United Church and using the respective church properties as part of that church.

It is claimed that the action by which the proposed union was attempted was wholly void and ineffectual so far as the Cumberland Church is concerned, that those of its members, elders, and ministers who have affiliated with and assumed to be members of a united or combined church are, in law and in fact, seceders and outsiders, without any authority, right, or power to act for the Cumberland Church, or to use or control the property belonging to that church at the time the so-called union took place, and that the Cumberland Church remains, as before, a separate church organization with all of its subordinate bodies intact, including those of its officers and members who repudiate the alleged union. This claim is based on two principal grounds: First, that the basis of union, as an entirety, was not submitted to the presbyteries; second, that the General Assembly and the presbyteries did not have the power to effect such union.

The first ground, specifically, is that the question proposed to the presbyteries and affirmatively answered, did not include that part of the proposition stated in the first paragraph of the Basis of Union providing that the United Church should have the "name and style of the Presbyterian Church in the United States of America," that the presbyteries have never expressly approved of the proposal so far as it involved the elimination of the word "Cumberland" from the church name, and hence that the attempt to unite was abortive. In this connection we will also notice the objection that neither the assembly alone, nor the assembly and presbyteries together, had the power to change the name of the church.

We do not find anywhere in the Cumberland Presbyterian constitution a declaration that the name of the church shall be the "Cumberland Presbyterian Church." The history of that church does not show that by any action of the membership, or of the General Assembly and presbyteries jointly, that name was adopted as the name of the church. The first presbytery, which was organized in 1810, adopted the name "Cumberland Presbytery." In the subsequent meetings of the church courts, and in the church literature, the church was always designated as the Cumberland Presbyterian Church. The constitution of 1883 describes the church by that name, and further declares that the General Assembly "bears the title of the General Assembly of the Cumberland Presbyterian Church." In the year 1850, a change of name was suggested in the General Assembly; but it did not meet with favor, and the proposition was dropped without action. There is nothing in the evidence to show that the church, either by General Assembly action, or by that body and the presbyteries combined, has ever expressly declared what its name should be. It evidently received its name originally by common consent from the fact that its first presbytery took the distinctive name "Cumberland" because it was located in the Cumberland region of Tennessee. The name therefore is not shown to be an essential part of the church structure. It constitutes no part of the church government. A change of name would seem to be within the province of the General Assembly, acting alone. It has general jurisdiction "over such matters as concern the whole church." It was expressly authorized "to concert measures for promoting the prosperity and enlargement of the church" and to superintend the affairs of the whole church. It is made the supreme authority of the church, except as "limited by the express provisions of the constitution." The provision that the assembly, with the approval of the presbyteries, may change or amend the Confession of Faith, the Catechism, the Constitution, and the Rules of Discipline, is perhaps a limitation upon the power of the assembly alone to make such changes or amendments. But this provision does not include the change of the church name. Nor is the name a part of the general regulations, Directory for Worship, or Rules of Order, which, by the second paragraph of the provision concerning amendments, can be amended or changed only by a two-thirds vote of all the enrolled members of the assembly. As observed in McBride v. Porter, 17 Iowa, 204: "It is the substance, and not the name, that the law regards." Not being expressly fixed by the constitution, the church name is not an essential part of it. The obvious conclusion is that it is within the power of the assembly to change the name, and there was no necessity for the approval thereof by the presbyteries. In confirmation of this conclusion we have the decision of the General Assembly, itself. Its formal declaration that the entire plan of union had been constitutionally adopted could be true, with respect to the change of name, only upon the theory that the question put to and affirmed by the presbyteries included an approval of the proposed change of name, or upon the theory that presbyterial approval thereof was not necessary. The declaration was therefore equivalent to a decision that one of these two theories was correct. This being a matter solely of ecclesiastical jurisprudence, the decision of the assembly, the highest authority of the church, is, as we will hereinafter show, conclusive upon all civil courts.

Moreover, the terms of the question, if the appellant's counsel are correct in their estimate of the importance of the name, imply the change proposed. The Cumberland Church was formed by members of the Presbyterian Church. The question proposed the "reunion and union" of the two churches, obviously meaning the reunion which had been proposed in the Basis of Union, including the change of name. It stated that the change was to be made upon the "ecclesiastical standards" of the Presbyterian Church. If the name was so all-important as the appellant insists that it was, so important that its omission would have been fatal to the union, then its name must have constituted one of the "standards" of the Presbyterian Church, and a reunion under those standards would have been a reunion under its name.

But if we are wrong in these propositions, it by no means follows that the mere name by which the two churches were to be known, after the union, was of such vital importance to the plan of union and to its operation and effect that the attempt to unite, although complete in all other particulars, would be ineffective if the name of the united church was not prescribed or fixed as a part of the plan, or if, although specified in the original plan, it was for any reason not included in the plan as adopted. The two churches could have united without changing the name of either and without any provision fixing the name of the new and united church, and such union would have been entirely valid and effectual. The name of the united church in that event would have been matter for further consideration by the united church, and it could have been determined in the proper and lawful manner by the lawfully authorized bodies of the new church. If the name has not been properly submitted to the presbyteries, and such submission is necessary, then a name can now be adopted by the General Assembly and presbyteries of the United Church. We are of the opinion that the omission of the specification of the name, in the question to be answered by the presbyteries, is not destructive of the union formed by the action of the assembly and presbyteries.

There was not, in fact, any fraud, deception, or concealment in the failure to include the proposed name in the question. The proposed union was first suggested in the year 1900. The committees to frame a plan of union were appointed in 1903. The plan was adopted in 1904. It was submitted to the presbyteries during the interval between May, 1904, and May 10, 1905. During all this time, in all its stages, the union was hotly opposed by an earnest and active minority of considerable numbers. The entire plan proposed was thoroughly debated by the entire church during this interval. In transmitting the question to the presbyteries, the circular letter accompanying it, and presumably authorized by the assembly, informed them that "your action thereon will mean the acceptance or rejection of the entire plan, embracing the 'Basis of Union,' 'Concurrent Declarations,' and 'Recommendations.'" There was no lack of understanding that the church name was to be that of the old church, if the reunion took place.

We are unable to discover in the proceedings for reunion any substantial departure from the established mode of procedure as established by immemorially recognized Presbyterian usage and as prescribed by the constitution of the Cumberland Presbyterian Church, itself.

Nor do we perceive any lack of power to accomplish the reunion in the manner in which the church authorities acted in the matter. The constitution provides that the Confession of Faith, Catechism, Constitution, and Rules of Discipline "may be amended or changed" by the co-operative action of two-thirds of the members of the General Assembly voting thereon and of a majority of the presbyteries, precisely in the manner here followed. The constitution and rules of discipline constitute substantially all there is in the idea of church government and organization. The power to change these includes the power to adopt an entirely new constitution, rules of discipline, or form of government for the church, as well as to change any other of its established institutions or features.

It is said that the attempt to unite was ineffectual because no vote of the individual members of the church was taken, and because it does not appear that they, or a majority of them, ever consented to such union. The argument is that the sovereign power of the church rests in the members, and that, although they may have committed to the presbyteries and the assembly power to change matters of procedure and form, or the internal organization of the church, yet they have not given power to these bodies to adopt measures so radical as the union of the church, as a body, including members and temporalities, with another church, involving as it does in this case the complete effacement of the church individuality, the destruction of its separate existence and the taking of a name hitherto recognized as descriptive of a distinct and different church organization composed of different members.

It is obvious that no formal vote of the members was necessary to the exercise of the powers actually conferred upon the assembly and presbyteries; none being prescribed by the constitution. When a person joins an organized society, such as a church or congregation associated for religious worship, under the supervision and control of higher church courts, he necessarily by that act agrees to abide by its rules of government and the judgments of its courts regularly made, and consents that all his rights, privileges, and duties as a member, or in respect of his membership, shall be governed and controlled by those rules and judgments. This agreement is always implied from the fact of membership. Watson v. Jones, 80 U. S. 729, 20 L. Ed. 666; Lamb v. Cain, 129 Ind. 513, 29 N. E. 13, 14 L. R. A. 518; White Lick, etc., v. White Lick, etc., 89 Ind. 151; Bear v. Heasley, 98 Mich. 289, 57 N. W. 270, 24 L. R. A. 615; McGinnis v. Watson, 41 Pa. 14; Mack v. Kime, 129 Ga. 17, 58 S. E. 184; 24 Am. & Eng. Ency. of Law, 338. In the Cumberland Church an express promise was exacted of persons uniting therewith "to abide by and support the rules and regulations" of the church, while a member thereof. According to Presbyterian polity, as established from time immemorial, the only acts of sovereignty, if they can be called such, retained by, or permitted to, the individual members, with respect to such matters as are here involved, are the election of deacons and ruling elders when a particular church is organized and when vacancies occur, and the selection of a ruling elder as a representative of the particular church in the presbytery and synod. This limitation upon the rights of members is also apparent from the terms of the Cumberland constitution of 1883. These powers are expressly mentioned therein as pertaining to the members, and there is nothing anywhere in it evincing any intent to depart from or change the previous church usage and polity in this particular. All other powers of a sovereign character are vested in the presbyteries and General Assembly. The powers thus vested are, when exercised, binding upon all the members whether the result is satisfactory to them or not. If a member is not willing to submit, he may withdraw from the church and cease to be a member; but, while retaining membership, he must yield to the decrees of the church authorities, made in the recognized and established mode. The members are therefore bound by and carried into this union, with all its consequences, unless the power to make it has been withheld from the assembly and presbyteries, which are admittedly vested with all other sovereign ecclesiastical authorities.

It is contended that this power is inherent in the membership, and that it is so important in its nature and consequences that nothing less than an express declaration in the constitution can be received as evidence that it has been delegated to representatives, or to the constituted authorities of the church. We are aware of no right or privilege, civil or ecclesiastical, which may be abnegated at all, which is so sacred that power to yield or part with it cannot be delegated otherwise than by express declaration, except when protected by some statute or Constitution, as, for instance, the statute of frauds. Human intentions and desires are manifested in various ways, and the manifestation may be equally authoritative and binding when evidenced by conduct as when shown by express statement. The evidence shows that in Presbyterian usage from its beginning all church power has been uniformly and universally considered and understood to be vested in the presbyteries and assembly. See Fussell v. Hail, 134 Ill. App. 634. The presbytery is the recognized church unit and has a voice in affairs of this character. The assembly consists of representatives of the several presbyteries, and, as the Cumberland Constitution states, it is the "bond of union" between them and "represents in one body all the particular churches." It declares and executes, for the whole church, the orders and judgments of the presbyteries expressed through their representatives assembled in and constituting the assembly. The highest governmental powers were always exercised and declared by their joint action in this manner, before any written constitution had purported to confer the authority upon them to do so. A striking example of this is found in the history of the Cumberland Church itself, in the adoption, by its assembly and presbyteries, of the church constitution in 1883. No vote of the members or church sessions was taken to accomplish this act. Nor was it ever considered or claimed that such vote was necessary to its validity and force. If those bodies could thus, in the absence of any express authority, determine the form of church government, the statement of its doctrine, the rights and privileges of its members, and the powers and duties of its several bodies and courts, it is clear that they must have power to do so now, since the constitution expressly confers it upon them. There is no limitation with regard to the particular form or mode of exercising this power. A formal or avowed amendment to the constitution is not made a measure of the power. It may be made in any reasonable way, and hence it may be done by a resolution declaring that henceforth the rights, privileges, and powers of the members, ministers, courts, and subordinate bodies shall be enjoyed, not separately as before, but in unison and conjunction with another church of similar faith and form of government, but having a different name. McGinnis v. Watson, 41 Pa. 25; Brundage v. Deardorf, 92 Fed. 225, 34 C. C. A. 304. We are satisfied that a vote of the members was not necessary to the exercise of this power by the General Assembly and presbyteries.

Although the members may not have given a formal assent to such changes, nor voted directly upon them, it does not follow that they have had no voice in regard thereto. The Presbyterian government is wholly representative in character. It has no characteristics of a pure democracy. The members exercise their will in such affairs, so far as they may under the Presbyterian system, in choosing the ruling elders, in selecting one of them as a representative to the presbytery, and in exerting their personal influence upon the ministers and ruling elders, by which means they doubtless frequently secure their desires. This government by representatives being the recognized rule of the church to which the members consented when they joined, it cannot be said that there has been any violation of the compact between the church and its members, or anything unfair, in the method of effecting the union.

The conclusion which we have reached on this branch of the case makes immaterial the objection that the result of the action of the church, if effectual, would not be a mere union of the two societies, but would be a merger of the Cumberland Church into the Presbyterian Church, or an absorption of the former by the latter, which, it is said, is equivalent to a complete destruction or annihilation of the former. Granting that such would be the technical effect of the proceedings, the power to change and amend is unlimited, and it was within the power of the assembly and presbyteries to carry it to that extent. But, as it may be of some importance in construing the judgment in this case, we deem it necessary to say that in our opinion no such consequences ensue. Each particular church, each presbytery, and each synod, established by the Cumberland Church, retains its individual and separate integrity and existence and its property rights after the union as fully as before, until and unless some change is made by the regular authorities of the united church having power to make it. The main difference in their condition resulting from the union is that they now belong to a larger body and have relatively less influence and power in affairs affecting the whole church. The entire church continues to exist, not separately and distinctively, indeed, but in union and association with the other church. The same is true of the Presbyterian Church. The United Church exists in continuity with, and as the successor of, both of the former churches. Neither of them has now a separate existence, one no more than the other. McGinnis v. Watson, supra, 41 Pa. 28; Gibson v. Armstrong, 46 Ky. 507; Central University v. Walters' Ex'rs, 122 Ky. 79, 90 S. W. 1066; McBride v. Porter, 17 Iowa, 204.

A further objection is made that the Basis of Union adopted and carried out does not purport to be an amendment of the constitution of the Cumberland Presbyterian Church, that the uniting of that church with another church is, in no sense, an amendment of that constitution, and hence that the power to do it is not given to the assembly and presbyteries, and that, as the power of amendment is manifestly a granted power, the mode prescribed must be followed. We are of the opinion that these objections require a construction of the powers of the church authorities, and of the terms of the declaration by which the union was accomplished, entirely too narrow and technical. That the terms of the Basis of Union are very general is conceded. An amendment or change may be as well made by a new enactment, not mentioning or referring to the one which it supersedes, as by a declaration which expressly purports to amend or change the formerly existing law or constitution. And the intention of the legislative authority is shown as clearly by the brief statement that the Confession of Faith and other doctrinal and ecclesiastical standards of the Presbyterian Church shall henceforth be those of the United Church, as by the most elaborate and detailed statement. The effect of the declaration contained in the Basis of Union is clear, although the words are few. The doctrine, form of government, everything pertaining to the old church that is included in the comprehensive phrase "ecclesiastical standards," are by that declaration made the doctrines, form of government, and standards of the Cumberland Presbyterian Church, and the two become one. Whether the process is called an amendment of the old constitution, or the formation or adoption of a new one, which, in effect, would be a "change," the intent is clearly manifested, and the church authorities concerned had the power to proceed as they did. The power to form a union is included in the absolute sovereign power vested in these church courts by Presbyterian usage, and declared by the constitution itself—a power which, as we have seen, was pre-existent to that constitution.

It is said that the property in the hands of the plaintiff corporation consists of donations made to the authorities of the Cumberland Presbyterian Church, in their capacity as such, for the purpose of aiding and supporting that church and its various institutions, that it is held in trust by that corporation for those purposes, and that it would be a violation of the trust and a perversion of the funds and properties to appropriate it to the use of the United Church, which, counsel insist, is a different and distinct denomination. Several answers may be made to this proposition. We have shown that the identity of the Cumberland Church and its respective synods, presbyteries, church sessions, particular churches, and other church institutions, including the plaintiff corporation, is not lost, but continues under the name of the United Church and in connection therewith. Hence the United Church is not a different or distinct denomination. There is no evidence that any part of the fund or property was given upon the specific trust that it was to be held by the church so long only as it retained the word "Cumberland" as a part of its distinctive name, or for the purpose of aiding in the teaching of the exact creed, or statement thereof, found in the Cumberland constitution at the time of such donation. If any property was so given and is so held, the right of the donors, or beneficiaries, to enforce the trust would not be affected by the decision and judgment in this case, since no such issue is raised, and such persons are not parties to the suit. The finding of the court below is that the property consists of houses of worship held by the plaintiff corporation for the members of the local churches, respectively, which occupy and use the same. Property thus given generally to the church authorities for the use of a particular church, or of the whole church, would not be affected with such specific trusts as are here contended for. Such property will be presumed to have been given with full knowledge that the church had power to change its name or creed and unite with another church. In such cases the property follows the church so long as its identity can be established, and the trust is not deemed to have been broken or perverted by such change, regularly made. Watson v. Jones, 80 U. S. 726, 20 L. Ed. 666; Horsman v. Allen, 129 Cal. 136, 61 Pac. 796; McGinnis v. Watson, 41 Pa. 16; Gibson v. Armstrong, 46 Ky. 500; Mack v. Kime, 129 Ga. 24, 58 S. E. 184; Brown v. Clark (Tex.) 116 S. W. 364; Wallace v. Hughes (Ky.) 115 S. W. 691.

We have preferred to decide the case on a consideration of the provisions of the constitution of the Cumberland Church, the powers of its judicatories, and the manner of the attempted exercise of those powers, without regard to the decisions of the General Assembly of that church upon these questions. We have supposed that this would be more satisfactory to the parties concerned. Lest we be understood to hold that the civil courts can disregard and overrule the decisions of the church authorities, acting regularly, in ecclesiastical matters, we expressly disavow that doctrine. We approve the principle laid down by the Supreme Court of the United States in Watson v. Jones, supra, and by the Supreme Court of this state in Horsman v. Allen, supra, relating to this subject. "Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of the church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Watson v. Jones, supra, 80 U. S. 727, 20 L. Ed. 666. This was said with reference to the Presbyterian Church, and it is declared to be the doctrine applicable to all churches having a similar system of ecclesiastical government. The doctrine has been followed in many other cases and, although not accepted in England, it is the prevailing rule in this country. Brown v. Clark, supra; Mack v. Kime, supra; Fussell v. Hail, supra; Wallace v. Hughes, supra; Brundage v. Deardorf, supra; Trustees v. Harris, 73 Conn. 217, 47 Atl. 116, 50 L. R. A. 636; Lamb v. Cain, 129 Ind. 518, 29 N. E. 13, 14 L. R. A. 518; Kuns v. Robertson, 154 Ill. 413, 40 N. E. 343; Chase v. Cheney, 58 Ill. 509; Russie v. Brazzell, 128 Mo. 112, 30 S. W. 526, 49 Am. St. Rep. 542; Wheelock v. First Presb. Church, 119 Cal. 482, 51 Pac. 841; Gibson v. Armstrong, supra.

If this rule were followed, the decision of the General Assembly of the Cumberland Church that the creeds of the two churches were sufficiently in agreement to warrant the proposed union is final as to the objection that the creeds are different. The authorities would also support the proposition that the decision of that General Assembly, to the effect that the union of the two churches was constitutionally made and had become operative, is final and conclusive upon the civil courts. That decision was made after a protest had been regularly presented to that body, attacking the validity of the union on the same grounds which we have here considered, due deliberation was had thereon, and the final decision was in all respects regular. The regularity and validity of the union of that church with another of the same faith and form of government was essentially a question of ecclesiastical law. In view of its expressly conferred powers, as hereinbefore recited, it would seem that this decision of the General Assembly should put the matter at rest, so far as the church members and its subordinate agencies are concerned, even if we were of the opinion that the decision was erroneous.

The effect of these conclusions, as applied to the case at bar, is that the several synods, presbyteries, church sessions, and subordinate instruments and agencies of the former Cumberland Church are bound by the action of the assembly and presbyteries aforesaid; that they are now connected only with the United Church, under the name of the Presbyterian Church in the United States of America; that the action of the majority of the Pacific Synod of the Cumberland Church, in 1906, declaring that body to be the Pacific Synod of the Presbyterian Church in the United States of America, was regular and valid; that the trustees of the plaintiff who adhered to said Pacific Synod did not thereby vacate their offices as trustees; that the persons who separated from said meeting of said synod and organized to perpetuate the separate existence of the Cumberland Church were schismatics, and had and have no authority to appoint trustees for the plaintiff corporation; and that the persons they assumed to appoint as such trustees had no authority to bring or maintain this action. The conclusions of the court below to this effect were correct.

It is proper to add that the validity and effect of this union has heretofore been considered by the higher courts of other states. The courts of Illinois, Georgia, Kentucky, and Texas reached the same conclusion which we have here announced, in Fussell v. Hughes, supra, Mack v. Kime, supra, Wallace v. Hughes, supra, and Brown v. Clark, supra. In Boyles v. Roberts (decided in June, 1909) 121 S. W. 805, and Landrith v. Hudgins (decided in November 1907) 120 S. W. 783, the Supreme Courts of Missouri and Tennessee, respectively, held that the union was invalid. We are in accord with the decisions in the states first mentioned.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

157 Cal. 82

LEAVITT v. LASSEN IRR. CO. (Sac. 1,642.)

(Supreme Court of California. Dec. 24, 1909.)

1. WATERS AND WATER COURSES (§ 249*)—APPROPRIATION FOR SALE, RENTAL, OR DISTRIBUTION—AGENCY OF APPROPRIATOR.

One appropriating water under Const. 1879, for sale, rental, or distribution, is but an agent of the public for the distribution of such waters to such members of the public as may apply for them and pay him the legal charge for the service rendered by him.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

2. WATERS AND WATER COURSES (§ 249*)—APPROPRIATION—SALE OF SYSTEM—RESERVATION.

One who appropriates water for sale, rental, or distribution cannot, when he sells the system, reserve any part of the waters for irrigation of his private land, unless he had through the same canal and ditches made a private appropriation for use on such lands; in which case his reservation must be limited to such private appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

3. WATERS AND WATER COURSES (§ 143*)—APPROPRIATION FOR PRIVATE USE—MEASURE OF RIGHTS.

The rights of a private appropriator of waters is measured by the amount he has actually taken and applied to a beneficial use on his land.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 143.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. WATERS AND WATER COURSES (§ 249*)—WATER COMPANIES—GIVING PREFERENTIAL RIGHTS.

A water company having water appropriated under Const. 1879, art. 14, § 1, for sale, rental, or distribution the use of which is thereby declared to be a public use cannot confer any preferential right on one consumer over another to the use of any part of its water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

5. WATERS AND WATER COURSES (§ 249*)—WATER COMPANIES—LIMITING TERRITORY TO BE SUPPLIED.

It would not be in derogation of Const. 1879, art. 14, § 1, declaring that the use of water appropriated for sale, rental or distribution is a public use for a water company in possession of a limited amount of water so appropriated to fix the limits of the territory to the irrigation of which it shall be devoted, and agree to supply the water first to the lands therein, and to supply only the surplus to outsiders.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

6. WATERS AND WATER COURSES (§ 249*)—WATER COMPANIES—PERMANENCY OF CONSUMERS' RIGHTS.

One who has once been supplied by a water company which has water appropriated for sale, rental, or distribution is entitled to a continuation of such supply, unless his quantum is diminished by a shortage for which the company is not responsible, or by an increase of demand by addition of consumers, when the supply must be fairly apportioned.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

7. WATERS AND WATER COURSES (§ 249*)—WATER COMPANIES—CONTRACTS REPUDIATED.

Where a water company tenders water to a consumer, first at the rate fixed by law, and next at the rate fixed by a contract, and the consumer refuses to pay anything, and claims the right to use it without charge, this amounts to a repudiation, by which any rights of his under the contract are ended.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.*]

In Bank. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by B. H. Leavitt against the Lassen Irrigation Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

W. F. Williamson and H. D. Burroughs, for appellant. N. J. Barry, for respondent.

HENSHAW, J. Plaintiff's complaint contained two causes of action. In the first he asserted his ownership of the Leavitt Buggytown ranch, containing 1,000 acres; alleged that he was of right entitled to take, free of charge, sufficient water from defendant's canals and ditches to thoroughly and properly irrigate all of these lands. He alleged that defendant refused to allow him so to take the water in the irrigating season of 1905, and that by reason of this refusal his crops were seriously damaged. The second cause of action sets forth a like claim to the free taking and use of water from the defendant's ditches sufficient to thoroughly and properly irrigate another piece of land of 160 acres, in the irrigating season of 1905; the defendant refused to allow plaintiff so to take the water, with the result that his crops were damaged. In both causes of action he seeks compensation for this damage, and an adjudication of his rights to water for these lands. The cause was tried without a jury, judgment passed for plaintiff, and from that judgment and from the court's order denying defendant's motion for a new trial it appeals.

1. Plaintiff's asserted right to the free use of water for his Buggytown ranch rests upon the following facts: In 1889 and the years following plaintiff constructed the Susan river irrigation system, by which he appropriated, for the purposes of sale, rental, and distribution, the surplus waters of Susan river, in Lassen county. Plaintiff testifies that he appropriated these waters for the purposes of sale, rental, and distribution, and also for private use upon his Buggytown ranch. The court finds that immediately after the construction of the system plaintiff appropriated and used from the waters of the system a sufficient quantity to irrigate this ranch. Subsequently plaintiff sold his water system, but, in selling, reserved to himself "the prior and preferred right to take from said system a sufficient quantity of water to properly irrigate during the irrigating season of each and every year all of the lands comprising said Leavitt Buggytown ranch." After further findings to the effect that defendant acquired title to the system with full notice and knowledge of plaintiff's prior and preferred right, the court gave its judgment that "plaintiff has a prior and preferred right to take from said system, free of charge, during the irrigating season of each and every year, water in sufficient quantities to thoroughly and properly irrigate all of the lands comprising the said Leavitt Buggytown ranch (describing it), and the defendant, its agents, attorneys, and employés be and they are hereby perpetually enjoined from in any manner interfering with plaintiff's right to take from said system so much of the waters thereof as may be necessary to irrigate the said 1,000 acres of land during the irrigating season of each and every year." For respondent, the most favorable view which can be taken of the evidence is that he made an appropriation of waters for the public use of sale, rental, and distribution under the Constitution of 1879; that by means of the same canal and ditches he made a private appropriation of waters for use upon his individual land; and that when he came to sell his irrigating system he withheld from the sale the waters so privately appropriated. It cannot be said that there was anything illegal in these acts. But when the rights of plaintiff come to be measured by the trial court, it is noticeable that he is given far more than the facts and the law warrant. Treating Leav-

itt's appropriation as being wholly and entirely for public use, he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purposes any part of this water. If he could reserve a part, he could reserve all, and thus, by his ipse dixit, convert a public use into private ownership, or, if he could reserve a part for himself, he could with equal authority give away parts of the supply to others, and by this method destroy what the Constitution itself has declared shall forever remain a public use. Therefore the only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch. If this be so, then his rights to water would be measured as are the rights of every other private appropriator—not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land; but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water would also be measured by and limited to this quantity. Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139; Strong v. Baldwin, 137 Cal. 440, 70 Pac. 288. The findings and judgment as above quoted establish that the court adopted the erroneous view that respondent, by his so-called reservation, had been able to secure for himself an undetermined quantity of water, without regard to the amount which he had been beneficially using. The findings and judgment are silent upon the question as to this latter amount, and the judgment upon this cause of action must therefore be reversed. This discussion has been upon the assumption that Leavitt did in fact make a private appropriation of water for use upon his Buggytown ranch in connection with his appropriation of the waters of Susan river for public use. If, however, the facts should be that he did not make such private appropriation, his attempted reservation of a private right out of a public trust, as above stated, would be futile and void.

2. Respondent's second cause of action is based upon breach of contract. One Purser came into the ownership of Leavitt's irrigation system. As Purser became the owner subject to whatever force and effect attached to Leavitt's reservation of water for his Buggytown ranch, it is to be remembered that all other waters were appropriated for the public use of sale, rental, and distribution, and that Purser stood simply as the agent of the public in the execution of this use. Purser, while so the owner, made a contract with Grace Elledge, a daughter of plaintiff, who was at that time in possession of 160 acres of land. By this contract Purser agreed to supply Grace Elledge with sufficient water from the Susan river irrigation system for the annual irrigation of this land. Grace Elledge agreed to pay the sum of $1 per acre annually "for each and every acre of land which may have been previously cleared of brush or cultivated." It was further agreed that the water should be delivered by Purser at seasonable times and should be taken and used by Grace Elledge in conformity to the lawful rules and regulations which Purser might make. It was understood that Grace Elledge should have a priority of right to the use of water over and above all other consumers saving those who held contracts like her own. The contract contained many other provisions; but, as they touch matters foreign to this consideration, it is not necessary to set them forth. This contract between Purser and Grace Elledge was acknowledged upon February 15, 1896, and upon the same day there was indorsed thereon, but not acknowledged, the following: "For a valuable consideration I hereby assign the within agreement and all my rights thereunder to B. H. Leavitt. [Signed] Edward T. Purser. Grace E. Elledge." Subsequently Grace Elledge made a deed of the 160 acres of land to her father, Leavitt, granting therewith "all ditches, water and water rights used thereunto or appurtenant thereto." Upon this state of facts the court found that Leavitt was entitled to take from defendant's system, free of charge, "a sufficient quantity of water during the irrigating season of each and every year to properly and thoroughly irrigate" this 160 acres, and that this right was a permanent right and prior and preferred over all other rights, saving the rights of those who had contracts with Purser of like effect.

Against this judgment appellant advances many propositions of gravity, not a few of which we consider valid. Thus, he argues that the judgment itself is void for uncertainty, in decreeing to respondent in general terms water sufficient to "thoroughly irrigate 160 acres of land," without specifying the quantum of water, the kind of irrigation, or in any way the amount which might actually be needed. Again, he argues that the contract itself provided that Purser, the owner of the system, would supply water under the rules and regulations which he might make, while the decree entitles Leavitt to enter and take the water. He further argues and shows that the purported assignment to Leavitt was not acknowledged, so that no constructive notice came to appellant of the purported assignment, and that if, as respondent contends, Grace Elledge's rights were such as passed by her deed to her father, it could only be so upon the theory that an easement

—an interest in land—had been created, and if such was the case, and as Purser had made a subsequent assignment of his rights under this very contract to a third person and it had been duly recorded, Leavitt's unrecorded assignment became void. Civ. Code, § 1214; Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391. Again, appellant argues, and with much force, that the effect of Purser's assignment of the contract to Leavitt, and of Grace Elledge's assignment of the contract to Leavitt, could not in law be the creation of a free right to water against the appellant; that Purser's assignment carried the right to collect tolls at the rate of a dollar per acre for the water supplied, but carried also the duty of supplying the water; that Grace Elledge's right was to receive water upon the payment of a dollar per acre; that the conveyance into a single person of all of both parties' rights and duties under such a contract could result in nothing but a merger of these rights and duties and an extinguishment of the contract, since no man can contract with himself and no man can be compelled to furnish water to himself and pay himself therefor a dollar per acre for so doing. These, and many other objections, are advanced against this judgment, with much force and learning. But the paramount question renders unnecessary their consideration and determination. That question may be thus stated: Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental, and distribution under the Constitution of 1879. He was but the purveyor of this public use, the agent in the execution of this public trust. If, by any method however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself. Nakedly stated, it amounts to this: That a corporation, which has appropriated water which the Constitution has declared shall forever be devoted to a public use, may contract with A., B., and C. to supply them in perpetuity with a given quantity of this water, and then, by assigning in turn to A., B., and C. its rights under these contracts, confer upon A., B., and C. a private right superior to and destructive of the public use. If this can be done with one, it may be done with many, and water which has thus been appropriated for public rental, distribution, and sale may, by this legerdemain of the law, be transferred into private ownership and use. This may not be done.

The fundamental and all-important proposition then is this: That a public service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any part of its water. Even before the adoption of the Constitution of 1879 and its declaration therein contained (article 14, § 1), it was said by this court, in Price v. Riverside L. & I. Co., 56 Cal. 431: "Every corporation deriving its being from the act above cited has impressed upon it a public trust, the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created." In McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264, is contained the first statement of this court in construction of the constitutional provision: "Whenever water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner." And in the late case of Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395, it was said by Mr. Justice Shaw, speaking for the court in bank, in defining the public use declared by the Constitution: "In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use 'must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates.' McQuillen v. Hatton, 42 Ohio St. 202. 'The use and benefit must be in common, not to particular individuals or estates.' Lewis on Eminent Domain, § 161; Coster v. Tide Water Co., 18 N. J. Eq. 68; Pocantico Co. v. Bird, 130 N. Y. 259 [29 N. E. 246]; Gilmer v. Lime Point, 18 Cal. 251; McFadden v. County of Los Angeles, 74 Cal. 571 [16 Pac. 397]. The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." The principle receives universal recognition, says the Supreme Court of Indiana, in State ex rel. Wood v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245. "No statute has been deemed necessary to aid the courts in holding that, when a person or company undertakes to supply a demand which is affected by a public interest, it must supply all alike who are like situated, and not discriminate in favor of nor against any." 45 Cent. Law J. p. 278; Haugen v. Albina L. & W. Co., 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424; Olmsted v. Morris Aqueduct, 47 N. J. Law, 311; Com. v. Wilkes-Barre Gas Co., 2 Kulp (Pa.) 499; Chicago & N. W. R. Co. v. People ex rel. Hampstead, 56 Ill. 365, 8 Am. Rep. 690; Nebraska Teleph. Co. v. State ex rel. Yeiser, 55 Neb. 627, 634, 76 N. W. 171, 45 L. R. A. 113; Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841; State ex rel. Atwater v. Delaware, L. & W. R. Co., 48 N. J. Law, 55, 2 Atl. 803, 57 Am. Rep. 543.

All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate and to abide by the reasonable rules and regulations of the company. It does not follow that a water company may not make specific contracts with individual consumers which are within the purview of the Constitution and within valid legislative enactments regulating the public use. This is precisely as decided by Fresno Canal Company v. Park, 129 Cal. 437, 62 Pac. 87. But, as decided in Crow v. San Joaquin Irr. Co., 130 Cal. 309, 62 Pac. 562, 1058, immediately following the Park Case, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to the water furnished by the public service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply. The language of this court in Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359, must be construed in the light of the facts there presented. The court was there considering the claim of a water company to the right to collect rates in excess of those fixed by a contract made with its predecessor; its claim being in part founded on the theory that by a foreclosure sale it had acquired the water and distributing system free from that contract. The opinion, in the main, goes upon the theory that the water in control of the company was not subject to a public use, and upon that theory it was held that the contract to furnish water to Bachman's land attached the water right to it as an appurtenance, with the right to receive water from the previous owner of the system and its successors at the contract rates. The company made the additional argument that the water was in fact devoted to public use, that if it could be thus attached to land as an appurtenance, the property dedicated to public use would be converted into private property, and that, as this could not be permitted, the contract was against public policy and void, so far as it attempted to create the appurtenance or fix rates. This argument is not fully stated in the opinion. In answer to the argument, the court cited the case of Fresno, etc., Co. v. Park, supra, and declared that the constitutional provision regarding water devoted to public use did not prevent a water company from making a contract giving to a particular tract of land the right to receive water for permanent and continuous use for irrigation, subject to the condition that the public authorities could regulate and control the use. Such a contract disposing of water devoted to public use, of course, would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which the public use extended, and establish its status as land permanently entitled to share in the public use. It did not appear in that case that any public regulation had been made, and the contract controlled the rights of the parties. It was therefore immaterial, so far as the right to collect the rates in controversy in that case was concerned, whether the water right was appurtenant to the land as private property, or whether the land was entitled to a part of the water as a sharer in the public use, where public rates had not been fixed and private contracts controlled. This is the essence of the decision, and it does not conflict with Hildreth v. Montecito, supra, or any other cases on the subject of public use.

The foregoing statement that a water company, or person in charge of water devoted to public use, cannot confer a preferential right upon one consumer over another, is not to be understood as denying the right of such company or person in possession of a limited amount of water to devote that amount to the irrigation of a given area of land. We are not to be understood as saying that the company may not fix the limits of this territory, and lawfully agree to supply its waters, first, to the lands within that territory, and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied. This would not be in derogation of the public trust, but would be a mere regulation of use in the performance of the trust.

Hunt v. Jones, 149 Cal. 297, 86 Pac. 686, is not in conflict with the principle enunciated. A land company had acquired water for use upon its lands. It was in its nature a private appropriation. In selling the lands it sold with them, as appurtenant to them, a proportionate share of water as a private water right. It was in effect the sale by a private landowner of land with water rights appurtenant thereto, and his subsequent attempt to withhold the water. It involved no question of the rights of consumers in waters appropriated to public use.

It is, of course, a truism of the law that an act of the Legislature conflicting with constitutional provision must fall. All of the acts of the Legislature regulating or attempting to regulate the public use of waters so appropriated are subordinate to the provisions of the Constitution and, to be valid, must be in harmony therewith. We have said, and undertaken to show, that a water company organized under the Constitution of 1879, which has appropriated waters of the state for public rental, distribution, and sale, cannot give a preferential right to one consumer over another. Permanent rights, in a limited sense, such consumers may acquire. That is to say, having once been supplied by the company, they are entitled to a continuation of such supply, unless their quantum shall be diminished by a shortage for which the water company is not responsible, or a shortage by reason of the increased demand of added consumers. In such cases the duty of the water company is to supply such water as it has, fairly apportioned between its consumers. If it be conceived that section 552, Civ. Code, is designed to confer upon any particular consumer any special, permanent, and preferential right above what is here stated, that effort, being plainly violative of the Constitution, would be held void. The same declaration applies to the provision of the act entitled "An act to regulate and control the sale, rental and distribution of appropriated waters in this state other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March 12, 1889, and of the amendment to that act by the act approved March 2, 1897 (Stat. 1897, p. 49, c. 54).

In Fresno Canal Co. v. Park, supra, it was held that, in the absence of a rate fixed by the supervisors, a rate agreed upon between the parties could be enforced. In Crow v. San Joaquin, etc., Canal Co., supra, it was held that a consumer did not deprive himself of the right to take water under the rate established by law by reason of his refusal to pay under and in accordance with the terms of his contract. In this case there was no refusal upon the part of the appellant company to furnish water. Respondent was tendered the water—first, at the rate fixed by law, and, second, at the rate fixed by the Grace Elledge contract. But he refused to pay anything for the water, and insisted upon his right to take it and use it without charge. This right he did not have. The utmost for which he could contend was the right to the use of water (in consonance with the foregoing principles) upon tender o' payment of the contract rate. The contract was continuous, its obligations concurrent. Respondent's conduct amounted to more than a default. It was an intentional breach and repudiation by which, whatever it may have been conceived they were, his rights under the contract came to an end. Page on Contracts, §§ 1447, 1461; South Boulder R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 Pac. 504; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

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157 Cal. 94

LASSEN IRR. CO. v. LONG. (Sac. 1,643.)

(Supreme Court of California. Dec. 24, 1909.)

WATERS AND WATER COURSES (§ 257*)—FURNISHING WATER FOR IRRIGATION—REFUSAL TO PAY—SUING FOR REASONABLE VALUE.

Continued refusal of one, to whom an irrigation company furnished water under a contract, to pay therefor, is a breach of the contract, justifying the company in treating it at an end, and suing in the absence of a legally established rate, for the reasonable value of the services rendered.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 257.*]

In Bank. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by the Lassen Irrigation Company against John T. Long. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

W. F. Williamson and H. D. Burroughs, for appellant. N. J. Barry, for respondent.

HENSHAW, J. Plaintiff sued to recover from defendant the reasonable value of its services in furnishing water for the irrigation of defendant's land, which value was alleged to be $2 per acre. The services were rendered during the irrigation seasons of 1902, 1903, 1904, and 1905. Defendant answered, asserting that the value of the services did not exceed $1 per acre, and denied that there was anything due from him to plaintiff. By cross-complaint he set up a contract made with the predecessor in interest of plaintiff, under which he contended that he had a permanent preferential right to water sufficient to thoroughly irrigate 320 acres of land, and averred a failure and refusal upon the part of plaintiff to furnish sufficient water during the irrigation season of 1905, to his damage in the sum of $2,800. The court decreed defendant the permanent and preferential right under the contract for which he contended, found that he owed $616.20 for water furnished, at the rate of $1 per acre, held him to have been damaged by the failure and refusal of plaintiff to furnish water for the season of 1905, and gave defendant judgment for $933.80.

The contract in this case is in form precisely that considered in the case of Leavitt v. Lassen Irrigation Co. (No. 1,642, this day decided) 106 Pac. 404. The decree upholding the validity of the contract is in terms precisely the same as the decree in that case. For the reasons there given, this defendant could not acquire any permanent preferential right to the use of the water over any other member of the public entitled to draw his water supply from the same public service corporation. For this reason alone, the judgment must be reversed. But, in addition, it is made plainly to appear that defendant was in default, and after demand had refused to pay for the services rendered him by plaintiff and its predecessors for the years above mentioned. He does not pretend to have paid anything other than "a little on account." This continued refusal to pay was a distinct breach of the contract, justifying the water company in doing as it did—treating it as violated and at an end, and suing thereafter (in the absence of a legally established rate) for the reasonable value of the services which it rendered. Leavitt v. Lassen Irrigation Co., supra; De Prosse v. Royal Eagle Distilleries, 135 Cal. 411, 67 Pac. 502; Page on Contracts, § 1477; South Boulder & R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 Pac. 504. The judgment must therefore be reversed, and the cause, if tried again, tried upon the correct theory, and not upon the one here adopted by the trial court—that defendant had a preferential right to the use of water, for the failure to supply which plaintiff became responsible in damages. Plaintiff could be responsible only if it unwarrantedly refused to supply water, or if, through the failure to exercise ordinary care in a matter which it could control, it suffered its supply to run short.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order are reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

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157 Cal. 146

PERRY v. CITY OF LOS ANGELES et al.

(L. A. 2,408.)

(Supreme Court of California. Dec. 27, 1909. Rehearing Denied Jan. 26, 1910.)

1. Municipal Corporations (§ 330*)—Improvement Without Letting Contract.

St. 1901, p. 30, c. 32, § 9, as amended by St. 1907, p. 611, c. 330, § 4, provides for bonds for certain improvements, and that all contracts for public improvement, or for furnishing labor or materials therefor, shall be let to the lowest responsible bidder, but that the municipality itself may construct such improvements and employ labor necessary therefor, and that in cities operating under a charter under Const. art. 11, § 8, the provisions of such charter as to the manner of letting contracts shall control. Los Angeles charter, framed under such Constitution, nowhere expressly prescribes that a contract must be let for the doing of any such work, but section 148 provides that all contracts for labor or material for any improvement of which the board of public works has charge shall be let in a certain manner, and that the city need not let to one bidder under a single contract the whole of any public improvement. *Held*, that the work of constructing any public improvement can be divided into as many sections as is deemed advisable, making a separate contract for each section of the work, or for the labor or any portion of the labor required; and, under sections 148, 207, excepting a contract involving an expenditure of not exceeding $500 from the requirements of being in writing, and being let only after notice inviting bids, the city could itself do public work by day's labor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 854, 855; Dec. Dig. § 330.*]

2. Words and Phrases—"Doing Work by Contract."

According to the ordinary acceptation of the term "doing work by contract," it means the letting of the work, or some portion thereof, to some one who agrees to deliver it completed for a specified price, and does not include the case of one who himself constructs an improvement by means of materials purchased directly by him and artisans and laborers directly employed and paid wages by him.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by A. St. C. Perry against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Oscar A. Trippet, for appellant. W. B. Mathews, Leslie R. Hewitt, City Atty., Lewis R. Works, Asst. City Atty., for respondents.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendants, entered upon sustaining demurrers to plaintiff's amended complaint. The action was one to obtain an injunction preventing the officers of the city of Los Angeles from proceeding with the construction or completion of public works or improvements of any kind involving an aggregate expenditure of more than $500, in any other way than by letting the same by contract to the lowest bidder in the manner prescribed by the charter of the city for the letting of contracts, and from paying any moneys on account of such work, except where the work was done under such contracts. The real question as to which a determination is sought is whether the city may itself do such work without letting any contract therefor; in other words, by day's labor, under the authority and control of the city by its board of public works, purchasing such material as it may require therefor.

The work or improvement specifically described in the complaint with which it was alleged the city officers were thus proceeding was an outfall sewer. Counsel for defendants state in their brief that this work was fully completed and paid for prior to the giving of judgment in this case in the court below, and this statement does not appear to be seriously disputed by counsel for plaintiff. The case made by the complaint would therefor appear to be a moot case so far as the outfall sewer was concerned. There are, however, general allegations to the effect that defendants are proceeding in the same manner with the construction of other work and improvements, both those for which bonds have been voted under the bond act of February 25, 1901 (St. 1901, p. 27, c. 32), as amended March 19, 1907 (St. 1907, p. 609, c. 330), and those for which no bonded indebtedness has been incurred. We shall assume, purely for the purposes of this decision, that these allegations sufficiently present the question we have stated, and, disregarding other points made by defendants in support of the ruling of the lower court, determine that question.

At the outset it should be stated that there is nothing in the bond act hereinbefore referred to that militates against the position of defendants. Section 9 of that act provides that "All contracts for the construction or completion of any public work or improvement or for furnishing labor or materials therefor, as herein provided, shall be let to the lowest responsible bidder," and prescribes a method of obtaining such bids. The same section provides, however, "that nothing herein contained shall be construed as prohibiting the municipality itself from constructing or completing such works or improvements, and employing the labor necessary therefor," and also that in cities operating under a charter framed under section 8, art. 11, of the Constitution, of which Los Angeles is one, the provisions of such charter as to the manner of letting contracts, etc., shall control. The proviso last above quoted was not, it is true, a grant of power to a municipality to itself do the work without letting a contract therefor. This was definitely decided in Matthews v. Town of Livermore, 104 Pac. 303, 319. But it is a distinct recognition of the proposition that a municipality may have the power under its charter, or what practically constitutes its charter as in the case of towns operating under the municipal corporation act, to construct a certain public work or improvement itself without letting any contract therefor, and a positive declaration that where it has such power as to the work or improvement for which bonds have been issued, nothing in the bond act is to be construed as depriving it thereof. The question whether it has such power is to be determined solely by the provisions of its charter, regardless of the provisions of the bond act. In Matthews v. Livermore, supra, the court was perhaps not entirely correct in saying that the opening clause of section 9, taken alone, forbids any work except by contract duly let to bidders; that clause simply providing that: "All contracts * * * shall be let to the lowest responsible bidder." The court was not there called upon to carefully consider or to determine the exact meaning of this particular provision, but simply to determine whether the proviso relating to the doing of the work by the municipality itself was a grant of power to a municipality prohibited by its charter from so doing, and it was substantially held that, as is apparent from the language of the section, the sole object of the proviso was to make it clear that in constructing a work or improvement with the proceeds of bonds voted therefor under the act, a municipality might do the work itself without the medium of a contractor, if its organic law permitted the doing of such work in such manner. The sole question, then, is whether the city of Los Angeles has this power under its charter.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is not disputed that the charter of Los Angeles in terms confers upon the city the power to construct the public improvements and do the public work referred to by the allegations of the complaint. By express provision of the charter the board of public works is given charge, superintendence, and control of such public work as is here involved; the provision including the design and construction of all sewers, and the design, construction, alteration, repair, etc., of all public works and improvements, with the power to engage such employés therefor as may be authorized by the city council. These general powers would seem to necessarily imply the power to have such work done by its own employés, unless that method be expressly or by necessary implication prohibited by other provisions of the charter.

The Los Angeles charter nowhere expressly prescribes that a contract must be let for the doing of any of this work. We find such express provisions in the organic acts of other municipalities, and the acts considered in cases relied on by plaintiff. For instance, the municipal corporation act, in so far as it is applicable to cities of the sixth class, being the act involved in Matthews v. Livermore, supra, provided that "in all street and sewer work," as well as other work described therein, "when the expenditure required for the same exceeds the sum of one hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder," etc. Section 874, Mun. Corp. Act (Deering's Gen. Laws 1906, p. 906). A similar provision is to be found in that portion of the same act applicable to cities of the fifth class. Section 777, Mun. Corp. Act. Provisions expressly requiring certain kinds of public work to be done "under contract" awarded after notice to the lowest responsible bidder are to be found in the San Francisco charter, as adopted in 1899, and in many other freeholders' charters. In the case of Chicago v. Hanreddy, 211 Ill. 24, 71 N. E. 834, a case much relied on by plaintiff, the statute in terms provided that "any work or other public improvement, when the cost exceeds $500, shall be let to the lowest responsible bidder in the manner prescribed by ordinance." Where such provisions as those instanced exist, as they do in very many statutes, it is necessarily clear, as was said in the Illinois case cited, that "no discretion is thereby conferred upon the city or any of its officers as to whether the work or improvement shall be constructed under contract, or by day labor." When we come to the Los Angeles charter we find that the only provisions under which it is sought to require the enforcement of a similar rule are provisions requiring "all contracts" to be let and entered into in a certain manner, and providing that the city shall not be bound by "any contract" not let and entered into in the manner prescribed. Sections 148, 207, Los Angeles Charter.

The language particularly relied on is the first paragraph of section 148 of the charter, which, so far as material, is as follows: "All contracts for the performance or furnishing of labor, materials or supplies, required for the execution of any service of which the board of public works has charge, superintendence, or control, or for the construction or completion of any work or improvement of the construction or completion of which the said board has charge, superintendence or control, * * * shall be let and entered into in behalf of the city by the board in the following manner." Then follow elaborate provisions as to notice, bids, and written contract. Plaintiff's counsel reads this as requiring, not only that the construction of any work of which said board has charge shall be done by written contract, let in the manner prescribed, but also that the whole of any particular work or public improvement shall be let to one bidder, and done under a single contract. In other words, he contends that a work like the outfall sewer or the Owens river aqueduct must, under this provision, be let as one job to one contractor. Manifestly there is no foundation for any such construction. The provision above quoted is to be read as if the word "required" had been again inserted before the words "for the construction or completion of any work or improvement," etc., where they first occur therein, so that what the provisions really mean is that "all contracts" for labor, materials, or supplies "required" for the execution of any service of which such board has charge, or "required" for the construction or completion of any work or improvement of which such board has charge, shall be let and entered into, etc. This is very clear in view of other language subsequently used in the same section. So there is absolutely no foundation for any claim that the board may not divide the work of constructing a single public improvement into as many sections as may be deemed advisable, making a separate contract for each section. Nor can we see anything in this language that prohibits the letting of separate contracts for materials or supplies, or any portion of the materials or supplies, that may be required in constructing any section of the work, or for the labor or any portion of the labor that may be required in any section.

By other provisions of sections 148 and 207 of the charter, a "contract" involving an expenditure of not exceeding $500 is excepted from the requirements of being in writing, and being let only after notice inviting bids. The charter provisions taken together undoubtedly require that wherever it is proposed to make an agreement for the purchase of certain materials or supplies for a sum exceeding $500, or to make an agreement with another by which he is to furnish such labor for a sum of money exceeding $500, a written contract must be let and entered into in the manner prescribed. But do they require anything else? We are of the opinion that they do not, and are satisfied that they should not be construed as prohibiting the doing of public work by the city itself by day's labor.

Provisions of the character of those contained in the Los Angeles charter are manifestly different from provisions requiring work to be done by contract, or to be let to the lowest bidder. According to the ordinary acceptation of the term "doing work by contract," it means the letting of the work, or some portion thereof, to some one who agrees to deliver the same completed for a specified price, and does not include the case of one who himself constructs an improvement by means of materials purchased directly by him and artisans and laborers directly employed and paid wages by him. Although the latter is doing the work by contract in the sense that he sustains a contractual relation to every artisan and laborer employed, and to every materialman from whom he purchases materials, he is not doing the work by contract in the sense in which that term is commonly accepted either by laymen or lawyers. The general legislative recognition that this meaning is to be given to the term is shown by numerous acts, to some of which we have referred, and many freeholders' charters clearly show the same recognition. Of course, where a statute or charter declares that any work must be let to the lowest bidder, there is no possible basis for any other construction than one making bids and contracts imperative. The omission from the Los Angeles charter of any such provision as either of those discussed is most significant. If it had been intended to require that whenever a proposed improvement would cost more than $500, the work must be done "by contract" let to the lowest responsible bidder, it would have been the simplest matter in the world to say so in plain terms, as has been said over and over again in other acts and charters. The failure to do so indicates that the framers of these charter provisions were guarding solely against the method of letting contracts for public work otherwise than to the lowest responsible bidder, after public notice of the work to be done thereunder; the object being to prevent favoritism in the matter of letting contracts and the payment of a greater price than the work was reasonably worth. There is nothing in the language used to indicate that it was designed to prevent the doing of the work by the city itself through the officers having such work in charge. The doing of the work being expressly authorized, and the board of public works being expressly given charge of the construction thereof, the power to construct otherwise than "by contract" exists, unless the necessary implication of sections 148 and 207 of the charter is such as to prohibit such method. We are of the opinion that we would not be warranted in holding that these sections do imply any such prohibition. The street cases cited by plaintiff were cases where the street improvement act gave the power only to do the work in the way prescribed by the act, and the other cases cited are clearly distinguishable from this by reason of the particular language used. The case of Home Building, etc., Co. v. Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551, is squarely in point for defendants. See, also, Yarnold v. City of Lawrence, 15 Kan. 126.

In view of what we have said, the demurrers were properly sustained.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

(157 Cal. 153)

FOX v. HUBBARD et al. (L. A. 2,394.)

(Supreme Court of California. Dec. 27, 1909.)

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by E. R. Fox against A. A. Hubbard and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin R. Fox, in pro. per. Leslie H. Hewitt, City Atty., and Lewis R. Works, Asst. City Atty. (W. B. Mathews, of counsel), for respondents.

PER CURIAM. The real question sought to be presented by this appeal is the same as that presented in the case of Perry v. City of Los Angeles et al (L. A. No. 2,408, this day decided) 106 Pac. 410. For the reasons given in the opinion filed in that case the ruling sustaining the demurrers to plaintiff's complaint was correct. The judgment is affirmed.

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12 Cal. App. 37

LACY MFG. CO. v. LOS ANGELES GAS & ELECTRIC CO. (Civ. 722.)

(Court of Appeal, Second District, California. Nov. 22, 1909.)

1. WORK AND LABOR (§ 22*)—IMPLIED PROMISE.

A complaint, in an action for labor and material, which alleges that certain generators were erected at the request of defendant under a written contract, requiring the completion of the work within a specified time, that the work was not completed within that time, but that plaintiff continued the work thereafter under the supervision of defendant, and that when the work was completed defendant accepted it, and has ever since used the generators, states a cause of action in indebitatus assumpsit, notwithstanding other allegations, excusing delay in completing the work, to support a recovery on the theory that defendant waived the time limit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 41; Dec. Dig. § 22.*]

2. PLEADING (§ 208*)—SPECIAL DEMURRER.

A special demurrer on the ground of uncertainty, addressed generally to a complaint stating a cause of action in indebitatus assumpsit, and containing allegations seeking to support a recovery on a contract on the theory that defendant had waived the time limit therein for the completion of the work, is properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513–519; Dec. Dig. § 208.*]

3. WORK AND LABOR (§ 24*)—ISSUES AND PROOF.

In indebitatus assumpsit for labor and materials furnished under a written contract therefor, it is immaterial whether the work which plaintiff did for defendant was under the contract, or a modification of it, on it appearing that defendant accepted the work.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 43; Dec. Dig. § 24.*]

4. APPEAL AND ERROR (§ 204*)—OBJECTIONS TO EVIDENCE—WAIVER.

Failure to call the attention of the court to an objection to improper evidence waives the objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258–1280; Dec. Dig. § 204.*]

5. CONTRACTS (§ 300*)—DELAY IN PERFORMANCE—EXCUSE.

One contracting to erect gas generators for another within a specified time is not liable for delay caused by the acts of the latter.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1374; Dec. Dig. § 300.*]

6. WORK AND LABOR (§ 27*)—EVIDENCE—ADMISSIBILITY.

In an action on a quantum meruit for work done under a special contract, the price fixed in the contract is evidence of the value of the services rendered.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 53; Dec. Dig. § 27.*]

7. DAMAGES (§ 22*)—BREACH OF CONTRACT.

Damages for breach of contract will be given only for such detriment to the aggrieved party as is proximately caused by the breach, or which, in the ordinary course of things, will be likely to result therefrom; and the mere fact that an injury and a breach are contemporaneous, or that the former is subsequent to the latter, does not establish that the injury is the result of the breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 59–61, 63; Dec. Dig. § 22.*]

8. WORK AND LABOR (§ 10*)—DEFENSES.

The fact that a written contract for the erection of gas generators was not recorded, as provided by Code Civ. Proc. § 1183, does not prevent the contractor from recovering on a quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 10.*]

9. WORK AND LABOR (§ 2*)—SERVICES—RECOVERY.

Where one has derived any benefit from the labor of another, the law implies a promise on his part to pay such remuneration as the benefit conferred is really worth; and an action in indebitatus assumpsit is maintainable therefor.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 1, 2; Dec. Dig. § 2.*]

10. SET-OFF AND COUNTERCLAIM (§ 29*)—BREACH OF CONTRACT.

A defendant in indebitatus assumpsit for labor and material furnished under a special contract may counterclaim for injuries sustained because of plaintiff's failure to comply with the obligations imposed on him by his contract.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49–51; Dec. Dig. § 29.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Lacy Manufacturing Company against the Los Angeles Gas & Electric

Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Wm. A. Cheney, Frank C. Vaughn, Herbert J. Goudge, and Le Roy M. Edwards, for appellant. Oscar A. Trippet and Shankland & Chandler, for respondent.

TAGGART, J. This is an action to recover the sum of $10,992.50 for labor and material furnished by plaintiff in the erection of a set of gas generators for the defendant. Judgment was for plaintiff, and defendant appeals from the judgment and from an order denying its motion for a new trial.

The matters presented as error are based upon the assumption that the action is on the contract under which the work was begun, but we do not think this is the only form of action stated in the complaint. It is alleged that the generators were erected at the request of defendant under a written contract requiring the work to be done within 30 days from date, that they were not completed within that time, but that plaintiff continued the work of constructing them after the expiration of the time with the knowledge and under the supervision of the defendant, and when they were completed, 15 days after the time limit of the contract, defendant accepted them, took possession thereof, and has ever since used them for the purpose for which erected. These allegations, together with the further allegation of the reasonable value of the labor and material furnished contained in the complaint, state a cause of action in indebitatus assumpsit. When the generators were completed and delivered by the plaintiff, whether in time or not, whether in accordance with the contract or not, and the defendant accepted them, the law implied that the work and material furnished in their construction would be paid for by the defendant. The trial court properly instructed the jury upon this theory of plaintiff's cause of action. While there are also allegations in the complaint relating to the acts of defendant, upon which plaintiff relied in excuse for the delay in completing the generators within the agreed time, these do not detract from the statement of a cause of action on the common count. They were no doubt intended to support a recovery upon the theory that defendant had waived the time limit in the contract, and was estopped to take advantage of the delay because due to defendant's own acts, but plaintiff's right of recovery was not limited to this cause of action.

There was no demurrer on the ground that these causes of action were improperly united, or that they were not separately stated, and no motion was made to strike out either as surplusage or redundant matter. There was a special demurrer to the complaint on the ground of uncertainty, which was overruled, but this ruling is not urged as error here. It was addressed to the complaint generally, and was properly overruled. Jones v. Iverson, 131 Cal. 104, 63 Pac. 135. The answer of defendant denies all the allegations of the complaint, except that which alleges the execution of the contract, and sets up a counterclaim of damages for injury sustained by defendant because the work was not completed in the time specified in the contract. The right of plaintiff to recover the value of the generators is recognized in the pleading filed by defendant by crediting it upon the damages claimed.

All the issues presented in the complaint by the allegations relating to the excuses for delay, and those setting forth the changes and modifications of the contract in connection therewith, are raised by defendant's counterclaim and the denials which the statute interposes to the affirmative allegations therein contained. Twenty-seven special issues or interrogatories were submitted to the jury covering these matters and the injuries alleged to have been sustained by the defendant, and the findings upon all were in favor of plaintiff, in whose favor a general verdict for $11,826.09 was also rendered.

The view of the complaint so taken renders it immaterial whether the evidence of the work which the plaintiff did for defendant was under the contract, or in modification of it. The defendant accepted the work, and must pay for it. Evidence showing what work was done in the completion of the generators which defendant accepted was admissible. This renders it unnecessary to distinguish the authorities cited to support appellant's contention that there was a variance. It also disposes of the objection that evidence showing the reasonable value of the work done was improperly admitted, and the error predicated upon refusing to give instruction No. 15, requested by defendant, which is based upon the same theory of the action as the other objections mentioned.

There was, however, no objection to the introduction of the evidence which appellant complains of as an attempt to modify the original contract by parol. The references in the opening brief of appellant are to matters elicited upon the cross-examination of plaintiff's witness Wm. Lacy, by defendant's counsel, and to the direct examination of Richard H. Lacy, and in neither instance was there objection, exception, or motion to strike out. The same matter is testified to by Wm. Lacy elsewhere in the record without objection. If we were considering this matter upon the same theory as appellant, the variance would not be a ground for reversal. By its failure to call the trial court's attention to the matter by proper objection it was waived. Cushing v. Pires, 124 Cal. 665, 57 Pac. 572.

Instructions 8, 9, and 10, requested by plaintiff, were properly given. They deal with the right of defendant to a judgment on its counterclaim, upon the theory that if the changes in the plans and the delay in the completion of the generators were the acts of defendant, it cannot recover. These instructions correctly declare the law. Neither was the refusal of the trial court to give instruction 6, requested by defendant, error. The proposed instruction assumes that a provision in the contract for the adjustment of the contract price, according to whether or not the labor and material furnished in erecting the generators exceeded or fell below that necessary to construct certain other generators named in the contract, justified the court in saying as a matter of law that the changes made and the causes of delay, occurring either before or after the expiration of the contract time, were presumed not to extend the time within which the contract was to be completed, unless there was an express stipulation to that effect.

Instruction 11, given at request of plaintiff, finds support in Adams v. Burbank, 103 Cal. 646, 37 Pac. 640, that in an action on a quantum meruit for work done under a special contract the price agreed upon in the contract is evidence of the value of material furnished and services rendered. Instructions 15 and 22 correctly declare the rule of damages as stated in section 3300 of the Civil Code. Damages for the breach of an obligation arising from contract will be given only for such detriment to the aggrieved party as is proximately caused by the breach, or which, in the ordinary course of things, would be likely to result therefrom. This would not necessarily include injury caused by the overloading of its plant by defendant during the time of delay in waiting for the completion of the work done by plaintiff. It was not error to instruct the jury that the mere fact that the injury and the breach were contemporaneous, or the former subsequent to the latter, did not establish that the injury was the result of the breach.

The contention that the contract was void because not recorded as provided by section 1183 of the Code of Civil Procedure could not be sustained as between the parties to the contract, if it were necessary to decide this question (L. A. Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 Pac. 414, 420); but, as the plaintiff did not recover on the contract, a decision of the question is not required upon this appeal. The general demurrer was properly overruled because a cause of action based upon a quantum meruit was properly pleaded.

The action before us comes within the rule so clearly laid down in Dermott v. Jones, 23 How. 220, 16 L. Ed. 442, by Justice Wayne: The general rule of law is that, while a special contract remains open—that is, unperformed—the party whose part of it has not been done cannot sue in indebitatus assumpsit to recover compensation for what he has done until the whole is completed. But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such a case the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such remuneration as the benefit conferred is really worth; and, to recover it, an action in indebitatus assumpsit is maintainable. In such an action, the defendant may be allowed, by way of counterclaim or set-off, to recoup himself in damages for injuries or detriment sustained by him because of plaintiff's failure to comply with the obligations imposed upon him by the contract.

In this view of the action, there is no reversible error in the record, and the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 735

In re WASHBURN'S ESTATE.

HIGGINS v. WASHBURN et al. (Civ. 630.)

(Court of Appeal, Third District, California. Nov. 13, 1910. Rehearing Denied by Supreme Court Jan. 10, 1910.)

1. WILLS (§ 634*) — REMAINDERS — "CONTINGENT REMAINDER"—"VESTED REMAINDER."

To constitute a "vested remainder," there must be some known person in being who, by the instrument, is to take and enjoy the estate upon the expiration of the particular estate, and whose right to do so cannot be defeated by any contingency, while a "contingent remainder" is contingent if it depends upon the happening of a contingent event, which may not happen until the particular estate has terminated; the existence of a contingency, irrespective of the duration of the remainder, being the criterion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*

For other definitions, see Words and Phrases, vol. 8, pp. 7305–7307, 7828, 7829; vol. 2, pp. 1503–1506; vol. 8, p. 7615.]

2. WILLS (§ 629*)—CONSTRUCTION—INTENT OF TESTATOR.

While the law favors vested estates, testator's intent will be carried out even though it requires an estate devised to be construed as a contingent remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1462; Dec. Dig. § 629.*]

3. WILLS (§ 634*) — ESTATES DIVIDED — REMAINDERS—CONTINGENT REMAINDERS.

Testator devised the remainder of his estate in trust to manage, control, and invest it, and to pay one half the income to his wife for her life and the remaining half to his daughter, each half to go to the survivor until her death, upon the death of the other, and the trust to cease upon the death of such survivor, and the trust property vest in the two children named of testator's daughter, and such other children as may be born to her, or in such of them as shall then be living, share and share alike. Civ. Code, § 694, makes a future interest vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate estate, and section 696 makes a future interest contingent while the person to whom, or the event upon which, it is limited to take effect remains uncertain. *Held*, that the remainder to the children of testator's daughter was contingent, and would go to only such of the children as were living at her death.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

4. REMAINDERS (§ 9*)—MERGER—MERGER WITH LIFE ESTATE—CONTINGENT REMAINDERS.

To constitute a merger of a greater and lesser estate, the whole title, both legal and equitable, must unite in the same person, so that there could be no merger of a life interest in the income of personalty held by trustees, and a contingent remainder in fee after termination of the trust.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 6; Dec. Dig. § 9.*]

5. ESTATES (§ 10*)—MERGER—IN EQUITY.

The doctrine of merger of estates is not favored in equity, and the estates will be kept separate, though they meet in one person, where it would work injustice or defeat the intention of the parties to merge them.

[Ed. Note.—For other cases, see Estates, Cent. Dig. §§ 9–13; Dec. Dig. § 10.*]

6. TRUSTS (§ 61*)—TERMINATION.

A trust in realty cannot be extinguished except by union of the legal and equitable estates; the equitable estate being merged in the legal estate in such case.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83–87; Dec. Dig. § 61.*]

7. WILLS (§ 686*) — TESTAMENTARY TRUST — TERMINATION—TRANSFER OF LIFE ESTATE.

Testator devised the remainder of his estate, consisting of shares of stock, to trustees to invest it and pay one half the income to his wife for life and the remaining half to his daughter for life, each half to go to the survivor till her death, and that the trust should cease upon the survivor's death, and the property vest in two children named of testator's daughter, and such other children as may be born to her, or in such of them as shall then be living. *Held*, that the daughter's transfer of her life estate to her then living children during their minority, without any showing of mismanagement by the trustees, did not discharge the trust; such a result being contrary to testator's intention, as shown by the will, which contemplated that the trust should continue during the life of the survivor of the life tenants.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 686.*]

8. WILLS (§ 439*)—Construction — TESTATOR'S INTENTION.

A court's first duty in construing a will is to effectuate testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Petition by Jeanie W. Higgins, guardian of the persons and estates of Henrietta Higgins and Charles Higgins, minors, against E. P. Washburn and others, trustees under the will of Albert Henry Washburn, deceased, for final distribution of the estate. From a judgment for defendants, plaintiff appeals. Affirmed.

Everett Ball and John M. Corcoran, for appellant. Wilson & Wilson, for respondents.

CHIPMAN, P. J. Petition for final distribution of the estate of deceased. After making certain bequests of money, which have been paid, the will of deceased provides as follows:

"II.

"All the rest, residue and remainder of my estate, of every kind and character, and wheresoever situated, of which I may die seized and possessed, I give, devise, and bequeath to my brothers, Edward P. Washburn and John H. Washburn, of Wawona, and to Jay B. Cook of Yosemite Valley; in trust, however, to hold, manage and control and to invest and reinvest the same in such manner as in their judgment may seem best, and to pay over to my beloved wife Jean Bruce Washburn for and during the term of her natural life one half of the entire net income arising therefrom, in monthly installments; and to pay over the other one-half of said net income in monthly installments to my daughter Jeanne Washburn Higgins, wife of C. C. Higgins for and during the term of her natural life.

"Upon the death of either my said wife or my said daughter the one-half of the income to which the one so dying was entitled shall be paid to the survivor until her death.

"Upon the death of such survivor, this trust shall cease and determine and all of said property so held in trust, together with all accumulations thereon and thereof, shall vest in and belong to Henrietta Higgins and Charles Higgins, the children of my said daughter, and such other children as may be born to her, or in such of them as shall then be living, share and share alike, the children of any deceased child, if such there be, to take by right of representation.

"III.

"I hereby appoint my said brothers Edward P. Washburn and John S. Washburn and my friend Jay B. Cook, to be the executors of this my last will and testament, and I direct that no bond or other security be required of them or either of them at any time for the faithful performance of their duties as such executors or as such trustees.

"I hereby authorize and empower my said executors to lease or sell any of the property of my estate at public or private sale and with or without notice, and without the previous or any order of any court."

It appears from the findings of the court: That the estate is in condition to be closed. All the property was community property, to one-half of which Jean B. Washburn became entitled on the death of deceased. Since his death his wife died, but prior thereto she conveyed all her interest in the estate to her daughter, Jeanie W. Higgins, and, except as to her interest in certain shares of the capital stock of the Yosemite Stage & Turnpike Company (2,662½ shares), the one-half of said property to which the widow was entitled has been distributed as required by law. Henrietta and Charles Higgins, mentioned in said will, are minors, and children of the said Jeanie, but their age does not appear, and she has been appointed and is the duly qualified and acting guardian of their estates, and they are her only children. Prior to filing the petition herein the said Jeanie conveyed and relinquished to her said children, Henrietta and Charles, "all the rights and interests to which she was entitled under the will of said decedent by an instrument in writing" (which is set forth in the findings). The residue of said estate of decedent consists of 5,325 shares of the Yosemite Stage & Turnpike Company, and 25,000 shares of the Wawona Hotel Company. Jeanie W. Higgins is the wife of C. C. Higgins, now living. In its conclusions of law the court found: That the said Jeanie W. Higgins, as grantee of her mother, is entitled to have distributed to her one-half of the stage company stock (2,662½ shares), and that the trustees under the will are entitled to have distributed to them, in trust, all the remaining property of decedent, "to hold, manage and control the same in such manner as in their judgment may seem best, and to pay over to the said Henrietta W. Higgins and Charles Higgins, for and during the term of the natural life of said Jeanie W. Higgins, and until her death, the entire net income arising from said property, in monthly installments," and upon the death of the said Jeanie the said trust shall cease, and all of said property so held in trust, and its accumulations, shall vest in and belong to said Henrietta and Charles Higgins, children of said Jeanie, "and such other children as may be born to the said Jeanie W. Higgins, or in such of them as shall then be living, share and share alike, the children of any deceased child, if such there be, to take by right of representation." Decree was entered accordingly.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The appeal is by the plaintiff from that portion of said decree of final distribution as distributes to the trustees the property described and refusing to distribute said property as prayed for in said petition, namely, that all the property except one-half of the stage company stock be distributed to Henrietta and Charles Higgins. Briefly stated, the position of appellant is: That the widow of deceased being dead, Mrs. Higgins, as sole survivor of the life estate, became the sole beneficiary of the trust, and that when she conveyed that interest to Henrietta and Charles, her only children in esse, they became vested with the entire fee; that the object of the trust was solely to collect and pay over to Mrs. Higgins the net income of the property during her life and, as she had conveyed this interest to her two children, she had no further interest in the estate, and the object of the trust ceased; that when the vested interest in remainder and the intermediate and precedent estate of their mother was centered in the children, the precedent estate was merged in the greater vested estate in remainder in fee, and the children became vested with the entire title in fee, and hence there is nothing to which the trust can attach; that thereupon it became the duty of the court to distribute the estate to the persons entitled by law, namely, to the two children, Henrietta and Charles, subject to open and let in any after-born children, if any.

1. It is important, in some aspects of the case, to discover what interest these children, born and unborn, take under the will, and when it vests. Future interests are vested or contingent. Civ. Code, § 693. "A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent estate." Civ. Code, § 694. "A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." Civ. Code, § 695. There is no subject of the law more abstruse, or in which greater refinement of learning has been displayed, than that of remainders. No definitions ever have been, or ever will be, given which will relieve all cases from doubt. Mr. Kent commends Mr. Blackstone's treatment as far surpassing all others for its "perspicuity, simplicity, comprehension, compactness, exactness, accuracy, and admirable precision." And yet he adds: "I have read the chapter frequently, but never without a mixture of delight and despair." 4 Kent's Com. 208, note (14th Ed., by Mr. Gould).

Unquestionably, the interest of the unborn children is contingent because it is uncertain whether they will ever come into existence, and should this happen, there is the still further contingency upon which the taking by them of any interest would depend, namely, that the life tenant be then living. The interest of Henrietta and Charles is not so plainly apparent. The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. It may never happen, or it may not happen until after the particular estate upon which it depends shall have been terminated, so that the estate in remainder will never take effect. 2 Wash. Real Property, § 1332.

Speaking of the New York statute, which is the same as ours, it was held in the case In re Hoadley (D. C.) 101 Fed. 233, that if there are words of present gift to a class of persons in existence, the remainder is vested, though it cannot be ascertained until the determination of the particular estate which, if any, members of the class will ultimately take; but if futurity attaches to the gift so that it is not intended to take effect until the determination of the particular estate, the remainder is contingent. The existence of a contingency, irrespective of the duration of the remainder, on which contingency possession or enjoyment depends, is the fundamental characteristic of a contingent remainder, and forms a true, tangible, and practical criterion by which the contingent character of a remainder is limited on an uncertain event; that is, an event which may never happen, or on an event which may not happen till after the determination of the particular estate, though it is certain to happen at some time, or when the remainder is limited to a person not in being or not ascertained. 24 Am. & Eng. Ency. of Law, p. 400.

The law prefers to consider future estates as vested, but the law also seeks to effectuate the wishes of the testator, and when his desire is clearly expressed, as we think it is here, it should be carried out, regardless of the conventional distinctions made between vested and contingent remainders, for this is the paramount duty of the court. "The will may disclose an intent not to give a vested interest. This is effected by words of contingency as to the persons who shall take, e. g., a devise to A., remainder to his children living at the time of his death." 24 Am. & Eng. Ency. of Law (2d Ed.) p. 383. In all cases it is the intention, expressed in the instrument creating the expectant estate, that is to govern, and, therefore, if the language employed shows an intention to postpone the vesting until the happening of a certain event it is contingent. Id. 392, and cases noted. The present capacity to take in possession is not a universal test. Thus, if land be given to A. for life, and in case B. survives A., then to B. in fee simple, the remainder to B. is contingent, because it depends upon an uncertain event, namely, the death of A. in the lifetime of B.; but all the while that A. and B. are both alive, B.'s remainder has a present capacity to take effect in possession should the possession become vacant by the death of A. 24 Am. & Eng. Ency. of Law, 388. Numerous instances of contingent remainders of this sort are cited in the notes. The true criterion of a vested remainder is the existence in an ascertained person of a present, fixed right of future enjoyment of the estate limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate. Id. 389.

The will here provides that: "Upon the death of such survivor this trust shall cease and determine, and all of said property * * * shall vest in and belong to Henrietta Higgins and Charles Higgins the children of my said daughter, and such other children as may be born to her, or in such of them as shall then be living." This latter clause refers to all of the class—Henrietta and Charles and any other children born to their mother—and the property is to vest "in such of them as shall then be living," i. e., "upon the death of such survivor." By express terms the trust was to continue until the death of Mrs. Higgins, and that was the precise event upon the happening of which the title was to vest in the children living at the death of the testator, or "such other children as may be born to her," Mrs. Higgins. It seems to us that nothing is lacking to make entirely clear the intention that the children living at the death of the life tenant, or "the children of any deceased child" then living, were to take, and this could be known only when the contingent event happened. It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, that renders the remainder contingent. 4 Kent, 202–206. The uncertainty of any of the children of the class surviving Mrs. Higgins renders the interest of any such contingent.

A few cases may be cited as illustrative of the principles we have endeavored to point out.

In Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120, the will devised the estate to the testator's executors to be held in trust for his widow during widowhood, and upon the death or remarriage of the widow the executors were to proceed to divide the remainder among his children specially named, "as may then be alive, or the lawful issue of such of them as may be dead leaving lawful issue." The interest of one of the sons was sold under execution, and it was conceded that if this interest was merely contingent the purchaser took nothing, but otherwise if vested. The court said: "A remainder is said to be vested when a present interest passes to a party, to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates, while a contingent remainder is one limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event. 2 Bl. Com. 168. * * * But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened, and thereby become certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition (citing cases). It is plain that, in the present case the estate devised, so far as Robert Haward was concerned (the son above referred to), was subject to a contingency, viz., his being alive at the time the particular estate should be determined by the death or remarriage of the widow. Whether this contingency constituted a condition precedent or subsequent must be determined by the language of the will. It seems to be clear, though not wholly free from doubt, that the intention was not to devise to his son Robert a present estate subject to be defeated in case of his death before the termination of the particular estate, but to make the estate itself conditional upon his being alive at that time." In support of the opinion the following cases were cited as instances where the remainder was contingent: Olney v. Hull, 21 Pick. (Mass.) 311, where the words were: "* * * The land shall then be equally divided among my sons." Nash v. Nash, 12 Allen (Mass.) 345, the language was "* * * At her death to such of his children as might then be living." In Thomson v. Ludington, 104 Mass. 193, the provision was: To the widow during life or widowhood, and directed that at her death or marriage the estate should be divided "equally to and among such of my children as shall then be living." The distinction made between a remainder subject to a condition precedent and a condition subsequent is well shown in Blanchard v. Blanchard, 1 Allen (Mass.) 223, and in that case the court said: "There being in that portion of the devise no words of contingency, such as 'if they shall be living at her death,' or 'to such of them as shall be living,' the usual and proper phrases to constitute a condition precedent, a vested remainder in fee was created."

In the recent case of Golladay v. Knock, 235 Ill. 412, 85 N. E. 649, 126 Am. St. Rep. 224, the will devised the testator's property to his wife, Nancy Golladay, "and to her children after her death; * * * and if the said Nancy Golladay does not have children that will live to inherit said real estate, that the said real estate, at the death of Nancy Golladay and her children, fall to Moses Golladay and his heirs of said county." The court held, as in Haward v. Peavey, supra, that the devise over to Moses Golladay could not be construed as vesting a present interest in fee, subject to be divested upon the death of the life tenant leaving children surviving her. Said the court: "The clearly expressed intention of the testator was to give his wife a life estate in the premises, with remainder in fee to such of her children as might be living at the time of her death; then, to meet the possibility that his wife might die leaving no children surviving her, he made the devise over to Moses Golladay and his heirs. Here the devise depended upon a dubious and uncertain contingency; that is, the death of the life tenant without leaving children surviving her."

In U. S. Trust Co. v. Roche, 116 N. Y. 120, 22 N. E. 265, by a trust deed a life estate was given to Anna S. Stagg, remainder to her children living at the time of her death. In an action to foreclose a mortgage during the life of Anna it was held that her children were not necessary parties. The court said: "No legal estate in remainder, vested or contingent, was created by the deed of trust, but the entire legal estate was vested in the trustee, where it now remains, and James C. Foster (child of Anna) has no legal estate of any kind to protect. * * * James C. Foster has not a vested interest in the subject of the trust, nor its avails. His interest is contingent upon his surviving his mother."

In Smith v. Edwards, 88 N. Y. 103, certain property was to be distributed at the time of the marriage or majority of the youngest grandchild who "may then be living." The court discussed at some length the question as to the time the interest vested. The court said: "The condition of survival attached to the gift itself; who the legatees would in fact prove to be depended upon a future contingency. Those who were to take in the prescribed event were uncertain until it happened; might not be any of those in esse at testator's death, and might prove to be a grandchild born 20 years later."

In Everitt v. Everitt, 29 N. Y. 75, the court said: "The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment, or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age or surviving some other person, or the like. If futurity is annexed to the substance of the gift, the vesting is suspended; but if it appear to relate to the time of payment only, the legacy vests instanter."

For the rule in England, see chapter 2, 2 Redfield on Wills (2d Ed.) 213. This author says: "Where a gift over is made to take effect in favor of a class, it is in general held that the gift in remainder is contingent as to the individual devisees, since the persons composing the class are not to be ascertained until the period of the determination of the intervening estate, and, there could be no vesting until the devisees are ascertained." Id. p. 239. While in many cases this, as all other rules, is made to bend to circumstances, it is everywhere held that it is competent for the testator in terms to direct whether the estate shall vest or not, and where this is done all construction is excluded. Id. p. 244.

Giving a fair construction to the will and yielding to the apparent intention of the testator, we reach the conclusion that the remainder is contingent, and will go to such of the class only as may be living at the death of Mrs. Higgins.

We might, perhaps, have rested the question with the decision in the case of In re Winter, 114 Cal. 186, 45 Pac. 1063, had we not thought it best to again examine the matter. In that case the will bequeathed to the testator's wife all of his estate except a certain ranch, which latter he bequeathed to her "for the remainder of her life; then it is to be sold and the proceeds divided between my surviving brothers and sisters." It was held that "it was reasonably clear the intention of the testator was to bequeath the money proceeds of the ranch to those brothers and sisters living at the time appointed in the will for the distribution of the money."

2. Appellant's further contention is that the children named not only took a vested remainder, but that when the lesser estate, i. e., the life estate, was conveyed to them, it became merged in the greater estate, i. e., the remainder; that the trust was thus terminated and immediately they were entitled to the fee absolute. Considered as a contingent remainder, however, there could be no merger, for the fee is in the trustees. The definition of a merger precludes the possibility of its happening where a life estate and a contingent estate only are united. The whole title, legal as well as equitable, must unite in one and the same person. Where the two thus meet, without any intermediate estate, the less is immediately annihilated, or, in law phrase, "merged." Anderson's Dictionary; 2 Bl. Com. 397; 1 Kent, 265. The merger here claimed is of interests in personal property, and, if the doctrine of merger may apply in such case, which is certainly unusual, the same principles would apply as in cases of real estate, we should think. Where a trust has once been created in respect of real estate, it attaches to and binds itself upon the estate, and can never be detached from it, or extinguished, except by a union of the legal and equitable estates in one person; the equitable, in such case, being merged in the legal estate. 2 Wash. Real Property, § 1469. To have the union operate a merger, the estates must unite in one and the same person, having a commensurate and coextensive interest in each, with no intervening interest in another. A legal estate in fee in one who has only a partial equitable interest, or vice versa, would not merge. Id. § 1484. Wherever it would work injustice, or defeat the intention of the donor to work a merger, the two estates will be kept alive although they come together in one person. Id. § 1486. While merger at law follows immediately upon the union of a greater and lesser estate in the same ownership, it does not so follow in equity. There the doctrine is not favored, and the estates will be kept separate where the intention of the parties and justice require it. Smith v. Roberts, 91 N. Y. 475. The court said, in Pryor v. Winter, 147 Cal. 554, 82 Pac. 202, 109 Am. St. Rep. 162: "Section 741 of the Civil Code expressly declares—what was always the law—that 'no future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or particular interest.'"

3. But if we are wrong in holding the remainder to be contingent, we find insuperable objections to the scheme worked out by appellant. The object of the transfer doubtless was to discharge the trust, the benefits of which the mother was willing to forego that she might, at least during their minority, manage and control the property for her children, freed from any restraints by the trustees. Is this allowable by the simple expedient of a transfer of the life estate, and in the absence of any pretense of mismanagement or fraud of the trustees? Aside from the question, raised in the briefs, that this may not be done, except by bill in equity (a question we do not find it necessary to decide), it seems to us that to carry out appellant's plan we must fly in the face of the testator's express directions, and this would be violative of the first duty of the court, namely, to effectuate his intention. The will bears the earmarks of skilled professional workmanship. That it was drawn with a view to have its provisions faithfully, and at least substantially, followed cannot be doubted. The testator selected near of kin as his trustees and devised the property to them in trust with power to manage and control the property and pay over the incomes to his widow and daughter for their support and maintenance and to the successor of either of them. He expressly provided that the trust should continue during the life of the survivor, whichever one it might be, and he expressly declared that the property was to vest in the children of his daughter then living, or who might thereafter be born to her, at the death of the survivor, who might happen to be his widow, and not sooner. The character of the property suggests a necessity for wise and prudent management, for it consists of shares in a stage company and in a hotel property. If the testator had thought it unnecessary to place the management in the hands of his chosen trustees, and for the period named by him, an entirely different method would have been adopted. But his desire was not only to provide support for his widow and daughter and the survivor of either, but to preserve the corpus of the estate for his daughter's children, and the duties of the trustees were to cease "upon the death of such survivor," the property and the accumulation to then vest in the children. It must not be overlooked that the will devises the property to the trustees, and it is only the incomes which are to be paid to the widow and daughter. The remaindermen come into their own at the termination of the trust, the period of which is definitely fixed. The trustees were given power to lease or sell any of the property at public or private sale with or without notice,

and without the previous order of any court, and the testator's confidence in his trustees was such that he directed that no bond or other security be required of them, or either of them, at any time for the faithful performance of their duties. All these important powers and duties are to be no longer imposed upon any one, and the control and management of the property is to pass to these two minor children, with absolutely no provision for the protection of unborn children, except upon the principle that should any appear hereafter the estate will open and let them in. The property involved is all personal property—shares in corporations—and may pass by indorsement. The decree prayed for places no restrictions upon these children in the disposition of the property, and it would be extremely difficult to so frame a decree as would protect unborn heirs, as might readily be done if the property were real estate. These children could vote the stock only through their guardian (Civ. Code, § 313); and, if an action in court should become necessary, it must be conducted by a guardian (Civ. Code, § 42).

Counsel for appellant was asked by my associate, Judge HART, at the argument, how he would frame a decree that would place the entire trust fund in the hands of two minors and their guardian, and at the same time adequately protect the unborn children, and no satisfactory answer was forthcoming. The difficulties of accomplishing such a task are many. For myself I can see no way, if the estate is to be distributed to these children, except to establish by the decree some sort of a substituted trust for that created by the testator, and how can these minors act as trustees during minority? But why struggle to set aside the careful, well-considered and entirely sufficient means of effecting the testator's object which he provided?

It is altogether too narrow a view of the trust to say that the testator's widow and her daughter were the only beneficiaries of the will, or that they were the principal or only objects of testator's bounty. They were to receive only the incomes, rents, and profits; the corpus of the estate was to be husbanded, managed, and controlled for the benefit of two children then living and others who might come after; the latter a probable event for Mrs. Higgins' husband is living. The control and management of the estate was a large consideration with the testator. and, that the property might be protected and safely transmitted to the remaindermen was doubtless also of much concern to the testator in selecting his trustees. It is inconceivable that he ever thought it possible, or ever intended, that the scheme he had so carefully devised for the benefit of all concerned should be disregarded, and one wholly inadequate to accomplish his object substituted. What say the courts upon this question?

In Walker v. Sharpe, 68 N. C. 363, a life estate was given the widow, remainder to her children at her death. The children were all of age, and the widow joined with them for a dissolution of the trust. There was no possibility of other issue, and the trustees did not object. It was held that the children's interest vested at the death of their mother, and her surrender of the life estate was without a valuable consideration, and was not entitled to the approval of the equity court. In Brady v. Walters, 55 Ga. 25, the land was conveyed to B., the wife of C., for her sole and separate use, and the use of her children born and to be born. Held, that a trust estate was created in B., and for the use of her children, and that the trust was not executed until all probability of the birth of any more children had become extinct. In Brandenberg v. Thorndike, 139 Mass. 102, 28 N. E. 575, a life estate was given to the widow, remainder to be paid three years after her death to certain named nieces and nephews then surviving. The widow waived her life estate and took her dower instead. The court said: "We must construe the bequest in favor of the nieces and nephews in the same manner as if the widow had accepted the provisions of the will. Recurring to his bequest, it is clear that it cannot now be determined who will take under it. It is a bequest to the nieces and nephews 'then surviving' and to the issue of each niece or nephew 'the deceased leaving issue them surviving.' It cannot be known that any of the nieces and nephews now living will take anything under this bequest. This furnishes a conclusive reason why the trust cannot now be terminated." The doctrine is stated in 28 Am. & Eng. Ency. of Law (2d Ed.) p. 946: "Where a trust is in favor of the children now living, or that may hereafter be born of certain parents, the trustees will retain the title as long as there is a possibility of issue, which in the eye of the law continues as long as the woman lives, or coverture exists." Godfrey v. Roberts, 65 N. J. Eq. 323, 55 Atl. 353; Bearden v. White (Tenn.) 42 S. W. 476. Cases where all the interested parties, or parties who may be interested in the future, are in esse and acting, or capable of acting, suo jure, are not in point here, and do not apply to a trust where the persons who are to take can only be determined at the termination of the life estate or death of the life tenant.

We think the trial court reached a correct conclusion, and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

12 Cal. App. 1

NEVIN v. GARY et al. (Civ. 708.)

(Court of Appeal, Second District, California. Nov. 20, 1909. Rehearing Denied by Supreme Court Jan. 19, 1910.)

1. CONSPIRACY (§ 18*)—FRAUD—SUFFICIENCY OF COMPLAINT.

The complaint alleged that defendants conspired to defraud plaintiff, and, in furtherance thereof, caused her to make a contract with part of defendants, by which she subscribed a certain sum for the purchase of land, no subscription to be payable until a certain amount had been subscribed, and that one of such conspirators falsely represented that that sum had been subscribed, and plaintiff, acting upon such information, paid her subscription to such conspirator, and thereafter two other defendants represented to her that her subscription had not been paid over to the corporation which was to purchase the land and that she would forfeit her interest unless she paid a further sum, and, upon such representation, instead of paying the amount demanded, plaintiff executed a note to the corporation, which was one of the conspirators, and delivered it to be held as security for the payment of such sum until a settlement was had as to the original subscription, and the note was subsequently indorsed to another who sued plaintiff thereon, that no land was ever purchased by the corporation, its option to purchase having expired before plaintiff paid the amount of her subscription or executed the note, all of which defendants knew. *Held*, that the complaint sufficiently alleged that the wrongful acts were done with the knowledge and procurement of each and all the defendants.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 18–24; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 934*) — REVIEW — PRESUMPTIONS.

Though the allegation of conspiracy was immaterial and not admitted by default, it will be presumed on appeal that the court heard and determined the facts establishing a joint liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3778; Dec. Dig. § 934.*]

3. PLEADING (§ 433*)—SUFFICIENCY OF ALLEGATIONS—RELIANCE ON FRAUDULENT REPRESENTATIONS—AIDER BY JUDGMENT.

A complaint alleging by fair inference that plaintiff relied on representations made to her by defendants and was induced to act thereby was sufficient after judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1456; Dec. Dig. § 433.*]

4. JUDGMENT (§ 239*)—AGAINST PART OF DEFENDANTS.

Where the complaint in an action against several defendants alleges a cause of action for deceit by the procurement of the defendants, plaintiff can recover from such of defendants as are shown to have co-operated in injuring her, though a conspiracy of all the defendants is alleged, conspiracy not being the gist of the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 417; Dec. Dig. § 239.*]

5. PLEADING (§ 34*)—COMPLAINT—CONSTRUCTION—CONSTRUING WHOLE PLEADING.

A defective averment in the complaint may be aided by subsequent allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66, 67; Dec. Dig. § 34.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by W. G. Nevin against C. N. Gary and others. From a default judgment for plaintiff, three of defendants appeal. Affirmed.

Joseph W. Callahan, for appellants. S. S. Sanders, for respondent.

ALLEN, P. J. It is averred in the verified complaint filed by plaintiff that all of the defendants named entered into a conspiracy to cheat and defraud plaintiff and others out of money and property, and, in furtherance thereof, caused a certain contract to be entered into between plaintiff and the defendants other than the Palms Land, Light & Water Company, by which it was agreed by the subscribers, respectively, to pay certain sums of money in order to raise a fund for the purchase of certain real property, no part of which fund was payable until $90,000 had been subscribed, and, in that event, 25 per cent. of the amount subscribed was made payable and the remainder when necessary to complete the purchase. It is averred: That said $90,000 was never subscribed and no land was in fact ever purchased, or intended to be purchased, facts well known at all times by the defendants. That C. D. Pollock, one of the said conspirators, represented to plaintiff that said $90,000 had been subscribed for the purchase of said land, and plaintiff, acting upon this information, paid him the sum of $700 upon her subscription. That thereafter F. B. Clarke, Jr., and C. N. Gary, two of said defendants, represented to plaintiff that such full subscription had been raised, and that Pollock, to whom plaintiff had paid $700, had not paid to the syndicate the money paid by plaintiff, and that, unless plaintiff paid the further sum of $250, she would forfeit her interest in said syndicate and said contract. That upon said representation, in lieu of paying said $250 demanded, plaintiff executed a promissory note payable to the Palms Land, Light & Water Company (a corporation), which corporation is alleged to have been one of the conspirators, and delivered the same to F. B. Clarke, Jr., one of defendants, as her agent, to be by such agent held as security for the payment of the $250 so demanded until a settlement could be effected as to the original payment of $700, and no other or further consideration was ever received by plaintiff for said note. That said corporation assigned said note, before maturity, to its president, C. N. Gary, who, in turn, indorsed and transferred the same to a bank. That two of the conspirators, one of whom was the president of the corporation and the other the party to whom the $700 was paid, subsequently paid $350 to said bank as part payment of said note, and the bank instituted suit against plaintiff to recover the sum of $350 and interest, the balance of said note. It is averred that no land was ever purchased, or intended to be purchased, by said syndicate; that, while said syndicate had an option for the purchase of land, the same had expired before the $700 was collected from plaintiff, or the note executed, all of which was well known by those receiving the money and the note, and that such false representations were made for the purpose of cheating and defrauding plaintiff. Plaintiff prays judgment for the money paid and the sum of $350 and interest, for which she is liable to said bank. Summons was regularly served upon all of defendants and they all suffered default, and judgment was rendered for the amount claimed in the complaint on November 11, 1908. Thereafter, on March 29, 1909, notice of appeal from said judgment was given by three of the defendants, Ward, Clarke, and the corporation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellants contend that the complaint does not state a cause of action against the corporation, or James P. Ward, nor against the defendants jointly, and that several causes of action ex contractu and ex delicto are united. It may be observed that no cause of action is based upon the contract, but the same is disaffirmed, and plaintiff, if a cause of action is stated, is entitled to relief for the injury from such of the defendants as she can show have united or co-operated in doing her a wrong. More v. Finger, 128 Cal. 319, 60 Pac. 933. The action is one to recover money obtained from plaintiff by fraud and deceit. Section 585, Code Civ. Proc., provides that in actions other than those arising from contract, if no answer is filed within the time specified in the summons, the plaintiff may apply to the court for the relief demanded in the complaint. The judgment shows an application for such relief and the granting of the same by the court. The complaint alleging a conspiracy to do the things complained of while not the gist of the action is the equivalent of an allegation that the things done were with the knowledge and procurement of each and all so engaged; and were we to acquiesce in appellants' proposition that the allegation of conspiracy was not a necessary or material one, and the default therefore did not admit the same, yet in support of the judgment it must be presumed that the court, on the application of plaintiff for the relief, heard and determined the facts establishing the joint wrongdoing.

It is insisted, further, that the complaint is defective, in that it is not averred that the false and fraudulent representations were the inducements to enter into the transaction. The complaint is most unhappily worded, and can only be said to state a cause of action through the application of the rule that, where a fact is stated only inferentially and no demurrer is interposed, the pleading will be held good after judgment. Estate of Behrens, 130 Cal. 418, 62 Pac. 603; Hill v. Haskin, 51 Cal. 175. And, as said by Mr. Justice Henshaw in Alexander v. McDow, 108 Cal. 29, 41 Pac. 25: "While a judgment will not relieve from the entire absence of a necessary averment, it will cure defects in all such averments as may by fair and reasonable intendment be found to have been pleaded, although defectively" —and in which last case it was held that a defective averment might be aided by subsequent statements. The necessity for this is obvious. That one may determine from inference the meaning and force of a word or expression, a consideration of the circumstances under which it is used and the end apparently sought to be obtained is the surest and safest guide.

We have before us a complaint charging dishonesty and bad faith upon the part of defendants, and the procurement of money through a well-matured and effective scheme to defraud, through the operation of which, without any consideration, money was obtained from the plaintiff. Considering plaintiff's statements with reference to the frauds practiced and that she acted thereon, we feel able to say that by fair intendment she sought to charge, and by fair inference it may be said she alleged, although defectively, that she relied upon such statements and that they were inducements for her to act. If her statement that she acted upon the representations is the equivalent of reliance, it follows that "a reliance upon the representations of another person in respect of any fact necessarily implies a belief in the truth of the statement thus made." Mabry v. Randolph, 7 Cal. App. 426, 94 Pac. 406. We recognize that in this construction of the pleadings we have gone to the fullest extent possible under the rule, but we feel that the statement in Cushing v. Pires, 124 Cal. 665, 57 Pac. 572, that appellate courts will not be overzealous in finding defects in the complaint after trial or judgment has peculiar application to the pleading under consideration, especially in view of the gravity of the charges and the admission of their truth occasioned by the default.

We do not appreciate the force of appellants' contention that it does not appear that the relation of defendants to plaintiff by virtue of the agreement was any other or different from that of any of the other parties to said agreement, and that plaintiff's opportunities for information were not equal to those of the other defendants. This objection, we think, is fully answered by the allegations of the complaint with reference to the scheme to defraud this particular plaintiff and others not implicated in such scheme. We are of opinion, therefore, that, applying the rules of construction above stated, the complaint does state a cause of action against said defendants jointly sufficient to sustain the judgment by default. The judgment was within the demand of the complaint.

There is no merit in respondent's contention that the right of appeal is subordinate to an application for relief under section 473, Code Civ. Proc.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

12 Cal. App. 34

GAVIN v. PHILLIPS et al. (Civ. 698.)

(Court of Appeal, First District, California. Nov. 22, 1909.)

1. Appeal and Error (§ 544*) — Review — Scope.

On appeal from a judgment on the judgment roll without the bill of exceptions, the only question presented is whether the judgment is supported by the findings, which must be regarded as conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2478; Dec. Dig. § 544.*]

2. Judgment (§ 668*) — Conclusiveness — Homestead—Rights of Surviving Children.

Where a husband's homestead was sold to his wife under judgments against him from which no appeal was taken, one being a judgment given by divorce decree, and the other being a judgment for use and occupation after the first sale, his surviving son, who was also a party to the latter judgment, was estopped by the judgments from maintaining ejectment against the wife's devisee.

[Ed. Note.—For other cases see Judgment, Dec. Dig. § 668.*]

3. Adverse Possession (§ 74*)—Effect.

Adverse possession under a probate decree distributing land purchased at a sheriff's sale, the land being inclosed as provided by Code Civ. Proc. § 323, will bar ejectment by the debtor's heir, where such possession has been held for the period prescribed by section 318.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 74.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Ejectment by Charles J. Gavin against John Sullivan Phillips and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Louis Hirsch and T. M. O'Connor, for appellant. Platt & Bayne, for respondents.

COOPER, P. J. This was an action in ejectment to recover the possession of the premises described in the complaint. The defendants had judgment, and this appeal is from the judgment on the judgment roll without a bill of exceptions. The only question before us is as to whether or not the judgment is supported by the findings. We are not at liberty to investigate any question of fact, and must regard the findings as conclusive.

It appears from the findings that in December, 1875, one Patrick Gavin, a widower, whose family consisted of himself and three sons, including the plaintiff, was the owner, as his separate property, of the premises described, and at that time he duly executed and recorded a declaration of homestead upon said premises for the benefit of himself and family. Subsequently to the filing of the declaration of homestead the said Patrick Gavin again married; but afterwards, to wit, in April, 1889, a decree of divorce was granted to his second wife Mary Jane Gavin. In the said action for divorce the said Patrick Gavin appeared and contested the same, with the result that the decree of divorce was granted to the plaintiff therein against Patrick Gavin, and by the decree a judgment was given in favor of the plaintiff in said action for the sum of $2,600, which was, by the terms of said decree, made a lien upon the property described in the complaint, and the court directed that unless the said sum of $2,600 was paid within ninety days of the entry of the judgment, the said property should be sold, and the proceeds applied to the payment and satisfaction of said lien. From this judgment no appeal was taken, and it became final. The $2,600 was not paid, and such proceedings were had that in September, 1892, the said property was sold by the sheriff under said judgment, and a deed was duly executed and delivered to the said Mary Jane Gavin conveying the property to her in satisfaction of said lien.

After this decree said Mary Jane Gavin married one Holmes, and in April, 1893, she began an action in the superior court of the county of San Francisco against the said Patrick Gavin and his sons who were then living, to wit, this plaintiff, Charles J. Gavin, and James Gavin, the other brother, to recover the sum of $300 as rent for the use and occupation of the said premises during the time the defendants in said last-named action had occupied the same since they had become the property of plaintiff in said action by reason of said sale. The result of said last-named action was that plaintiff recovered judgment for the sum of $300 against the Gavins therein named, including this plaintiff, and under and by virtue of said judgment a writ of execution and order of sale were issued, which were duly levied upon the said premises. The sheriff levied upon the premises, and under and by virtue of said execution and order of sale he afterwards sold the same to the plaintiff in said action, Mary J. Holmes, and a certificate of sale was issued to her, followed in due time by a sheriff's deed. No appeal was taken in the said action by this plaintiff from the judgment so made in favor of Mary J. Holmes, and none of the parties to the said action appealed. The judgment therefore became final. Afterwards the said Mary J. Holmes died, leaving a last will and testament, which was duly admitted to probate. Subsequently, in the matter of the estate of said Mary J. Holmes, a decree of distribution was duly given and made, distributing the said property described in this action to the defendant herein John S. Phillips, under the terms of the will of said Mary J. Holmes. The said Phillips immediately went into the possession of said property, and the court expressly finds: "That said defendant John S. Phillips since the said 5th day of October, 1897, and said decree of distribution above mentioned, has been in possession of and occupied said property openly, notoriously, continuously, and adversely to plaintiff and to all the world; that during all of said times said property has been protected by a substantial inclosure. Said defendant John S. Phillips has paid all taxes, state, county, and municipal, which have been levied or assessed upon said property since the said 5th day of October in the year 1897." The court further states in its conclusions of law, in pusuance of the last finding herein quoted. that the action is barred by the provisions of sections 318 and 323 of the Code of Civil Procedure; and further finds that the said defendant "ever since has been and now is the owner of, seised in fee and in possession of, said property." At the time this action was commenced the said Patrick Gavin and his sons other than this plaintiff had died, and plaintiff was the only surviving son and heir of the said Patrick Gavin. It therefore appears from the findings of fact that the plaintiff is estopped by virtue of the said judgments referred to in said findings as herein stated, and further that the action is barred by the statute of limitations.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment is therefore affirmed.

We concur: KERRIGAN, J.; HALL, J.

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12 Cal. App. 26

WIRRINGER et al. v. MORGAN. (Civ. 225.)

(Court of Appeal, First District, California. Nov. 22, 1909.)

1. TAXATION (§ 875*)—INHERITANCE TAXES—"COLLATERAL HEIRS."

Illegitimate children acknowledged by their father in accordance with Civ. Code, § 1387, are not "collateral heirs," and any inheritance passing to such a child from its father is not a collateral inheritance subject to a collateral inheritance tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1690–1692; Dec. Dig. § 875.*]

2. STATUTES (§ 121*)—TITLE OF ACT—COLLATERAL INHERITANCE TAX LAW.

The title of the Inheritance Tax Law of 1893 (St. 1893, p. 193, c. 168), amended by St. 1895, p. 33, c. 28, and St. 1899, p. 101, c. 85, as "An act to establish a tax on collateral inheritances, bequests and devises," etc., limits the scope of the act to collateral inheritances.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 173, 174; Dec. Dig. § 121.*]

3. STATUTES (§ 121*)—TITLE AND SUBJECT OF ACT.

The title of the Inheritance Tax Law of 1893 (St. 1893, p. 193, c. 168), amended by St. 1895, p. 33, c. 28, and St. 1899, p. 101. c. 85, being "An act to establish a tax on collateral inheritances, bequests and devises," etc., the act is void under Const. art. 4, § 24, relating to the subjects and titles of statutes, so far as it attempts to impose a tax on an inheritance not collateral but in the direct line.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 173, 174; Dec. Dig. § 121.*]

4. EXECUTORS AND ADMINISTRATORS (§ 315*)—INHERITANCE TAXES—EFFECT OF DECREE OF DISTRIBUTION.

Where the decree of distribution of an estate fixes the amount "less the amount of the inheritance tax as required by law," but does not fix the amount of such tax, nor expressly adjudicate that any tax should be deducted, the distributees who are not within the collateral inheritance tax law are entitled to the entire estate without any deduction under the decree.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1306, 1307; Dec. Dig. § 315.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Josef Wirringer and Katharina Moosmuller against F. E. Morgan. Plaintiffs had judgment, from which, and an order denying a new trial, defendant appeals. Affirmed.

Carl E. Lindsay, for appellant. Loewy & Gutsch, for respondents.

HALL, J. This is an appeal from a judgment in favor of plaintiffs and the order denying defendant's motion for a new trial. The action was brought to recover a sum of money under a decree of distribution entered in the superior court of Santa Cruz county in the estate of one Sebastian Holzfurtner, deceased. The order settling the final account and decree of distribution are contained in one order or decree, which is attached to and made a part of the complaint; and the solution of the controversy in this case depends upon the effect to be given to this decree.

It appears from the decree that said decedent died intestate on the 28th day of April, 1899, a resident of Santa Cruz county; that he was never married, but left surviving two children of him born out of wedlock, the plaintiffs herein. That before his death he in writing, signed in the presence of at least two competent witnesses, acknowledged himself to be the father of said plaintiffs herein. That he left no other children surviving him, and that the plaintiffs herein were his only heirs at law. The court accordingly distributed the residue of said estate in equal shares to the plaintiffs herein. In that part of the decree settling the final account, the court, after making an allowance for attorney's fees, reporter's fee, and estimated expenses of closing the estate, found the residue of money in the hands of the administrator (defendant herein) to be "$5,927.22, less the amount of the inheritance tax as required by law, which is hereby ordered paid to the county treasurer of Santa Cruz county." Again, in describing the residue of the estate ordered distributed, the court described two promissory notes, and cash in a given sum of money "less inheritance tax." Nowhere is the amount of any inheritance tax fixed, nor any reference thereto made other than as above set forth. Defendant paid to the plaintiffs out of the sum of $5,927.22 the sum of $5,034.65, and this action was brought to recover the difference between said sums, to wit, $892.57. Unless defendant was entitled to retain something for the payment of an inheritance tax, it is conceded that plaintiffs are entitled to the said sum of $892.57. Plaintiffs' contention is that, as the law existed when said decedent died, no inheritance tax was required by law from children of a decedent, whether legitimate or illegitimate, and that as the decree of distribution nowhere fixed the amount of the inheritance tax to be retained out of the residue found to be in the hands of the administrator, but simply referred to it as "the inheritance tax as required by law," the decree does not in fact authorize any deduction for an inheritance tax.

The first question to be determined is: Did the law as it existed in 1899 require payment of any inheritance tax of illegitimate children acknowledged by their father in accordance with section 1387, Civ. Code? The inheritance tax law passed in 1893 (St. 1893, p. 193, c. 168) is entitled "An act to establish a tax on collateral inheritances, bequests, and devises, to provide for its collection, and to direct the disposition of the proceeds." The act was amended in 1895 (St. 1895, p. 33, c. 28) and in 1899 (St. 1899, p. 101, c. 85), but not in respect to its title. The body of the act provides for a tax on inheritances to all persons other than to certain enumerated persons. Among the persons expressly excepted from the payment of the tax are "lawful issue" and "any child or children adopted as such in conformity with the laws of the state of California." But whether illegitimate children acknowledged in accordance with section 1387 are expressly excepted or not, they are not collateral heirs, and any inheritance passing to such a child from its father is not a collateral inheritance.

In speaking of this same statute, the court, in Estate of Winchester, 140 Cal. 468, 74 Pac. 10, said: "Again, the act under which the taxes were imposed by the court below, in its title relates to 'collateral inheritances, bequests and devises' only, and under the provisions of the Constitution its effects must be limited to the subjects thus described. This would exclude successions or bequests to children and grandchildren, whether adopted or natural, for clearly they are not collateral, but in a direct line." See, also, Estate of Campbell, 143 Cal. 623, 77 Pac. 674, as to meaning of the word "collateral."

By the title of the act in question the scope of the act, so far as taxing inheritances is concerned, is limited to collateral inheritances. So far as the act attempts to require a tax to be paid on an inheritance not collateral but in the direct line, it is void. Const. Cal. art. 4, § 24; Estate of Winchester, supra.

It thus being clear that the distributees under the decree were not required by law to pay any tax on their inheritances from decedent, their father, it only remains to determine whether or not a proper reading of the decree of distribution exacts such payment. If these distributees were "lawful issue" of the decedent, and were so found to be in the decree of distribution, we hardly think it would be contended that they would be liable to a deduction from the residue of the estate distributed to them by force of the words "less the amount of the inheritance tax as required by law, which is hereby ordered paid to the county treasurer." It being expressly written in the statute that "lawful issue" should pay no inheritance tax, the vague and uncertain language of the decree would not be read as adjudging such payment to be made. The exemption of these illegitimate children from the payment of the tax in question is just as certain as a matter of law as is the exemption of "lawful issue."

By the terms of the decree the only deduction from the residue of money found to be in the administrators' hands is "the amount of the inheritance tax as required by law." The decree does not fix the amount of such tax, nor expressly adjudicate that any tax should be deducted, but leaves the matter dependent upon whether or not the law requires any inheritance tax. As it does not, the distributee (plaintiffs herein) were entitled to the entire residue of the estate in the hands of the defendant.

In thus holding the trial court did not, as contended by appellant, ignore the decree of distribution, but gave effect to such decree in accord with its terms.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

12 Cal. App. 30

HALL v. CROWLEY. (Civ. 689.)

(Court of Appeal, First District, California. Nov. 22, 1909. Rehearing Denied by Supreme Court Jan. 21, 1910.)

1. Appeal and Error (§ 1071*)—Harmless Error—Affecting Party Not Entitled to Succeed.

Any error in ejectment in finding that counsel stipulated at trial that whatever title was conveyed by a trust deed became vested in plaintiff was harmless if the other findings show that the title conveyed by the trust deed vested in plaintiff through intermediate conveyances.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. § 1071.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MORTGAGES (§ 113*) — TRUST DEED — CONSTRUCTION—TRUSTEES—PERSONS APPOINTED.

A trust deed was executed to secure a loan from H. S. B. by the owners as parties of the first part to "F. W. B., A. F. B., parties of the second part and H. S. B., trustee, party of the third part," and provided for reconveyance by the parties of the second part if the debt was paid, and authorized them or the survivor of them, on demand by the third party, to sell the property if the debt was not paid and execute a deed to the purchaser and prescribed the things to be done by the parties of the second part in case of sale, and further provided that the party of the third part could from time to time appoint other trustees to execute the trust, who, upon conveyance to them by the parties of the second part, their successors, etc., should be vested with all the powers hereby vested in the parties of the second part. *Held*, that the parties of the second part named in the trust deed were the trustees appointed; the word "trustee" being used by mistake after the name of H. S. B.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 113.*]

3. EVIDENCE (§ 178*)—BEST EVIDENCE—RECORDS—DESTRUCTION OF ORIGINAL.

Where the original trust deed which the evidence showed was executed and delivered by the mortgagor was destroyed by fire, the record copy thereof was properly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 584; Dec. Dig. § 178.*]

Appeal from Superior Court, Alameda County; J. D. Murphy, Judge.

Action by Frances Hall against Daniel Crowley. From a judgment for plaintiff, defendant appeals. Affirmed.

James H. Boyer, for appellant. Johnson & Shaw, for respondent.

COOPER, P. J. Plaintiff recovered judgment in ejectment for possession of the lot and premises described in the complaint. This appeal is from the judgment on the judgment roll with a bill of exceptions.

Plaintiff's title was derived as follows: In April, 1904, Daniel Crowley and his son, Jeremiah Crowley, being the owners of said lot, executed, acknowledged, and delivered a deed of trust to F. W. Bridge and A. F. Bridge, as parties of the second part, and one H. S. Bridge, as party of the third part, to secure the payment of a promissory note made by the Crowleys to said H. S. Bridge. The note was not paid, and the parties of the second part named in the deed of trust, after default in the payment, and under and in pursuance of the power of sale contained in the deed, and upon due and proper notice, sold the lot to one Carrie E. Bridge, and executed and delivered to her a deed to the said premises. Carrie E. Bridge afterwards sold and conveyed to plaintiff. It is therefore evident that the plaintiff was the owner and entitled to the possession of the lot, unless there was some fatal defect in some of the proceedings through which the title passed from the Crowleys to him. We will briefly examine the alleged assignments of error made by appellant's counsel.

He attacks the following finding: "That thereafter, after proceeding had and taken, and as stipulated by counsel in the trial of said case, whatever title was conveyed by said deed of trust became duly vested in plaintiff by the trustee's deed, duly delivered in accordance with the said deed of trust." The quoted finding is only a detached sentence taken from the findings, which cover some 10 folios, and it is discussed without any regard to its context. It is stated that there is no evidence that counsel ever entered into the stipulation referred to in the finding; but, conceding no such stipulation was made, the reference to the stipulation may be regarded as surplusage if the other findings and the remaining portion of the finding quoted show that the title conveyed by the deed of trust passed, through intermediate conveyances, to and finally vested in the plaintiff. It is, however, contended (and this seems to be the appellant's main contention) that the sale was void for the reason that it was made by F. W. Bridge and A. F. Bridge instead of "H. S. Bridge, Trustee."

In determining this question we must take the entire instrument, and read it in connection with the object and purpose for which it was made. It was made by the Crowleys for the purpose of obtaining the loan which was made to them by H. S. Bridge. It was taken by H. S. Bridge for the purpose of securing the loan made to the Crowleys. The object was to secure the loan, and to empower the party from whom it was obtained to sell the lot in a lawful manner in case the loan was not repaid. The deed was made by the Crowleys as parties of the first part, and to "F. W. Bridge, A. F. Bridge, parties of the second part, and H. S. Bridge, trustee, party of the third part." It then recites the loan and the purpose for which the deed was made, and follows with a particular description of the lot. Then follows a provision that, in case the parties of the first part shall repay the loan and all the interest and moneys secured thereby, then the parties of the second part shall reconvey the lot to the parties of the first part. Then follows an express power to the parties of the second part as follows: "If default shall be made in the payment of any of said sums of principal and interest when due in the manner stipulated in said promissory note, or in the reimbursement of any of the amounts herein provided to be paid, or of any interest thereon, then the said parties of the second part or the survivor of them, their successors and assigns, on demand by the party of the third part or his assigns, shall sell the above granted premises, or such part thereof as in their discretion they find it necessary to sell, in order to accomplish the objects of these trusts, in the manner, following, viz.: * * *" The deed then proceeds to state certain things that shall be done by the parties of the second part in advertising the time and place of sale and so forth, and concludes as follows: "And upon such sale, they shall make, execute, and after due payment made shall execute to the purchaser or purchasers, his or their heirs and assigns, a deed or deeds of the premises so sold, and out of the proceeds thereof shall pay. * * *" Then follow the usual provisions as to paying costs, attorneys' fees, and the amounts due upon the note, and the "balance or surplusage of such proceeds, if any, to party of the first part or assigns." In the concluding part of the deed is the following: "It is expressly covenanted that the party of the third part may from time to time appoint other trustee or trustees to execute the trusts hereby created; and upon such appointment and a conveyance to them by the parties of the second part, the survivor of them, their successors or assigns, the new trustees shall be vested with all the title, interests and powers, duties and trusts in the premises hereby vested in or conferred upon the parties of the second part."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is thus too plain to require further discussion that the parties of the second part were the trustees named and authorized to make the same under the instrument. It is evident that the word "trustee" was inadvertently used in the first part of the deed when naming H. S. Bridge as party of the third part. It is with regret that the court examines page upon page of a brief, and finds, as in this case, that the point presented does not even have the merit of being plausible. Numerous authorities are cited and discussed by appellants' counsel to the point that "a sale under a deed of trust by a person not authorized to act is void"—a proposition so elementary that it should be known to every student before he is admitted to practice.

The court did not err in admitting the record copy of the trust deed in evidence. It was proven that the original deed had been destroyed in the great fire of April 18, 1906, and in fact appellants admit that such deed was destroyed. It was further proven that the deed was executed by both the Crowleys, and there was evidence sufficient to justify the court in finding that it was delivered. The appellant could not write his name, but the notary Austin testified that both the Crowleys signed and acknowledged the deed, and that Daniel Crowley signed by making his mark. The deed on its face is signed "Daniel Crowley $\underset{\text{mark}}{\overset{\text{his}}{X}}$," and at the end is the following: "Daniel Crowley being unable to write made his mark, and I, at his request, in his presence, wrote his name for him. George W. Austin."

There is no merit in this appeal. In view of the fact that it is stated that the property is worth much more than the amount for which it was sold, we have not assessed damages for a frivolous appeal, although we might well have done so. The remedy of appellant was plain. He could, in case the property is of the value contended for by his counsel, have paid the debt or borrowed the money elsewhere before his property was sold. He did not do so, and the law cannot now interfere.

The judgment is affirmed.

We concur: KERRIGAN, J.; HALL, J.

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12 Cal. App. 6

PEOPLE v. ROWLAND. (Cr. 102.)

(Court of Appeal, Third District, California. Nov. 20, 1909.)

1. CRIMINAL LAW (§§ 409, 538*)—CONFESSIONS—ADMISSIONS—EFFECT AS EVIDENCE.

The confession or extrajudicial admissions of a defendant charged with crime cannot be considered for the purpose of showing the corpus delicti, or of proving the elements necessary to constitute the crime with which he is charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 1229; Dec. Dig. §§ 409, 538.*]

2. CRIMINAL LAW (§ 535*)—CONFESSIONS—ADMISSIBILITY—SUFFICIENCY OF FOUNDATON FOR CONFESSION.

Evidence, in a prosecution for embezzlement by a bank cashier, *held* to establish the corpus delicti, independent of defendant's confession, so as to render such confession admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1226; Dec. Dig. § 535.*]

3. EMBEZZLEMENT (§ 11*)—ACTS OF CORPORATE OFFICER—TIME OF APPROPRIATION.

Where defendant, as bank cashier, on receiving a check in payment of a depositor's note, caused the proper entry to be made on the depositor's account showing the withdrawal of such amount, but retained the money himself, and made no entry on the loan account of the bank as having received that amount he is guilty of embezzlement, under Pen. Code, § 504, making it embezzlement for the officer, servant, or agent of any association or corporation to fraudulently appropriate to any purpose, not in the due execution of his trust, any property under his control by virtue of his trust, or secrete it with fraudulent intent to appropriate it to such purpose; and it is immaterial when, before the finding of the indictment, the money was actually used, except as affected by the statute of limitations.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

4. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

In a prosecution of a bank cashier for embezzlement of a specified amount, evidence of a general shortage in defendant's accounts is admissible; such evidence not being within the rule excluding proof of a crime distinct from the one charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

5. CRIMINAL LAW (§ 434*)—EVIDENCE—BOOKS OF ACCOUNT.

In a prosecution of a bank cashier for embezzlement, evidence of entries on books of the bank is admissible, though not made by defendant, but by subordinate officers or clerks under defendant's directions; defendant having knowledge of the contents of the books and the general condition of the affairs of the bank.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. § 434.*]

6. EMBEZZLEMENT (§ 42*)—EVIDENCE.

In a prosecution of a bank cashier for embezzlement, evidence that defendant, during the period within which occurred the transactions leading to the general shortage in his accounts, engaged in stock gambling on an extensive scale, and that he had comparatively little property in his own name, is admissible as tending to show that defendant used the bank's money for private speculation.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 64; Dec. Dig. § 42.*]

7. EMBEZZLEMENT (§ 48*) — TRIAL — INSTRUCTIONS.

In a prosecution of a bank cashier for embezzlement, in the absence of evidence that defendant borrowed the money alleged to have been embezzled, and in view of his confession admitting his responsibility for the losses of the bank by his wrongful acts, an instruction to acquit defendant if he was authorized to borrow money from the bank, and that he did borrow the money involved in the indictment, was properly refused, though he afterward returned to the bank the amount of his shortage.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72–75; Dec. Dig. § 48.*]

8. CRIMINAL LAW (§ 829*)—TRIAL—REFUSAL OF INSTRUCTIONS.

Instructions fully covered by other instructions, though in different language, are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

9. CRIMINAL LAW (§ 772*)—TRIAL—INSTRUCTIONS.

In a prosecution of a bank cashier for embezzlement, it was not error to instruct that "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812, 1816; Dec. Dig. § 772.*]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

E. S. Rowland was convicted of embezzlement, and he appeals. Affirmed.

T. J. Geary, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

HART, J. Under an indictment charging him with the crime of embezzlement, in the alleged felonious and fraudulent appropriation to his own use of the sum of $1,036.15, the money of the bank of Healdsburg, the defendant was convicted by a jury, and by the court sentenced therefor to a term of six years in the state prison. This appeal is from the judgment of conviction, and from the order of the court declining to grant defendant's motion for a new trial.

The defendant had been for many years secretary and cashier of the bank of Healdsburg, Sonoma county. On the 3d day of December, 1908, W. C. Watson, State Bank Commissioner, having in his official capacity investigated the affairs of the bank, discovered a large shortage in the cash accounts, and thereupon ordered the institution closed to business, pending further investigation. The amount which it is claimed that the shortage represented exceeded the sum of $100,000. The charge in the indictment, however, relates to a transaction involving the sum of $1,000, and occurring on the 7th day of May, 1908, so it is alleged. It appears that on that date one Robert G. Cook paid to the bank a note calling for the sum of $1,000, together with interest accruing thereon, amounting to $36.15. This money had been borrowed from the bank by the firm of Cook & Passalacqua in the year 1907, and the payment of the sum due on said note was made in the form of a check on said bank; Cook & Passalacqua then having sufficient funds in the bank to satisfy the note. The check was placed on the "file" used by the bank for such purpose by the party or official of the institution to whom it was delivered, and later an entry in the proper book made of the receipt thereof.

Appellant first claims and declares that there was introduced at the trial absolutely no evidence, either direct or circumstantial, showing that he embezzled any money from the bank of Healdsburg on the day alleged in the indictment; that, secondly, the court made erroneous rulings in the admission of evidence, and that said rulings were prejudicial to his substantial rights; and, lastly, that in its charge to the jury the court, in several instances, committed vital errors, and thus misdirected, to his prejudice, the jury upon questions of law. The record on this appeal contains an extended synopsis of the testimony given at the trial, but we do not feel called upon to present here anything like a detailed statement of the evidence; it being sufficient, in our opinion, to refer in a general way only to the facts.

1. The contention of the appellant is that there is no evidence of any nature whatsoever, except that of a general shortage, which proves, or tends to prove, to the required degree, that the specific offense charged was committed by the defendant, or, in fact, that there is no evidence showing that said offense, or any other crime, was committed by the defendant, or at all, except the alleged confession of the accused of the existence of a general shortage at the time the Bank Commissioner investigated the affairs of the bank and discovered that something was wrong in the cash accounts thereof. This contention involves, obviously, the claim that the corpus delicti was not shown by evidence independent of that of the confession.

It is, of course, a well-established rule of law that the confession or extrajudicial admissions of a party accused of crime cannot be considered for the purpose of proving the corpus delicti, or, in other words, of proving the elements necessary to constitute the crime with which he is charged. See People v. Tapia, 131 Cal. 651, 63 Pac. 1001; People v. Jones, 123 Cal. 65, 55 Pac. 698; People v. Eldridge, 3 Cal. App. 648, 86 Pac. 832. But this rule has never been so far extended in its scope or application as to require the elements or the body of the crime to be proved beyond a reasonable doubt before the admissions or confessions may be received and considered as evidence. As is said in People v. Jones, 123 Cal. 68, 55 Pac. 700: "As to the degree of evidence required to show criminal agency [that is, the cause of the facts constituting the corpus delicti], a distinction must be taken between the evidence which upon the whole case would justify a conviction and that degree of proof of criminal agency in the burning of the buildings, for the purpose of letting in evidence of the confessions or admissions of the defendant. To justify a conviction, the jury must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the offense and to identify the defendant as the perpetrator; but *it is not necessary that the evidence should be of that conclusive character in order to justify the admission of the defendant's confessions.*" (Italics ours.)

In People v. Ward, 134 Cal. 306, 66 Pac. 374, the rule as thus expounded is reaffirmed, the court saying: "Nor is the other objection—'that the corpus delicti had not been proven'—of any validity. Proof of the corpus delicti does not necessarily involve or require proof that the crime was committed by the defendant, or person charged with having committed it. The general rule is that it must first be shown; but, except in those cases where it is sought to put in evidence the confession or admission of the defendant, the order of proof is in the discretion of the court, and, even in those cases, plenary proof of the corpus delicti is not always required." See People v. Simonsen, 107 Cal. 346, 40 Pac. 440. The present question here, then, is, Does the evidence in the case at bar disclose sufficient proof of the corpus delicti, or the specific crime charged, to have warranted the admission of the confession in evidence?

The question may be answered by a brief examination of the evidence. The record shows that these facts were proved by the evidence, presumably to the satisfaction of the jury: That, as before stated, the defendant was, for many years prior to the date of the discovery of the defalcations, the secretary and cashier of the Bank of Healdsburg; that, in that capacity, the administration of the affairs of the bank was, practically, under his direct and almost exclusive control; that the books of account were kept by clerks under his immediate direction; that he had the usual power vested in bank cashiers in the matter of making loans and in the performance of the numerous other duties involved in a general banking business. It may here be remarked that John Favour, the president of the bank, whose principal duties were to look after securities for loans and examining real estate upon which loans were sought from the bank, occasionally assisted the defendant in counting the cash. Further than this he had little, if anything, to do with the inside operations of the bank. But, as suggested, the evidence very clearly shows that the books of the bank, though actually kept by clerks employed therein, were under the exclusive control and supervision of the defendant, and it further appears very clearly that, under the system upon which the defendant conducted the business of the bank, the mere counting of the cash on hand by any person other than the defendant did not necessarily open up an opportunity to such person to learn or to know whether there was in fact any shortage in the cash accounts or not. The system in vogue in the bank for the daily transaction of its business was, according to the evidence, as thus described: Whenever one of the attachés of the institution waited on a customer a tag was prepared—generally by the clerk, but sometimes by the customer himself—whereby the exact nature of the transaction was shown. If, for illustration, money was paid into the bank, either as a deposit or for the purpose of fully liquidating or making a payment on a loan, the transaction would be noted on a tag in such manner as to clearly indicate all the necessary information with regard thereto. This tag would, if properly disposed of, be placed on a file at the "window" at which all the transactions of the bank were customarily carried on. The tag would subsequently be taken by the bookkeeper, and the transaction evidenced thereby be entered in the proper book. The accounts of the bank were balanced, and the cash counted and compared with the balances as disclosed by the books, at the end of each day. To facilitate the balancing of the books, a machine list of all the transactions of the day was prepared each day. The items on this machine list were compared or checked with the tags, and the balances thus reached. Thereupon, the day's transactions were accordingly entered in the books. The evidence further shows that it was the custom of the defendant to daily examine the tags representing the transactions occurring each day, and to compare and check the same with the machine list.

According to the testimony of the president of the bank, the defendant himself always kept the book known as the "Loan Register," and he, and no other person, invariably made a record therein of any loans that came in, "or where there was anything to be credited upon the loan register." It further appears from the evidence that the transaction forming the basis of the charge in the indictment was conducted in person by the defendant himself. Cook, as heretofore stated, delivered to the defendant a check on the bank for a sum sufficient to satisfy the note previously executed in favor of the bank by Cook & Passalacqua. It also appears that the defendant thereupon personally canceled and delivered to Cook said note. The defendant then placed the check on file at the window, and from said check the bookkeeper later in the day made an entry thereof in the personal account of Cook & Passalacqua, thus indicating the withdrawal from the bank of the sum represented by the check on account of said Cook & Passalacqua. The evidence shows that the defendant himself personally entered in the interest account the receipt of the sum of $36.15 on account of the interest due on the note of said firm of Cook & Passalacqua. The defendant, however, failed to prepare a tag, or to make any other record from which the bookkeeper could learn that the note of Cook & Passalacqua had been paid. Nor did he otherwise give out any information tc the clerks with respect to the payment of said note. It is therefore plainly manifest that, when the books of the bank were balanced as to that day's transactions, the note of Cook & Passalacqua, although paid, and no longer an asset of the bank, remained such in the loan account of the bank. In other words, the evidence discloses that the books showed that on the 7th day of May, 1908, the sum of $1,000 had been withdrawn from the bank, but failed to show that said sum was in fact paid into the bank to liquidate the loan to Cook & Passalacqua. Of course, when the cash was counted on that day it was found to balance with the books, because the $1,000 note referred to was still an ostensible asset of the bank, although fictitious and false, it having been paid. And, according to the testimony of Mr. Watson, the Bank Commissioner, who, after the discovery that there was a shortage, made a detailed examination into the affairs of the bank and the methods of their administration by the defendant, the method by which the accused handled the transaction of which the charge in the indictment is predicated was the same as that which enabled him to use over $100,000 of the bank's funds without the knowledge of the other officers of the institution.

There are some other minor circumstances disclosed by the evidence tending to show that the transaction relating to the Cook & Passalacqua note was, so far as the defendant's part in it was concerned, dishonest, and carried out with a design on his part to misuse or misapply the sum represented thereby; but we think we have given a sufficient résumé of the facts as proved to clearly demonstrate that the corpus delicti was sufficiently established by evidence aliunde the confession.

In addition to the evidence specifically directed to the transaction to which the charge in the indictment relates, there was, apart from the confession, evidence of a general shortage (as to which a point is sought to be made, and to which we shall later refer) which, assuming it to have been properly admitted, tends to prove the commission of the crime charged, or at least is corroborative of the immediate circumstances pointing to the commission of the crime of which the accused was convicted. And, the jury having passed upon all the facts, it is too late to now say or to claim that the failure of the defendant to prepare a tag from which the exact nature of the transaction could have been ascertained by the bookkeeper might have been a mistake or an oversight, for the proposition now under consideration stands sustained by these salient and uncontradicted facts: That on the 7th day of May, 1908, the firm of Cook & Passalacqua was indebted to the bank in the sum of $1,000 and accrued interest; that the bank held the firm's note for that sum; that Cook & Passalacqua had sufficient funds on deposit in the bank with which to pay the note and interest, and that said firm did in fact pay said note on that day in the form of a check drawn on said bank; that there was cash in the vaults of the bank on said day approximating in amount the sum of $20,000; that the defendant personally conducted the transaction, receiving the check and filing it in the customary place and manner, and surrendering the note to Cook, and entering the interest paid thereon in the interest account; that, although he was himself the immediate custodian or keeper of the loan register, in which the record of all loans paid and of credits on loans was kept, he failed to make an entry in said register of the payment of said note, thus allowing it to remain on the books as an apparent asset of the bank.

It is very true, as counsel for the appellant suggests, that none of the officers and clerks of the bank called as witnesses for the state testified directly that there was any money of the bank misappropriated or converted to a wrongful use by the defendant, or any other person, on the 7th day of May, 1908. Under the system by which the defendant conducted his dishonest operations it was manifestly impossible to disclose, except through evidence of circumstances, a specific defalcation, and therefore it is not to be wondered that no witness could be produced who could give direct testimony of the fact at issue here. The further claim of counsel for the appellant that there is no testimony showing that the defendant omitted to make a tag indicating the payment of the note of Cook & Passalacqua is not sustained by the record. As seen, there is evidence showing that the system by which the inside business of the bank was conducted called for a tag, placed on a particular file, revealing the exact nature of every daily transaction, and from which tag the bookkeeper made the proper entry in the proper book. There is no evidence that a tag disclosing the fact of the payment of the Cook & Passalacqua note was made by the defendant and placed on the customary file, while, on the other hand, there was introduced in evidence the book containing the loan account of the bank, in which a record was kept of all loans paid and in which, from and including the 7th day of May, 1908, to and including the day the bank was closed by the Bank Commissioner—December 3, 1908—there was no record of the payment of said note. Thus it must readily be observed that the circumstances disclosed by the evidence very strongly tend to show that the defendant made no tag of the transaction, and that the money represented by the check delivered to him in payment of the note was diverted from subserving its legitimate purpose by him, and thus misappropriated.

Unavailing is the argument that, if this particular money was embezzled at all by the defendant, it might have been thus taken at a time prior to, and remote from, the 7th day of May, 1908, for the important and the undisputed fact, obviously inconsistent with that view, is that there was in the bank on that day sufficient money with which to meet the demands of the check of the firm of Cook & Passalacqua, and that the final act in the consummation of the misappropriation of that particular money occurred on that day. We know from common knowledge that the moneys ordinarily paid into a bank are not kept separate and apart in distinct packages as such moneys are paid in, but are intermingled together with all the other moneys of the bank, and thus go into the common mass of the money kept for all the purposes of the business. Therefore the check of Cook & Passalacqua on the bank, in which they had on deposit sufficient funds to satisfy said check, and in which there was on hand a large amount of ready cash, available for all the purposes of the bank, was, in our opinion, no different from cash itself, and payment of the note in that form, under the circumstances indicated, constituted in reality a cash transaction. And it is manifestly immaterial what might have been the specific purpose of the defendant in misappropriating the money thus received from Cook & Passalacqua—whether it was to use that particular money on that very day to further some individual scheme or transaction, or to use it in covering up or partially concealing evidence of prior defalcations, in the hope of postponing discovery of the general deficiency in his cash accounts. By this we mean to be understood as saying that, even if he actually took no money from the bank on the day of the Cook transaction, but merely used it to juggle the books as to some other account in order to make it balance or appear straight, he nevertheless thereby misappropriated that particular money, and in substantial effect wrongfully converted it to his own use; the fraud of the transaction being indubitably shown, as we have seen, by the fact that he allowed the canceled note of Cook & Passalacqua to remain as though a living asset of the bank. If this is not embezzlement within the meaning of the law (section 504, Pen. Code), then we confess that we are at a loss to know what acts will constitute that offense.

Section 504 of the Penal Code provides, among other things: "* * * Every officer, director, trustee, clerk, servant or agent of any association, society or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose is guilty of embezzlement." The indictment charges, among other things, that the defendant "did willfully, unlawfully, fraudulently, and feloniously secrete, with a fraudulent intent to appropriate to his own use, and to a use and purpose not in the due or lawful, or due and lawful, execution of his trust," the money referred to therein. Thus it will be observed that, under section 504 of the Penal Code and the allegations of the indictment, it is immaterial when, before the filing of the indictment, the money was actually used, except in so far as the matter of time might be affected by the statute of limitations, if it be proved that the defendant secreted the money or property for the unlawful purpose. The statute seems to have been enacted with the object of meeting the exigencies of just such circumstances as appear in the case at bar. We do not suppose that the proposition will be challenged that, under the terms of the quoted section of the Penal Code, the act of secreting property of another by his agent, into whose hands such property has come for his employer, with the intent to convert it or to appropriate it to a use or purpose not within the scope of the objects of the fiduciary relation, amounts to a misappropriation of such property, and therefore embezzlement. So, as stated, if, in the case here, the money was either secreted within the meaning of the statute, or used to cover up some other shortage, or actually taken from the vaults of the bank and used in some transaction with which the bank had no connection, the crime is, in either event, proved. The elements which must be shown in order to establish the crime of embezzlement as alleged in the indictment here are these: (1) That defendant was an agent of the party from whom the money or property is alleged to have been embezzled at the time of such wrongful conversion; (2) that the property charged to have been embezzled must have come into the hands of the defendant as the property of his employer; (3) that defendant received it in the course of his employment; (4) that he appropriated such property to his own use with intent to steal it. Sections 504, 506, 509, Pen. Code; People v. Hemple, 4 Cal. App. 125, 87 Pac. 227, and cases therein cited.

The general rule is that the mere proof of defendant's connection with the crime is not sufficient to establish the corpus delicti. Nor is it necessary, in order to establish the essential elements of the crime, to prove the defendant's connection with it. The rule, however, does not go so far as to exclude, in showing the corpus delicti, proof of the defendant's connection with the crime, where the circumstances of the case are such that proof of the crime of necessity involves proof of defendant's guilt. In the case at bar it is manifest that the evidence directed to the proof of the corpus delicti necessarily involved defendant's connection with the crime, for he is inseparably connected with every important circumstance introduced for the sole purpose of proving the corpus delicti. We have therefore necessarily considered, in connection with the question whether the elements of the crime charged have been well enough proved to open the way for the proof of the defendant's confession, the proposition whether, upon the whole record, the jury were justified in returning a verdict of guilty. Hence we feel no hesitation in declaring that all the elements of the embezzlement charged in the indictment are brought home to the defendant by the proofs. That the accused was the agent of the bank on the 7th day of May, 1908, and that the money alleged to have been embezzled by him came into his hands as such agent as the property of and for his employer, are uncontroverted and incontrovertible propositions in this case. That, on the 7th day of May, 1908, he either secreted the money mentioned in the indictment with the fraudulent intent to convert it to his own use, or did actually use it with the fraudulent intent to appropriate it to his own use, or to a "use and purpose not in the due and lawful execution of his trust," we think, as before suggested, the circumstances thus far considered clearly tend to show; and that his guilt was sufficiently established to justify the verdict by those circumstances and other evidence, to which we shall later refer, we do not entertain the slightest doubt.

2. It is urged that the court seriously erred, to the detriment of the defendant, in its rulings admitting certain evidence. It is first claimed that evidence of a general shortage was not admissible for the purpose of proving the specific crime of which the defendant was accused and convicted. The theory of the argument upon this point is that such evidence comes within the rule excluding proof of another and distinct crime from the one charged. But we fail to perceive any merit in the contention. There can be assigned no sound reason on principle why evidence of a general shortage, brought about through the criminal act of a party, is not competent proof tending to support a specific charge of embezzlement where, as here, the particular transaction on which the charge is based is included in, or a part of, such general shortage. Such testimony is not, of course, conclusive of the truth of the charge, but furnishes only an important circumstance tending to prove it. It is admissible for the purpose of negativing the idea that the particular transaction giving birth to the specific charge was due to a mistake, and to show guilty knowledge or the fraudulent intent.

Counsel for appellant refers to the case of the People v. Walker, 142 Cal. 94, 75 Pac. 659, where it is held by a divided court that evidence of a general indebtedness is not admissible as proof of the specific crime of embezzlement charged in the information. But that case does not sustain the position of counsel here, for the reason that the facts there are decidedly different from those here. The court says: "In the case at bar the said testimony objected to was not of any other embezzlement; it was simply of a general indebtedness, and it appears affirmatively that the $80.35 charged to have been embezzled was not included in the general balance which the books showed." As already observed, the charge in the case here grows out of one of a number of fraudulent transactions culminating in the general shortage of over $100,000, and, as is said by Henshaw, J., in People v. Sanders, 114 Cal. 216, 46 Pac. 153: "If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime"—citing People v. Tucker, 104 Cal. 440, 38 Pac. 195. See, also, People v. Ebanks, 117 Cal. 663, 49 Pac. 1049, 40 L. R. A. 269, and People v. Walters, 98 Cal. 138, 32 Pac. 864. The distinction between the Walker Case, supra, and this case, so far as is concerned the point under present discussion, may thus be stated: In the former there was apparently no relation between the specific crime charged and the general shortage or "general indebtedness" as the court declares the general deficiency in that case to have been. Here there is a direct relation existing between the crime charged and the general shortage, because the former is shown to be one of the several transactions from which the general shortage arose, and the latter has therefore a tendency to establish the offense charged. In People v. Walters, supra, Chief Justice Beatty states the rule, allowing, in exceptional cases, proof of another offense than the one charged, in clear and concise language.

Nor did the court err in admitting in evidence certain entries in the books of the bank and certain tags made, not by the defendant personally, but by subordinate officers of the bank. The rule is that evidence of entries in books made by persons other than the defendant himself is inadmissible against the accused, unless there is proof connecting the defendant in some way with the making or knowledge of such entries. The theory upon which the court allowed the proof of the tags and entries in the several books of the bank in the case at bar was that said tags and entries, where not made by the defendant himself, were made by his clerks under his direction. The entries and the tags were offered and received in connection with the testimony of the bookkeeper himself, and herein lies the distinction between this case and that of People v. Blackman, 127 Cal. 248, 59 Pac. 573, so confidently relied on by appellant, where the Supreme Court held that evidence of entries in the books of the corporation of which the defendant was secretary was, under the circumstances of that case, inadmissible to prove the charge of embezzling the funds of said corporation. There, at the time of the trial, the bookkeeper, who made the entries, was dead, and the books or their contents were allowed to go into the record as evidence of the defendant's guilt, without proof having been made that he ever examined the books, or that he knew anything of their contents. The court said: "If there was evidence that the entries were made by the defendant or under his direction, or with his knowledge, they would most undoubtedly be competent and important evidence against him." Nor is either the case of People v. Whalen, 154 Cal. 472, 98 Pac. 194, or the case of S. F. Teaming Co. v. H. N. Gray et al., 104 Pac. 999, cited by appellant, in point here. In the first-mentioned case it was held that the mere written copy of the report of an assayer showing the value of certain gold ore was not admissible as evidence, where the assayer was not produced as a witness, nor where the assay was made in the office of the assayer, who was a witness, but who did not himself personally make or supervise the assay. In the latter case it was held that "where, in an action to recover a balance due for the use of teams and teamsters, the only testimony to support the introduction in evidence of a work book, showing the account against the defendants, is that of the bookkeeper of the plaintiff, who merely made the entries from a memorandum paper made by him from the oral statements of the various teamsters, and who had no personal knowledge of the work, such book is inadmissible." In both cases it is plainly to be seen the evidence offered was secondary or hearsay, pure and simple.

The evidence here indisputably shows, as we have before stated, that the full management and domination of the inside business operations of the bank were vested in and exercised at all times by the defendant. He alone directed and supervised the details of the administration of the affairs of the institution. He, as a rule, counted the cash on hand at the close of each day's business, and often examined the books, as it was his duty to do. The clerks and bookkeepers discharged their respective duties in obedience to the requirements of the system in vogue in the bank for many years, if not always from its organization, and all this under the immediate direction and control of the defendant. One of the books—the loan register and the important book in this case—was kept by the defendant himself. The witness Cox, who was the bookkeeper in the bank for some 17 months prior to the discovery of the shortage, testified that the defendant looked over the tags of each day on every following morning. He further stated that the accused "would always check over the adding machine slip to see that each debit and credit was listed by the machine," and that it was the defendant's custom to check each tag with the list preparatory to having it entered in the books. Furthermore, the defendant, a couple of months prior to the transaction on which the indictment is founded, and in the month of July, 1908, which, as is apparent, was subsequent to said transaction, delivered to, and filed with, the Bank Commissioner reports verified by him, setting forth facts which were thus represented to be sustained by the balance sheet, the authority for which were the books of the bank. Moreover, when, on the 4th day of December, 1908, in response to a previous demand by the Bank Commissioner, the defendant delivered to that official a copy of what purported to be the balance sheet of the day before, he, after being plied with some questions concerning the affairs of the bank, admitted that the statement of the loans was incorrect, and admitted that he was responsible for the condition of the loans, and made a full and practically an accurate explanation of the deficiency and the cause thereof. It may be added that it was at this time that he confessed having wrongfully used and misappropriated over $100,000 of the bank's funds.

We have gone over the testimony sufficiently to show that the defendant possessed full knowledge of the contents of all the books and their condition and of the tags narrating each day's transaction and the general condition of the affairs of the bank. Under these circumstances it cannot for a moment be doubted that the books and tags were admissible for the purpose of disclosing a general shortage, and thus a circumstance tending to establish the truth of the specific crime charged in the indictment.

What we have said with respect to the admissibility of evidence of the tags and the entries in the books applies with equal force to objections to evidence bearing upon certain other features of the case. But it is particularly urged that testimony showing that the defendant, during the period within which occurred the transactions leading to the general shortage, engaged in stock gambling on a very extensive scale, and that the books of the county assessor for said period disclosed comparatively little property to be assessed in his name, was erroneous and prejudicial. This evidence was clearly competent as involving circumstances tending to show that the defendant used the bank's money for private speculation, and thus caused the enormous deficiency in the cash accounts of the institution.

Other specific objections to the court's rulings are pointed out, but this opinion has now been extended to too great a length to give them particular notice. It is enough to say that we have taken the pains to carefully examine all these assignments and have found nothing in them detrimental to the substantial rights of the accused.

3. The court did not err by refusing to give to the jury instructions 4, 7, and 8, requested by the defendant. These instructions would have told the jury, in effect, that the defendant was authorized or had the right to borrow money from the bank whose funds he is charged with having misappropriated, and that if they (the jury) believed from the evidence, or entertained a reasonable doubt upon the proposition, that the defendant borrowed the money involved in the specific charge and in the general deficiency, it would be their duty to acquit. There was no evidence offered to show that the defendant borrowed the money. But undoubtedly the rejected instructions were requested upon the theory that they were pertinent because, as expressed by counsel in his brief, "it is in evidence that the right of the defendant to borrow from the bank was not questioned by any one connected with the bank," and further, that, after the disclosure of his shortage, he paid the bank in full on account of the shortage. In the absence of any evidence whatsoever supporting the only theory of which the refused instructions could be predicated—that he did borrow the money—and in view of the confession of the defendant, by which he not only admitted his responsibility for the losses to the bank, but that such losses were due to his own unauthorized and wrongful acts, the instructions were entirely out of place in the record. But appellant contends that the fact, admitted in evidence, that he returned the money to the bank amounts to proof that the other officers of the bank treated the transactions resulting in the shortage as involving loans. This position is drawn from the evidence of the written acknowledgment by the board of directors of the bank of the receipt of money from the defendant sufficient to cover the general shortage; but, apart from the mere written receipt itself, there is no evidence explaining that transaction, except in so far as it is explained by the general evidence showing the shortage and the defendant's wrongful responsibility therefor, and, of course, this does not sustain, but negatives, the theory that defendant borrowed the money.

Appellant insists that the court erred in its rejection of certain other instructions requested by him. These instructions are numbered 12, 13, 18, 24, and 76. The court's charge was exhaustive, and, in our opinion, fully and clearly covered every principle pertinent to the issue and the facts. Instructions 12 and 76 were, in a little different language, given in those instructions in which the jury were, in substance and in very plain terms, told that, notwithstanding the evidence of the entries in the books tending to show a general shortage, the defendant was entitled to an acquittal, unless his guilt of the specific crime charged was proved beyond a reasonable doubt. We think the court made it appear very clearly to the jury that the defendant could not be legally convicted on the proof alone of false entries or omissions to make proper entries not directly involving the charge laid in the indictment.

As to the other rejected instructions it may be said generally that those principles therein declared, which were applicable to the case, and therefore proper to be read to the jury, were sufficiently covered by the general charge of the court, and manifestly no harm could follow the refusal to repeat them in the language of appellant.

Instructions Nos. 42, 48, 49, 56, 57, and 61, given to the jury on the motion of the people, are denounced by appellant as prejudicially erroneous. We find absolutely no merit in any of the criticisms directed against these instructions. We shall not examine all these in detail. The criticism of instruction No. 42, as to which it is declared that the court thereby instructed the jury that proof of criminal negligence on the part of the defendant would establish the offense, involves, in our opinion, a palpably erroneous construction of its purpose and effect. The first part of the instruction is based on, and is in the language of, sections 20 and 21 of the Penal Code, and is in abstract form. The part of the instruction animadverted upon reads: "The court instructs you that in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." The court, as is obvious, thus referred to crimes generally, and not to the particular one then before the court; and the statement is not only correct as an abstract proposition of law, but is given in nearly every criminal case that is tried, whether the elements of the offense involved call for proof of a specific intent, or for proof only of such criminal negligence as is sufficient in certain cases to establish a crime. There may, and no doubt do, arise cases in which an instruction involving an abstract statement of a proposition of law would be, and is, harmful to the accused. But this is not one of them. The instruction merely explains or states, as the law provides, that there are crimes, to consummate which the proof of criminal negligence is sufficient, but nowhere does the court expressly say that criminal negligence is all that is required to be shown in the crime with which the defendant is charged. To the contrary, as we have shown, the court, in other portions of its charge, declared in pointed language and concrete form the necessity of proof of a fraudulent and felonious intent with respect to the specific act imputed to the defendant, and described and charged in the indictment before his conviction could legally follow.

We have given this record extended, as well as careful, consideration, and have been unable to discover any error in the trial of the cause which would justify the reversal of the judgment and the order. The record is a large one, and the briefs of counsel on both sides voluminous in size and exhaustive in argument, but we have, nevertheless, endeavored to give to all the important points presented the consideration which we thought they deserved. The trial appears to us to have been fair in all respects, and we doubt not for a moment that the result is justified by the proofs. We may further add, in conclusion, that if the facts of the Cook & Passalacqua transaction, as they are disclosed by the record here, do not sufficiently establish that the specific crime charged in the indictment was committed on the day named in said indictment, and that those facts, with other evidence properly received, do not show that the defendant committed it, then it is difficult to conceive of a case where a bank cashier, engaged for a series of years in a systematic wrongful use of the funds of the bank, and possessing the ability and cleverness to so manipulate the books of the institution as to keep in obscurity for all those years the fact of his dishonesty and the methods by which he has prosecuted his faithlessness to his trust, could ever be made to answer for his crime. Stockholders and depositors could thus be robbed with licensed impunity, and their despoiler go unwhipt of justice. Where, as here, for illustration, the total defalcation involves innumerable distinct transactions, and its prosecution has covered a period of four or five years, there must always be great difficulty experienced by public officers charged with the execution of the criminal laws to specifically prove any particular one of the many transactions from which the general shortage has arisen; and, if the courts, though properly requiring at all times that no substantial right of an accused citizen shall be taken from him in the trial of the charge against him, are to heed and adopt the hair-splitting yet disingenuous refinements often characterizing the arguments of learned and ingenious lawyers in their interpretation and application of rules of evidence, particularly when their clients are beset by desperate circumstances, there would then, indeed, invariably appear insuperable obstacles to the true course of justice in such cases.

For the reasons herein given, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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12 Cal. App. 44

CIAPUSCI et al. v. CLARK et al. (Civ. 659.)

(Court of Appeal, Third District, California. Nov. 22, 1909. Rehearing Denied by Supreme Court Jan. 21, 1910.)

1. Logs and Logging (§ 3*)—Standing Timber—Contract.

A contract of sale of standing timber recited that the grantor has sold to the grantee a certain amount of timber growing on his land for a fixed sum "as stumpage for said timber." The contract provided that the purchaser should have four years within which to take the timber, with privilege of an extension, and should have 10 days from the date of the agreement to examine the timber and the title. *Held* to constitute an absolute sale of the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3;* Contracts, Cent. Dig. § 890.]

2. Logs and Logging (§ 3*)—Contract—Construction—Forfeiture.

A contract for the sale of standing timber gave the purchaser four years within which to remove the timber, with the privilege of an extension by payment of $5 per year rent in advance. *Held*, that the provision for the rental was a covenant apart from the sale of the timber, and not a condition upon which the sale depended so that nonpayment of such rent at the appointed time could not alone work a forfeiture of all rights under the contract, where the full price of the timber had been paid.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

3. Logs and Logging (§ 3*)—"Stumpage."

The word "stumpage" is defined to mean timber standing in the tree, and the standing timber on land is commonly called "stumpage." It is also a term used to express the compensation paid by the purchaser for standing timber to be cut and removed by him.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 7, p. 6703.]

4. Landlord and Tenant (§ 108*) — Forfeiture for Nonpayment of Rent.

To entitle a landlord to enforce a forfeiture for nonpayment of rent, he must, as a general rule, make a demand for payment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 338; Dec. Dig. § 108.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by A. Ciapusci and another against J. Ross Clark and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

McNab & Hirsch, for appellants. Olney, Pringle & Mannon, for respondents.

CHIPMAN, P. J. This is an action to quiet title to certain land in Mendocino county. The cause was tried upon an agreed statement of facts, from which it appeared:

That on May 20, 1903, C. D. Robinson was the owner of the land in question. On that day he executed and delivered to Bender Bros., engaged in the business of buying and selling timber and timber lands, an instrument in writing, hereinafter set out. On September 12, 1903, Bender Bros. sold, assigned, and transferred all their rights under said instrument to defendant J. Ross Clark, by assignment written on said instrument, which, with said assignment was, on September 21, 1903, duly recorded in the office of the county recorder of said county. On October 8, 1904, said Clark "sold, assigned, granted and conveyed to the defendant Empire Construction Company, a corporation, all his right, title and interest in said instrument and in and to the land and timber therein set out, by an assignment in writing indorsed on said instrument" which was duly recorded after the commencement of the action. This instrument, with the assignments indorsed, is as follows:

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

"Gualala, May 20, 1903. I, C. D. Robinson, of Gualala, Mend. Co., Calif., have this day sold to Bender Bros., of San Francisco, Calif., a certain lot of timber growing on my land for the sum of eight thousand dollars ($8,000.00) United States gold coin, as stumpage for said timber being located on the northwestern portion of my ranch, and more particularly described as follows, all the timber growing on (describing the land), comprising about four hundred acres, said Bender Bros. to have the right to cut all the timber growing on said land, as above described, with the exception of the Bull pine timber growing next to the County Road, and I, C. D. Robinson, reserve the field fenced in near the southwest corner of said land, said Bender Bros. are to have the right to make all necessary roads for hauling said timber, also privilege of building cook houses and sleeping apartments for working men, also stables and corrals for teams, but no buildings for any other purpose whatever, and they shall not allow any other business to be carried on on the above described premises. And I, C. D. Robinson, reserve the right to go on said land at any time for the purpose of prospecting for mineral water or oil, or any other minerals, and the said Bender Bros. shall have four years to take said timber off of said land, with privilege of a longer time by paying the sum of five dollars per year rent in advance, for a time not to exceed ten years from date of this agreement. And it is further agreed that as soon as the timber is all off they shall peacefully give up all rights and possessions to the above described premises. I, C. D. Robinson, agree to let Bender Bros. have ten days to examine the timber and it is agreed at the end of ten days if they want the timber they will pay five hundred dollars, and at the end of thirty days, if the titles are all right, they are to pay the balance due on the eight thousand dollars. If title is good and the balance is not paid, the said Bender Bros. lose the aforesaid mentioned five hundred dollars. If title proves to be no good, I, C. D. Robinson, will pay the said five hundred dollars back to Bender Bros. I, C. D. Robinson, guarantee all rights of way to the County Road from any part of the above mentioned land, and it is further agreed that Bender Bros. shall have exclusive rights for any and all roads that are made over said land, or to be made on said land. [Signed] C. D. Robinson." (Witnesses to the signatures omitted.)

"San Francisco, Sept. 12, 1903. For and in consideration of the sum of $10.00 to us in hand paid, we hereby sell, assign and set over to J. Ross Clark, of Los Angeles, California, all our rights covered by the foregoing bill of sale. [Signed] Bender Bros., by Geo. L. Bender." (Duly acknowledged so as to entitle this to be recorded.)

"For value received, I, J. Ross Clark, the grantee of Bender Bros. in the within agreement, do hereby grant and convey unto the Empire Construction Company, a corporation, all my right, title and interest in and to the within contract, and in and to the land in the contract described and the timber growing thereon. Reference is hereby made to the description contained in the within contract and to the record thereof in Liber 94 of Deeds, page 128 of the records of Mendocino County, State of California. In witness whereof, I have hereunto set my hand this 8th day of October, 1904. [Signed] J. Ross Clark. Witness: [Signed] Warren Olney." (Duly acknowledged so as to entitle this to be recorded.)

The consideration of $8,000 was paid by Bender Bros. to Robinson, in accordance with the terms of said instrument, and thereupon they entered upon the land "and removed a large portion of the timber set out in the foregoing writing executed by said C. D. Robinson," and during his lifetime, and while he was the owner of the land. No timber has been cut or removed since January 1, 1906. Robinson had knowledge of the removal of the timber under claim of right by Bender Bros. and made no objection thereto. Defendant the Empire Construction Company is the owner of said instrument and has succeeded to and is owner of all the rights existing under it. On September 8, 1906, Robinson conveyed the land to his daughter, Mrs. Jacobs. The deed was duly recorded (date not given), and on February 2, 1907, she conveyed the land to plaintiffs. The deed was duly recorded (date not given), and plaintiffs are now the owners of the land, "subject to any and all right in said lands in favor of the Empire Construction Company which may now exist by virtue of said instrument made and entered into by Robinson with Bender Bros." Said Mrs. Jacobs and plaintiffs acquired said real property with full knowledge of the execution and delivery to Bender Bros. of the written instrument herein set out and of the payments made and of the cutting and removal of timber thereunder as hereinbefore set forth, and defendants had no actual knowledge of the transfer of said real property to plaintiffs until the commencement of the action. (Complaint was filed July 20, 1907.) The $5 per year rent mentioned in said instrument has not been tendered or paid except as appears by the following: On May 22, 1907, the Empire Construction Company, at Los Angeles, mailed to C. D. Robinson a check for $5 to pay the rent for the year ending May 20, 1908. This letter was received by F. L. Robinson, grandson of C. D. Robinson, who, on June 15, 1907, wrote the company, returning the check, and stating that C. D. Robinson was dead, and that the property in question had changed hands. On July 15, 1907, the company replied asking to be advised if C. D. Robinson's "right to the agreement of sale dated May 20, 1903, given by him to Bender Bros., has been assigned, and, if so, to whom, also advise who are his heirs, or name of administrator." On May 11, 1908, the company tendered to plaintiffs $10 in payment of rent reserved in said instrument for the two years beginning May 20, 1907, which was refused, and thereupon the company deposited the amount in the Bank of Point Arena to plaintiffs' credit and so notified them. C. D. Robinson died January 1, 1907.

Upon these facts the court entered judgment for defendant the Empire Construction Company, adjudging it to be the owner of the timber mentioned in said instrument with the right to remove the same and quieting plaintiffs' title subject to such right. Plaintiffs appeal from the judgment on bill of exceptions.

The controversy arises out of the conflicting construction given to the contract of sale by the respective parties. Appellants claim: First, that the agreement conveys "merely a license to cut—'stumpage'—for a determinate amount of time, and if payment is not made at the time fixed the right shall cease, and the time absolutely ceased by failure to make the payments." Second. "If the instrument must be construed to convey an estate in real property, that such interest is not perpetual, but is simply a determinable fee; in other words, merely conveys a present estate of absolute ownership in the timber, defeasible as to all the timber not removed within the time required by the terms of the instrument."

Respondents' position is, "broadly stated, that Robinson sold and the Benders bought all the timber in controversy for $8,000; that Robinson received and Bender Bros. paid for this timber a price mutually satisfactory; that upon the payment of the purchase price the Benders became the owners of the timber itself; that such ownership gave them an indefeasible interest in the realty in controversy; and that respondent company, as the successor of the Benders, is the owner of such indefeasible interest in the realty." Furthermore, that such "valuable rights in timber covering 400 acres of land will not be held forfeited in a court of equity for nonpayment of $5; that the $5 payment provided for in the contract is a reservation of rent and need not be paid until demanded; and that Robinson's death excused a tender of this rent."

It seems to us that no very searching analysis of the contract of sale is necessary to justify the conclusion that Robinson not only intended to sell, but did sell, all the timber except that specifically reserved. The condition as to the examination of the title rendered the contract executory, but upon full payment made it became an executed sale. Throughout the instrument the language imports a sale of all the timber; the price paid was for all the timber and was equivalent to $20 per acre—certainly on its face an adequate price, as it manifestly was satisfactory to seller and buyer. The property sold is described as "all the timber growing on" the land described; the purchasers "to have the right to cut all the timber growing on said land." The purchasers were given "four years to take said timber off of said land, with privilege of a longer time by paying the sum of five dollars per year rent in advance, for a time not to exceed ten years from date of this agreement," and they were to "peacefully give up all rights and possessions" under the contract "as soon as the timber is all off." It was further provided that the purchasers were to "have ten days' time to examine the timber" and also to see "if the titles are all right." Undoubtedly this was to give the purchaser opportunity to estimate the quantity of timber on the entire tract and to determine whether to pay the purchase price for all the timber. We can see no such significance in the use of the word "stumpage" as appellants attach to it, namely, "the right to cut timber, or the price of timber as cut." No inference can reasonably be drawn from the use of this word that the sale was less than of the entire standing timber as it stood, or that the price paid was only "of timber as cut." The word "stumpage" is defined to mean "timber standing in the tree." Nitz v. Bolton, 71 Mich. 388, 39 N. W. 15. "The standing timber on land is commonly called 'stumpage.'" Gordon v. Grand Rapids & I. R. Co., 103 Mich. 379, 61 N. W. 549. "'Stumpage' is the term used to express the compensation paid by the purchaser for standing timber to be cut and removed by him." Baker v. Whiting (U. S.) 2 Fed. Cas. 495, 499. As used, the word seems not to have any very definite meaning, and it is not to be given a meaning in conflict with other plain provisions of the contract, e. g., where the seller says, "I * * * have sold * * * a certain lot of timber growing on my land * * * more particularly described as follows, all the timber growing on" the land described. The contract contemplated that a longer period than four years might be necessary for the removal of the timber, and hence the provision extending the time not to exceed 10 years from the date of the contract. And it is upon this provision appellants rely most confidently; the contention being that the right given (i. e., merely a right to cut timber) was for a limited period, and the privilege of continuing that right depended absolutely upon the prompt payment of $5 on May 20, 1907, failing which, all rights of respondents ceased. The resultant effect, if this be true, is to work a forfeiture of the $8,000 paid as the full value of all the timber and also the right to take possession and remove the property bought. Well-established principles forbid any such inequitable result where the intention of the parties, expressed in their contract, may reasonably be held to be otherwise.

We are asked to import into the contract terms of forfeiture where there is not even a hint that forfeiture was intended and where the seller said he was to have peaceable possession "as soon as the timber is all off." In the case of Halstead v. Jessup, 150 Ind. 85, 49 N. E. 821, the owner of timber land sold to Halstead the timber thereon; the contract providing that he was "to have four years to take off said oak timber." Halstead sought to remove some of the timber after four years had expired and was denied the right by Jessup, who had acquired title to the land. The suit was to recover the value of the standing timber. The court said: "The only question between the appellant and the appellee, upon the terms of the contract, was as to the appellant's right, after the expiration of the four years, to go upon the land and take possession of the timber. By the denial of this right, and the retention of the timber, the appellant was certainly damaged to the extent of the value of the timber. The law does not favor forfeitures, and will not enforce them, in the absence of clearly stated conditions of forfeiture. Here, as we have said, there is no stated condition of forfeiture. If by delay in taking the timber after the period named, damage should accrue to the owner of the land, it would not be questioned that such damage could be recovered. But it would be manifestly unjust that mere delay should forfeit both the appellant's money and his timber, and that the appellee should become the owner of the timber upon the strength of an implied forfeiture."

In Irons v. Webb, 41 N. J. Law, 203, 32 Am. Rep. 193, the court held similarly in a similar case, and that the provision for removal within two years is a covenant and not a condition. In Walker v. Johnson, 116 Ill. App. 145, where the timber was not removed within the limited time, the court said: "Under the contract with Abbott, the defendant became the owner of the growing timber, coupled with the right to cut and remove it. This was more than a mere license. It was a substantial part of the thing sold, paid for, and delivered, so far as it was capable of delivery. The time limit for the removal of the timber is to be treated as a covenant and not a condition upon which to base forfeiture."

Our own Supreme Court has expressed similar views in Peterson v. Gibbs, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107. The facts there so clearly resemble the facts here that we think the principles of law there laid down must rule this case. The only noticeable dissimilarity discoverable is that in the case cited the instrument used the words "grant, bargain and sell," while here the language is "I have sold." But as we think a sale was intended to be made and was in fact made in the present case by the terms of the agreement, the difference between the two instruments in this regard is immaterial. In the case cited the purchaser agreed to pay $200, annually, rental for the privilege of removing the timber after the ten years had expired and also half of the taxes levied upon the land, while here the purchaser agreed to pay the nominal sum of $5 annually. In the case cited the $200 rental yas paid by the purchaser, but he had not paid his half of the taxes. His contract was made in 1887, and the action was brought in 1901—fourteen years later—and yet no timber had been removed. The court said: "While there is much apparent conflict in the decisions as to the proper construction of a contract for the sale of standing trees to be removed, it is well settled that such a sale may be absolute and the agreement to remove within a specified or reasonable time merely a covenant, in which case the timber remains the property of the purchaser, although not removed within the specified time. See Am. & Eng. Ency. of Law (2d Ed.) p. 541; Hoit v. Mills, 54 N. H. 109, 20 Am. Rep. 19. The question in each case is: What is the contract between the parties? Here there is absolutely nothing in the terms of the agreement which can be construed as making the removal of the timber a condition precedent to the passing of title, or as causing delay in such removal, beyond the period of 10 years from the date of the instrument, or failure to pay the rental reserved or one-half the taxes, to operate as a divesting of the title conveyed."

It seems to us that Peterson v. Gibbs disposes of appellants' contention that the provision for the payment of $5 to secure an extension of the time in which to remove the timber was a privilege given on condition of prompt payment of that sum, and that the use of the term "rent" was without significance. The agreement is conceded to have been inartificially drawn. It is not reasonable to suppose that so important a privilege as that of the right to remove the timber which had been fully paid for should depend upon so trifling a circumstance as the prompt payment of $5 per annum. There is nothing in the nature of the transaction to suggest that consequences so serious were intended to be imposed by such failure, or that a forfeiture of all rights was to follow. We are not precluded from regarding the use of the term "rent" as having some meaning. It was used probably with as clear a conception of its import as the other provisions in connection with it. We see no reason why we may not interpret the provision to mean that the buyer was to pay $5 per annum in advance as rent for the privilege of cutting timber after four years and before the expiration of ten years. As this was a covenant apart from the sale of the timber and not a condition upon which the sale depended, we are led to the safe conclusion that nonpayment at the appointed hour cannot alone work a forfeiture of all rights under the contract. Regarding the $5 payment as rent, there could be no forfeiture under this agreement without demand by plaintiff of the rental upon or after the last day given the lessee on which tc pay. Sauer v. Meyer, 87 Cal. 34, 25 Pac. 153; Civ. Code, § 1442; Taylor on Landlord & Tenant (8th Ed.) § 297; 18 Am. & Eng. Ency. of Law (2d Ed.) p. 375. And in Cyc. p. 1401, the rule is thus stated: "The general rule that to entitle the landlord to enforce a forfeiture for the nonpayment of rent he must make a demand for payment was laid down at an early date and has since been unanimously followed." Respondents suggest, furthermore, that Robinson was dead when the rent fell due, and the lands were then owned by plaintiffs, and there was therefore no requirement on defendants' part to perform the idle act of endeavoring to pay rent to a dead man. Respondents also invoke the maxim, "De minimus non curat lex," citing Mietzsch v. Berkhout, 100 Cal. xviii, 35 Pac. 321, 323. Generally, equity will not relieve where the injury is trifling. See Smith v. His Creditors, 59 Cal. 267; People v. Daniels, 70 Cal. 521, 11 Pac. 655; Civ. Code, § 3533. It would seem grossly unjust to forfeit rights so valuable for so small a sum as $5, and it is asking much of a court of conscience to do so. We do not, however, believe that the exigencies of the case require resort to this maxim, and we do not apply it. If we were to speculate as to the real purpose of this rent clause, we should be inclined to think that it was inserted under a misapprehension that without it some sort of a prescriptive right might accrue to defendants.

The judgment was in accord with sound principles, as we think, and it is therefore affirmed.

We concur: BURNETT, J.; HART, J.

157 Cal. 153

CROCKET v. MATHEWS, County Auditor.
(S. F. 5,329.)

(Supreme Court of California. Jan. 3, 1910. Rehearing Denied Feb. 2, 1910.)

1. Justices of the Peace (§ 15*)—Sheriffs and Constables (§ 29*)—Salaries—Statutes.

St. 1909, p. 322, c. 208, relating to the compensation of officers of counties of the fourteenth class, increasing the salaries of certain officers, and providing in section 1, subds. 13, 15, for salaries of justices of the peace and constables for specified services in lieu of fees, and declaring in section 2 that, except as to subdivisions 13 and 15, the act shall not take effect until the expiration of the present terms of officers enumerated, affects the salaries of incumbent justices and constables, the necessary implication being that the excepted subdivisions 13 and 15 shall take effect within 60 days after the passage of the act, as provided by Pol. Code, § 323.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 24; Dec. Dig. § 15;* Sheriffs and Constables, Cent. Dig. § 46; Dec. Dig. § 29.*]

2. Officers (§ 100*)—Salaries—Statutes.

Legislation affecting the compensation of an officer will not be presumed as intended to apply to an incumbent unless the Legislature expressly so declares.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152–157; Dec. Dig. § 100.*]

3. Statutes (§ 72*)—Uniformity of Operation—General Statutes.

St. 1909, p. 322, c. 208, relating to the compensation of officers of counties of the fourteenth class, increasing the salaries of enumerated officers, and providing in section 1, subds. 13, 15, for salaries of justices and constables in lieu of fees, though construed to affect incumbent justices and constables, but not to affect the incumbents of the other offices enumerated, is a general law of uniform application within Const. art. 1, § 11, as it applies to all persons within the class to which it relates.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 72; Dec. Dig. § 72.*]

4. Statutes (§ 68*)—"General Law"—What Constitutes.

Under the Constitution (article 11, § 5) empowering the Legislature to classify the counties by population for the purpose of regulating the compensation of officers, a statute providing for the compensation of officers within any class provided for is a general law, and it is immaterial whether the provision is in a special statute for each class or in a single act providing for all the classes, and an amendment to a statute which affects an entire class is equally a general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 70; Dec. Dig. § 68.*

For other definitions, see Words and Phrases, vol. 4, pp. 3065–3071; vol. 8, pp. 7679, 7670.]

5. Statutes (§ 73*)—Uniformity of Operation—General Laws.

A statute providing for the compensation of officers in counties of the fourteenth class is a general law of uniform operation, though there is only one county in the class.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 73; Dec. Dig. § 73.*]

In Bank. Petition for writ of mandate by D. C. Crocket against C. W. Mathews, auditor of Mendocino county, to compel the issuance of a warrant on the treasurer of the county in favor of plaintiff. Peremptory writ issued.

Preston & Preston, for petitioner. Robert Duncan, Dist. Atty., for respondent.

ANGELLOTTI, J. This is an application to this court for a writ of mandate requiring the defendant to draw a warrant upon the treasurer of the county of Mendocino, a county of the fourteenth class, in favor of plaintiff for the sum of $40, alleged to be the amount of salary due plaintiff as justice of the peace of Ukiah township in said county for the month of June, 1909. The matter was submitted on a general demurrer to the petition.

Plaintiff is entitled to the relief demanded if his rights in regard to compensation are determined by the provisions of an act entitled, "An act to amend section 4243 of the Political Code of the state of California, relating to the compensation and expenses of officers in counties of the fourteenth class," approved March 13, 1909. St. 1909, p. 322, c. 208. His present term as justice of the peace commenced in January, 1907, and at the time of the approval of the act of March 13, 1909, the law fixing his compensation was section 171 of the county government act of 1897 (St. 1897, c. 277), as amended by an act approved March 21, 1905 (St. 1905, p. 670, c. 511, § 1), under which both justices and constables of counties of the fourteenth class were compensated solely by specified fees for services performed, it being established by the decision in Smith v. Mathews, 103 Pac. 199, filed June 25, 1909, that the provisions of the act of March 18, 1907 (St. 1907, p. 354, c. 282), by which the county government act, amended in many particulars and revised, was incorporated as a part of the Political Code, was not to be construed as showing a legislative intent that the changes in salaries and compensation thereby made as to many officers should affect incumbents.

The act of March 13, 1909, deals exclusively with the matter of the compensation of the county and township officers of counties of the fourteenth class, no other subject being in the slightest degree referred to therein. The act consists of two sections. Section 1 of the act declares that "in counties of the fourteenth class the county and township officers shall receive as compensation for the services required of them by law or by virtue of their offices the following salaries and fees, to wit"; and this is followed by 15 subdivisions by which the compensation of each officer is fixed. No change was made thereby in the compensation of the recorder, tax collector, assessor, district attorney, and supervisors, who had theretofore received fixed salaries, nor in that of the coroner, public administrator, or surveyor who, under both old and new law, were to receive "such fees as are now or may hereafter be allowed by law." The theretofore fixed salaries of the county clerk, auditor, treasurer, and superintendent of schools were increased, and the sheriff was given certain additional allowances. Subdivision 13 deals exclusively with justices of the peace, giving them for all services rendered in criminal cases, in lieu of the fees theretofore allowed a monthly salary to be paid each month as salaries of county officers are paid, the salary to be $40 per month in townships where the population is 2,000 or more, $30 per month in townships where the population is 1,000 and less than 2,000, and $20 per month in townships where the population is less than 1,000, the population to be determined "by multiplying the vote for Governor cast in each township at the next preceding general state election by five." No change was made in the matter of compensation in civil cases. Subdivision 15 deals exclusively with constables, providing in lieu of certain fees in criminal cases a fixed monthly salary, graded, as in the case of justices, according to the populations of the townships. Section 2 of the act is as follows: "Except as to subdivisions 13 and 15, this act shall not take effect until the expiration of the present term of officers hereinabove enumerated."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is claimed by defendant that this act was not intended by the Legislature to affect the compensation of incumbents of the offices of justices of the peace and constables at the time it was enacted. It is not disputed that the Legislature had the power either to reduce the compensation of any county or township officer after his election or during his term of office, or to substitute a different method of compensation provided his compensation was not thereby increased; the prohibition of section 9, art. 11, of the Constitution, referring simply to an increase of compensation. Nor is it disputed, the act before us not disclosing whether or not the salary system of compensation substituted thereby for the fee system does produce an increase of compensation for justices and constables, that, if the act sufficiently shows the intent that the new system shall affect incumbents, the conclusive presumption is that the Governor and the Legislature have investigated, ascertained, and determined that the change does not result in an increase of compensation, a fact essential to a valid law affecting incumbents, and that the courts have no right to question or review the determination of the legislative branch of the state in that regard. This is the doctrine established by Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089 14 L. R. A. 459, 25 Am. St. Rep. 230. See also, Smith v. Mathews, supra.

We cannot construe the act otherwise than as one intended to affect incumbent justices and constables. The intention of the Legislature in that regard is too clearly expressed to admit of any other construction, and it is impossible to account for the insertion of section 2 of the act upon any other theory. If the act was to have no application to incumbents, section 2 was unnecessary and meaningless. In an act dealing solely with the matter of the compensation of the county and township officers of counties of a certain class, the Legislature says that "except as to" the provisions relating to justices of the peace and constables the act "shall not take effect until the expiration of the present term" of the officers; in other words, shall not affect incumbents, for in the connection in which they are used the words used can have no other meaning. The necessary implication is that the excepted provisions—those relating to justices of the peace and constables—shall "take effect" and affect incumbents at the time every statute, unless a different time is provided therein, does take effect, viz., "sixty days after its passage." Section 323, Pol. Code. So far as the apparent intent of the Legislature is concerned, the act before us must be read exactly as if section 2 in terms read: "Except as to subdivisions 13 and 15, this act shall not take effect until the expiration of the present terms of officers hereinabove enumerated. *As to subdivisions 13 and 15, it shall take effect sixty days after its passage.*" The sentence italicized is, in the absence of other language, the necessary consequence of the other sentence. Nothing else could have been meant or intended.

The doctrine of Smith v. Mathews, supra, is not opposed to our conclusion on this point. The court there was considering an act not dealing exclusively with the matter of compensation of county and township officers, but one that constituted a complete county government act, embracing, as said by the Chief Justice, "numerous other matters of grave importance, entirely distinct from official salaries and compensation." It was held that the true construction of such an act was to treat all the provisions as to compensation alike, and, "knowing that such of them as increase salaries could have been intended to apply only to officers elected subsequent to the amendment, to conclude, in the absence of express and specific declaration to the contrary, that other amendments which may or may not have the effect of increasing compensation were likewise intended to operate only in favor of or against officers to be thereafter elected." In the concurring opinion the rule laid down is substantially that legislation affecting the compensation of an officer will not be presumed as intended to apply to incumbents unless the Legislature "expressly so declares," and will not so apply unless the Legislature has plainly said that it is to do so. Nothing more was meant or said thereby than that the intent of the Legislature to that effect must be made to affirmatively appear by clear language. In the act under consideration the declaration of the Legislature is, in our judgment, tantamount to "an express and specific declaration" that the provisions as to justices and constables shall operate as to incumbents.

The claim is made by learned counsel for defendant that, if the act be construed as operative on incumbent justices and constables, it is violative of section 11 of article 1 of the Constitution, which provides that "all laws of a general nature shall have a uniform operation." It is said that this law does not operate uniformly for the reason that its operation is suspended as to all officers upon whom it assumes to operate except justices of the peace and constables. This objection is answered by the case of Vail v. San Diego Co., 126 Cal. 35, 58 Pac. 392, between which and the case at bar there is no material distinction. The plaintiff there was county surveyor of San Diego county. Under the law existing at the commencement of his term, he was to receive "ten dollars per day for all work performed." During his term, the county government act of 1897 was enacted, and this act provided in effect that in counties of the class to which San Diego belonged the surveyor should receive a salary of $2,000 per annum "in lieu of all fees and per diem now allowed by law." The act provided that its provisions, "so far as they change the compensation of any officer * * * heretofore paid a fixed salary, or heretofore paid a fixed salary and commissions, and not fees or per diem, shall not affect incumbents, unless otherwise provided in any of said sections," and that "this act, except as otherwise herein provided, shall take effect and be in force sixty days from and after its passage." According to its terms, the act did change plaintiff's compensation. The question was whether the act was effectual to change it, the claim being, as here, that the provisions purporting to make the changes operative on incumbents who had previously received a per diem, but not on those who were in receipt of a fixed salary, were in conflict with section 11 of article 1 of the Constitution. It was held that the distinction thus made by the act as to its taking effect on the one class of incumbents and not on the other was not an arbitrary one, but one founded in intrinsic differences naturally suggesting the propriety of different adjustments of the law in that regard, and that the classification was therefore authorized, and, that this being so, it followed that the law was uniform in its operation inasmuch as it affected equally all incumbents in each class or category; the court saying: "A statute is uniform in its operation if it applies to all persons or objects within the class to which it relates. The general provisions of said sections 233 and 234, by which the act of 1897 was made operative on the compensation of incumbents who had been paid 'fees or per diems,' affected equally all incumbents in that category, and such operation is therefore uniform." We see no reason to question the correctness of any conclusion reached in that case. In the case at bar the act was made operative solely as to all incumbents whose method of compensation was changed from fees to salary. The only distinction made by learned counsel between that case and this is that the law involved in the Vail Case "was a general statute applying to the entire state," while the act here is one applicable to one class of counties. This is entirely immaterial. The Vail Case establishes the proposition that such a classification is authorized in any general law fixing compensation of county and township officers, and does not destroy the uniformity of the operation of the law. It is thoroughly established that under the constitutional provision (article 11, § 5) empowering the Legislature to classify the counties by population for the purpose of regulating the compensation of officers, when such a classification has been made, a "statute providing for the compensation of officers within any class is a general law, and * * * it is immaterial whether such provision be in a special statute for each class, or in a single act providing for all of the classes, and * * * an amendment to such statute which affects an entire class is equally a general law, as was the original act." Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66. This point was very fully discussed in Johnson v. Gunn, 148 Cal. 745, 84 Pac. 665, in which many authorities are cited, and it is concluded "that the provisions made by the Legislature in other acts, or in other sections of the same act, regulating the compensation of officers in other classes of counties, cannot be referred to or taken into consideration for the purpose of determining from them that the provisions relating to the townships in this class of counties are unconstitutional because special, or local, or not uniform with those adopted for the other classes." This was the clear effect of numerous decisions of this court. It may be that these decisions trench somewhat upon the doctrine of the earlier case of Miller v. Kister, 68 Cal. 142, 8 Pac. 813, relied on by defendant, although most of the later decisions have sought to distinguish it on the facts. However this may be, the conclusions we have arrived at not only appear to us to be correct on principle, but are too amply fortified by the later decisions to be avoided.

That there is only one county in the fourteenth class is, of course, immaterial. It is not disputed that the Legislature may classify the townships of any class of counties according to population for the purpose of fixing the compensation of the township officers therein. See Tucker v. Barnum, 144 Cal. 266, 77 Pac. 919; McCauley v. Culbert, 144 Cal. 276, 77 Pac. 923; Johnson v. Gunn, supra.

What we have said practically disposes of all points made by the learned counsel for defendant. We see no good answer to the claim of plaintiff.

Let a peremptory writ of mandate issue as prayed for in the petition.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(157 Cal. 161)

Ex parte KING. (Cr. 1,558.)

(Supreme Court of California. Jan. 3, 1910.)

1. STATUTES (§ 68*)—"GENERAL LAW."

A law is a "general law" when it applies equally to all persons embraced in a class founded on some natural or intrinsic or constitutional distinction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 70; Dec. Dig. § 68.*

For other definitions, see Words and Phrases, vol. 4, pp. 3065–3071; vol. 8, pp. 7669–7670.]

2. STATUTES (§ 72*)—"SPECIAL LEGISLATION."

If the individuals to whom legislation is applicable constitute a class characterized by some substantial qualities or attributes of such character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not "special legislation" within the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 72; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 7, pp. 6577–6584; vol. 8, p. 7802.]

3. STATUTES (§ 72*)—"UNIFORM OPERATION OF LAWS."

If a statute operates uniformly on all members of the class to which application of the statute is limited, as it properly may be, it has the "uniform application" required by Const. art. 1, § 11.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 72; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 8, pp. 7175–7176.]

4. CONSTITUTIONAL LAW (§ 48*)—GENERAL LAWS—VALIDITY—PRESUMPTION.

Whether the individuals affected by a law constitute such a class that the law is general and not special is primarily one for the Legislature; and, the law being attacked as special, every presumption is to be indulged in favor of its validity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

5. CONSTITUTIONAL LAW (§ 48*)—GENERAL LAWS—VALIDITY—PRESUMPTION.

Where, on the facts legitimately before a court on attack of a statute as special legislation, it is reasonable to assume there were good and sufficient reasons actuating the Legislature in creating the class, which alone is affected by the statute, though such reasons may not clearly appear from a mere reading of the statute, such assumptions will be made.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

6. CONSTITUTIONAL LAW (§ 48*)—SPECIAL LEGISLATION.

To warrant a court in adjudging a statute special legislation on the ground that there was no proper basis for making the class alone affected by the statute, it must clearly appear that there was no reason sufficient to warrant the Legislature in finding a difference and making the discrimination.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

7. STATUTES (§ 72*)—GENERAL AND SPECIAL LAWS—CLASSIFICATION OF SALOONS.

The difference between saloons permanently established in a definite place, looking forward to a continuance in business, and those only temporarily established in a place, outside a city or town, because of the presence of a camp containing a large body of laboring men, as to the manner in which they are likely to be conducted, is such as to authorize Act March 25, 1909 (St. 1909, c. 413), legislating against the latter class.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 72; Dec. Dig. § 72.*]

8. INTOXICATING LIQUORS (§ 15*)—VALIDITY OF REGULATIONS—CLASSIFICATION OF SALOONS.

The distinction between permanently established saloons and those only temporarily established because of the presence of a camp containing a large body of laboring men engaged in a public work, being such as to authorize Act March 25, 1909 (St. 1909, c. 413), legislating against the latter, the provision substantially making establishment of a saloon, outside a city or town in proximity to such a camp, six months prior to establishment of the camp requisite to its being considered a permanently established place, cannot be considered unreasonable, or as one arbitrarily made to confer privileges on the former class.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 15.*]

9. CONSTITUTIONAL LAW (§ 70*)—LEGISLATIVE QUESTIONS—GENERAL AND SPECIAL LAWS—CLASSIFICATION OF SALOONS—REASONABLENESS.

Whether the distance of four miles in Act March 25, 1909 (St. 1909, c. 413), legislating against saloons temporarily established outside a city or town, because of a camp containing a large body of laboring men, within four miles of such camp, is a reasonable one is a question for the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

10. STATUTES (§ 71*)—UNIFORM APPLICATION—CLASSIFICATION OF SALOONS.

The uniformity of the operation of Act March 25, 1909 (St. 1909, c. 413), legislating against saloons temporarily established outside a city or town, within four miles of a camp containing a large body of laboring men engaged on public work, the question of temporary nature depending on whether the saloon was established less than six months before the establishment of the camp, is not affected by the pro-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vision that the act shall not apply to sales of liquors "at any winery, licensed brewery or distillery where the same is manufactured."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 71; Dec. Dig. § 71.*]

In Bank. Application of L. W. King for writ of habeas corpus, prayed to be directed against J. W. Kelly, Sheriff of Kern County. Writ discharged, and petitioner remanded.

D. M. Hammack and Hammack & Hammack, for petitioner. J. W. P. Laird, Dist. Atty. Kern County, Leslie R. Hewitt, City Atty. Los Angeles, and W. B. Mathews, for respondent. W. W. Dodge, Asst. City Atty. Los Angeles, Warren Olney, Jr., and Max Thelen, amici curiæ.

ANGELLOTTI, J. The petitioner seeks his discharge from the custody of the sheriff of Kern county on the sole ground that the act of the Legislature of the state under which he is held is unconstitutional and void. The act in question is one entitled "An act to prohibit the sale of intoxicating liquors within a certain distance of any camp or assembly of men, numbering twenty-five or more, engaged upon the construction, repair or operation of any public work, improvement or utility," approved March 25, 1909 (Stats. 1909, p. 722, c. 413). By section 1 of this act it is made unlawful "for any person to sell, keep for sale, or give away, any spirituous, vinous, malt or mixed intoxicating liquors at any place situated more than one mile outside the limits of an incorporated city or town, and within four miles of any camp or assembly of men, numbering twenty-five or more, engaged upon, or in connection with, the construction, repair or operation of any public or quasi public work, improvement or utility; provided, however, that nothing in this section contained shall be deemed to apply to the sale, keeping for sale, or disposal of any such liquor at a licensed saloon or liquor store which shall have been established, or at a licensed saloon or liquor store which shall be maintained, at the time this act takes effect, upon the same premises where a licensed saloon or liquor store shall have been established, at least six months prior to the establishment of such camp or assembly of men, or to the sale, keeping for sale, or disposal of any such liquors at any winery, licensed brewery or distillery, where the same is manufactured." Section 2 makes a violation of the act a misdemeanor punishable by fine or imprisonment or both fine and imprisonment.

The claim of the petitioner is that the effect of the proviso excepting certain sales from the operation of the act is to render the act violative of section 11, art. 1, of our Constitution, which provides: "All laws of a general nature shall have a uniform operation." It is urged that, in view of this proviso, this law limiting the business of the sale of intoxicating liquor denies to a portion of a class bearing the same relation to the law equal opportunities in the business so limited. While arbitrary discriminations by the Legislature between persons standing in the same relation to the subject of legislation will not be sustained by the courts, it is firmly settled that "a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction." City of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 607. "If the individuals to whom the legislation is applicable constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation" (Deyoe v. Superior Court, 140 Cal. 476, 481, 74 Pac. 28, 29 [98 Am. St. Rep. 73], and cases there cited), and if it operates uniformly upon all the members of such class, it necessarily has the "uniform operation" required by section 11, art. 1, of the Constitution. The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that when such a legislative classification is attacked in the courts, every presumption is in favor of the validity of the legislative act. Where upon the facts legitimately before a court, it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the Legislature in creating the class, though such reasons may not clearly appear from a mere reading of the law, such assumption will be made, and the legislation upheld. To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination. See Grumbach v. Lelande, 154 Cal. 679, 684, 685, 98 Pac. 1059. In the light of these well-settled rules, there is, in our judgment, no force in petitioner's claim.

The purpose of the act is apparent from its provisions. It was not the design to regulate or prohibit the carrying on in the usual way of the business of selling intoxicating liquor at regularly and permanently established places of business, established without reference to the fact that the place would be temporarily advantageous by reason of the presence of a camp or assembly of men engaged in the kind of work mentioned in the act. That such established places of business might temporarily happen to be within a short distance of such a camp or assembly of men was not considered by the Legislature as sufficient to call for any exercise of its power. The design was to protect the work described in the act, and the men engaged therein, from what is called in one of the briefs "the itinerant saloon," established temporarily in a certain place solely because of the proximity of such a camp or assembly. It seems clear to us that good and sufficient reasons may have appeared to the Legislature for making this distinction. It is easily conceivable that it may have been made to appear that there were evils attendant on the maintenance of such places that did not exist in the case of the place permanently established, and generally almost entirely dependent upon the residents of the community for its existence and support. The saloonman permanently established in a definite place, looking forward to a successful and profitable continuance of his business in the community, naturally has more incentive to conduct his business in an orderly and decent manner, and with due regard, not only for such regulations as may be imposed by law, but also for the idea of the community as to what constitutes a respectable saloon, than has one who is only temporarily established in a place because of the presence of a camp containing a large body of laboring men, and for the purpose of obtaining as much as he can of their earnings. The only incentive of the latter would ordinarily be to so conduct his business as to obtain the largest possible patronage and the greatest possible profit from the men on account of whose presence he had located his temporary establishment. It is unnecessary to dilate on this, for it must be obvious to any one in view of the nature of the business that there would ordinarily be such an essential difference between the two classes in the method of conducting the business that the Legislature might well conclude that certain evils, seriously impairing the doing of work in which the public is interested, and injuring the men engaging therein, exist in the case of the place so temporarily established, while they do not exist as to the permanently established place. As was said in Grumbach v. Lelande, supra, "It certainly is not made clear that good reason does not exist for the discrimination."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

If it must be held that the Legislature could make a distinction between the two classes we have discussed, as we are satisfied must be held, we can see no valid objection to the requirement that a liquor saloon or store shall have been established at least six months "prior to the establishment of such camp or assembly of men," in order to be considered a permanently established place. Such is substantially the meaning of the six months' provision. It is apparent that it would be practically impossible to guard against the mere temporary establishment in any other way than by requiring some such evidence of good faith on the part of the person engaging in such business. If the law excepted all places established at the time of the establishment of the camp, approximate knowledge of the site of a proposed camp could always be acquired by the party in sufficient time to enable him to locate within a convenient distance before its establishment. We cannot say that the Legislature was not reasonably warranted in concluding that a "saloon or liquor store," established outside of a city or town, and in the vicinity of the line of a proposed public work on which would be employed a large number of men, less than six months before the actual commencement of the work in that vicinity, would ordinarily be a mere temporary establishment, located solely with a view to the patronage of the men engaged in such work. The period of six months is not in itself an unreasonable time, and the Legislature may well have been justified by the facts within its knowledge in fixing that period. The discrimination thus made between places established more than six months and those established less than six months is not to be taken as one arbitrarily made for the protection of or for the purpose of conferring any privilege on those of the former class, and it may be conceded that it could not be sustained if such were the apparent object. It is to be taken solely as one reasonably made in furtherance of the policy of the Legislature to prohibit the maintenance of temporary establishments for the sale of intoxicating liquors near the "camp or assembly of men" described in the act, a policy, as we believe, fully warranted by its power in the matter of police regulations.

The question whether the distance prescribed, four miles, was a reasonable one, in view of the purpose of the act, was also, of course, a question for legislative determination. There is nothing to indicate that it is at all unreasonable.

Much reliance is placed by counsel opposing this law on the cases of Ex parte Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618, and Van Harlingen v. Doyle, 134 Cal. 53, 66 Pac. 44, 54 L. R. A. 771, but neither of these cases appears to us to be in conflict with the views we have expressed. In both the court held that there were no differences which justified the classification attempted to be made. The Bohen Case involved an ordinance prohibiting interments of bodies within the limits of the city and county of San Francisco, but excepting interments in such lots as had already been purchased for interment purposes. It was made to appear that in one cemetery alone more than 18,000 bodies could legally be interred under the exception, while the capacity of the unsold lots in the same cemetery was sufficient for only 3,600 bodies. It was held substantially that no good reason could be conceived why the one class of burials should be more offensive or more opposed to pubilc policy than the other, and allowed while the other was prohibited. The case of Van Harlingen v. Boyle involved the validity of a provision of law prohibiting the procuring by county officers of any supplies, printing, stationery or books from any person or firm "whose paper has not been established or whose place of business has not been established in the county for one year or more prior to" the time when the prices therefor were fixed by the board of supervisors. It was substantially held that all merchants and publishers stood in the same relation to supplies and advertising for the county, and could not be arbitrarily classified by the period of time during which they had engaged in business in the county. No natural or intrinsic or constitutional basis for any such distinction could be conceived. The essential difference between those cases and this is that here there is sufficient warrant for finding a natural and intrinsic difference between the classes created by the legislative department.

What we have said shows very clearly that the provision excepting from the operation of the act sales "at any winery, licensed brewery or distillery where the same is manufactured" cannot be held to affect the uniformity of the operation of the law. With relation to the evils sought to be prevented, the distinction between such places and the places prohibited is too clear to require discussion.

The writ is discharged, and the petitioner remanded to the custody of the sheriff of Kern county.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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157 Cal. 168

JUDSON v. LOS ANGELES SUBURBAN GAS CO. et al. (L. A. 2,233.)

(Supreme Court of California. Jan. 4, 1910. Rehearing Denied Feb. 3, 1910.)

1. APPEAL AND ERROR (§ 1009*)—REVIEW OF CONFLICTING EVIDENCE.

Though the reviewing court will not weigh conflicting evidence in an equity case, it will consider the contention that the evidence is not sufficient to justify any judgment for appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3971, 3972; Dec. Dig. § 1009.*]

2. NUISANCE (§ 8*)—NOISE AND SMOKE—SIMILAR ANNOYANCES.

The fact that there were electric and steam railroads operated near plaintiff's premises, and may have been a source of discomfort to him, is no defense to an action for a nuisance caused by noise and smoke from a gas plant.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 8; Dec. Dig. § 8.*]

3. NUISANCE (§ 33*) — NOISE AND SMOKE — SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a judgment restraining a nuisance caused by noise and smoke from gas works and for damages.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 89; Dec. Dig. § 33.*]

4. NUISANCE (§ 4*)—NOISE AND SMOKE—NATURE OF INJURY.

A thing may constitute a nuisance to the owner of a dwelling, though it has not affected the health of the occupants of such dwelling.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 32; Dec. Dig. § 4.*]

5. NUISANCE (§ 4*)—NOISE AND SMOKE—NATURE AND EXTENT OF INJURY.

A gas factory may constitute a nuisance as to a dwelling, though the noise and smoke therefrom is intermittent, owing to periodical cessation of work, and variation in the direction of the wind.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 26, 28; Dec. Dig. § 4.*]

6. NUISANCE (§ 4*)—NOISE AND SMOKE—NATURE AND EXTENT OF INJURY.

A gas factory may constitute a nuisance as to a dwelling owing to noise and smoke, though no damage to the dwelling house or herbage on his land results nor to the rental or saleable value of the property.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 26, 28; Dec. Dig. § 4.*]

7. NUISANCE (§ 3*)—MANUFACTURE OF GAS.

Though a gas factory is not a nuisance per se, and is a legitimate and necessary business, it is subject to the rule that the owner of property must use it in such a manner as not to injure that of another.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 12; Dec. Dig. § 3.*]

8. NUISANCE (§ 7*)—MANUFACTURE OF GAS—EFFECT OF PRECAUTIONS.

That the most approved appliances and methods for the manufacture of gas have been adopted does not justify the continuance of such manufacture where it remains a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 7; Dec. Dig. § 7.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by William J. Judson against the Los Angeles Suburban Gas Company, the California Coke & Gas Company, and others. Plaintiff had judgment, from which and an order denying a new trial defendants appeal. Affirmed.

Porter, Sutton & Cruickshank, for appellants. Emmet H. Wilson and B. H. Donnell, for respondent.

MELVIN, J. This is an action for damages caused by an alleged nuisance and for its abatement. The action was dismissed as to defendants T. S. C. Lowe and Thaddeus Lowe. The California Coke & Gas Company answered the complaint herein, denying substantially all of its allegations, and E. E. Crandall, as receiver of the Los Angeles Suburban Gas Company, intervened and filed his answer. He does not appeal, however. Plaintiff recovered judgment for $750 damages, and defendants were enjoined from maintaining the nuisance. This appeal is from the judgment and from the order denying a motion for a new trial.

The complaint alleged that the California Coke & Gas Company, as lessee of the other corporation, constantly managed, conducted, and operated certain gas works in such a manner as to precipitate about and above the property of plaintiff dense smoke and noxious, offensive gases. It was also alleged that the manufactory was so operated as to produce loud and disturbing noises, and roaring and rumbling sounds which reached and penetrated to plaintiff's house and studio, and, together with the smoke, gases, fumes, etc., disturbed plaintiff and his family, making the house and studio places "devoid of quiet, peace, and rest."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff's property is located upon the bank of the Arroyo Seco in the city of Los Angeles. Mr. Judson is an artist, and at the time of the trial and for a long time prior thereto he had been occupying his studio building as a home, letting his adjacent dwelling house to a tenant. The gas works are about 900 feet from plaintiff's property across the Arroyo in a southwesterly direction from his residence and studio. There is no proof that plaintiff's land has depreciated; that its rental value has been impaired; nor that the health of Mr. Judson or that of any member of his family has been injuriously affected by the operation of defendants' gas works. He did assert, however, that the smoke, odor, and noise produced by the manufacture of gas at defendants' works interfered with his comfortable enjoyment of his property. The testimony adduced before the chancellor was of a conflicting character, and while, of course, we cannot, under our invariable rule, pass upon its weight, we must consider appellants' contention that the evidence is not sufficient to justify any judgment whatever in favor of respondent. Mr. Judson testified that the works were in the Arroyo 50 or 60 feet lower than his property; that nearly every day since the erection of the gas works, at night as well as during the hours of daylight, he had noticed offensive odors; and that the annoyance had gradually increased all the time. Speaking of the noises he testified: "The noises that I complain of consist of a continuous roaring sound and occasional explosions. The roaring is almost continuous, and the explosions are frequent. The roaring sounded like the rumbling of a train, and the explosions sometimes like a shot out of a pistol, sometimes like a shotgun, sometimes like an explosion of dynamite, and again as though it were a large mass of gas that made a much heavier explosion, but not so sharp. I heard these explosions sometimes frequently and sometimes there would be quite a period when it did not occur. These noises disturbed my sleep at night. The members of my family were also disturbed by these noises." He further said: "The smoke disturbed me whenever the wind carried it our way. The smoke was black and white and yellow. We noticed it very soon after the gas works were built, and during the period of a year and a half prior to last January it was occasionally so thick as to obscure the landscape. These periods when it obscured the landscape probably lasted for from 20 minutes to an hour." While unable to state any exact amount of pecuniary damage, Mr. Judson testified that the smoke, odors, and noise had disturbed him in his occupation as an artist. He was corroborated by a number of his neighbors, some residing nearer and some farther from the gas works than he did. Their testimony greatly resembled that of plaintiff, except for the immaterial variations which one expects in accounts given by different people of physical conditions and happenings. The smoke was described as being of a "very penetrating and unpleasant" odor, and as being at times so thick that "it is impossible to see across the road," or as sweeping over the Arroyo "in such quantities as to strongly suggest a London fog." The noise was described variously by the different witnesses, but all agreed that at times annoying explosions occurred, one lady likening the sounds to a Fourth of July celebration.

While it was shown on behalf of the defendants that the main line of the electric railroad between Los Angeles and Pasadena passed very near plaintiff's studio; that the tracks of two steam railroads were within a few hundred feet of his property; and that between the gas works and his home a wagon road crossed the Arroyo on a wooden bridge —we cannot say that the sounds inevitably coming from such sources would be as annoying as those produced by the explosions, clanking of machinery, and hissing produced, according to the testimony, by the operation of the gas works. The fact that other sources of possible discomfort to plaintiff existed in the neighborhood of his property is no defense to an action of this kind. Robinson v. Baugh, 31 Mich. 294. Nor can we say that the annoyance suffered by plaintiff was of a slight character and not such as justified the injunctive relief granted nor the damages awarded. Considered as a whole, we think the evidence on behalf of the plaintiff amply sufficient to sustain the judgment. In order that a judgment of this character may be upheld, it is not necessary that the health of plaintiff or of members of his household should have been impaired. It is sufficient if the odors, sounds, and smoke were offensive to the senses. Meigs v. Lister, 23 N. J. Eq. 201; Coker v. Birge, 9 Ga. 428, 54 Am. Dec. 347; Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 206; Bohan v. Port Jervis Gaslight Co., 122 N. Y. 23, 25 N. E. 246, 9 L. R. A. 711; Hayden v. Tucker, 37 Mo. 221.

Admittedly the discomfort caused respondent by the operation of the gas factory was not constant. This makes no difference. It has been repeatedly and we think most properly held that where a nuisance is intermittent, owing to periodical cessation of work, variation in the direction of the wind and the like, nevertheless injunction will lie. The learned chancellor observed in Ross v. Butler, 19 N. J. Eq. 302, 97 Am. Dec. 654: "I am not aware of any authority or established principle, holding that a clear, unmistakable nuisance, which it is intended to commit periodically, will be permitted because it does not exist the greater portion of the time, but only for a small portion of it. This court will not determine that a family shall have their dwelling house made uncomfortable to live in for twelve hours, once in two weeks, or that they shall protect themselves by closing the house tightly, and remaining indoors for that time. It is surely no justification to a wrongdoer that he takes away only one twenty-eighth of his neighbor's property, comfort, or life."

The fact that respondent proved no damage to the dwelling house or herbage on his land nor to the rental, or vendible value of the property, does not prevent the court from awarding damages. In the very nature of things the amount of detriment sustained is not susceptible of exact pecuniary computation. It is for the court to say what sum of money the plaintiff should receive in view of the discomfort or annoyance to which he has been subjected. Wood on Nuisances, §§ 563, 866; Tuebner v. Cal. St. Ry. Co., 66 Cal. 175, 4 Pac. 1162; Gavigan v. Atlantic, etc., Co., 186 Pa. 604, 40 Atl. 834; Berger v. Minneapolis, etc., Co., 60 Minn. 296, 62 N. W. 336; Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094.

There is nothing in the habeas corpus proceedings in Re Smith, 143 Cal. 368, 77 Pac. 180, which conflicts with the conclusion reached by us in the case at bar. This court held in the Smith Case that an ordinance passed by the board of supervisors of the county of Los Angeles prohibiting the erection of gas plants in that locality was invalid as being unreasonable. A gas factory does not constitute a nuisance per se. The manufacture in or near a great city of gas for illuminating and heating is not only legitimate, but is very necessary to the comfort of the people. But in this, as in any other sort of lawful business, the person conducting it is subject to the rule sic utere tuo ut alienum non lædas, even when operating under municipal permission or under public obligation to furnish a commodity. Terre Haute Gas Co. v. Teel, 20 Ind. 131; Attorney General v. Gaslight & Coke Co., L. R. 7 Ch. Div. 217; Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51. Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance. Evans v. Fertilizing Co., 160 Pa. 223, 28 Atl. 702; Susquehanna Fertilizer Co. v. Malone, 73 Md. 276, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 594; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533.

The judgment in this case enjoins the appellant "from conducting and operating the gas works and manufactory * * * in such a manner as to cause or permit smoke, gases or offensive smells or fumes to be emitted therefrom or to be precipitated therefrom upon the property of the plaintiff." Counsel for appellant place upon this language the construction that it absolutely enjoins the gas companies from causing or permitting any smoke or gases to be emitted from the works, regardless of its reaching respondent's property or not. We think this interpretation of the injunction is not justified. The appellants are enjoined from maintaining the same sort of nuisance that had caused the annoyance to plaintiff. The injunction would perhaps be clearer if read with the first "therefrom" omitted, but we think the meaning is obvious. While the language does not limit the production of gases, etc., to such as would be inoffensive to plaintiff, it is clear from the evidence of appellants' own witnesses that the plant is operated with the least possible amount of escaping smoke, fumes, and gases. When so operated, it has been a nuisance injuriously affecting respondent. Therefore any conduct of the processes of manufacture for which that plant is equipped would but repeat the injury and annoyance to him. Consequently the injunction is not too broad, as it might be if applied to some factory in which the injurious effects complained of might be prevented without abating the operation of the works entirely. In this essential particular the case at bar differs from McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795, and that case is therefore not authority for the proposition that the injunction is too broad. Here it is conceded by appellant that the works cannot be operated at all without producing the conditions which obtained when plaintiff commenced his action.

The judgment and order are affirmed.

We concur: LORIGAN, J.; SLOSS, J.; SHAW, J.

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157 Cal. 174

RUSSELL et al. v. ROSS et al. (S. F. 4,911.)

(Supreme Court of California. Jan. 4, 1910. Rehearing Denied Feb. 3, 1910.)

1. PRINCIPAL AND SURETY (§ 161*)—DISCHARGE OF SURETY—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action against a contractor and his surety for a breach of contract, where it was claimed that the surety was released by the act of the plaintiffs in making premature payments to the contractor, evidence *held* to sustain a finding that no premature payments were made.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 161.*]

2. APPEAL AND ERROR (§ 994*)—REVIEW—QUESTIONS OF FACT—VERDICTS AND FINDINGS.

The appellate court will not pass upon the truth of evidence; and, where there is evidence clearly tending to support a finding of fact, the finding is conclusive.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

3. CONTRACTS (§ 306*)—BREACH—COMPLETION BY OTHER PARTY.

Where a party contracting to build a vessel for plaintiffs was unable to do so because of lack of funds, and the claims against it amounted to as much as it would probably sell for on a forced sale, so that it was the most economical thing for either plaintiffs or the surety on the contractor's bond to complete the boat, plaintiffs, being in duty bound to make the loss as light as possible, did right, on the refusal of the surety to do anything, in completing the boat at their own expense.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 306.*]

4. CONTRACTS (§ 245*)—ABANDONMENT—FACTS CONSTITUTING NEW CONTRACT.

Where a party contracted to build a vessel for plaintiffs, but abandoned the contract because of lack of funds, and plaintiffs completed it themselves, the fact that the contractor voluntarily and without compensation remained on the job as overseer did not constitute a new contract superseding the former one.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 245.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Fred Russell and another, copartners, under the title of Russell & Rogers Company, against George Ross and another. From a judgment for plaintiffs, and an order denying defendants' motion for a new trial, defendants appeal. Affirmed.

Myrick & Deering, Edward F. Treadwell, Mastick & Partridge, and H. W. Hutton, for appellants. Walter H. Linforth and Jackson Hatch, for respondents.

MELVIN, J. This action was brought to recover damages for an alleged breach of contract. The jury found a verdict for $10,000 in favor of plaintiffs, and this appeal is prosecuted from the judgment, and from the order denying defendants' motion for a new trial.

It appears that in May, 1902, plaintiffs entered into a contract with defendant Ross for the building of the hull of a vessel at Coos Bay, Or., the price to be $26,725. The Pacific Surety Company executed and delivered to plaintiffs a bond in the sum of $10,000 conditioned upon the faithful performance of the contract by Ross. The agreement between plaintiffs and Ross provided for payments at various times during the building of the vessel, each payment, except the first, depending upon the amount of progress made upon the work. The first four payments, amounting to $12,500, were duly made under the terms of the contract. On September 13, 1902, before the fifth payment became due, Ross telegraphed to plaintiffs for an advance. Plaintiffs took the telegram to Messrs. Foard & Anderson, who were sureties of Ross to the Surety Company, showed them the message, and informed them that, in the opinion of plaintiffs and their lawyers, no prepayment of the installment could be made by plaintiffs to Ross without releasing the Surety Company from liability under the bond. After some discussion plaintiffs loaned Foard & Anderson $2,500, taking the promissory note of the latter firm for that amount, and this money was sent by Foard & Anderson to Ross with the knowledge of plaintiffs. Subsequently the fifth installment became due, and Ross requested that it be paid to Foard & Anderson. This was done by cancellation of the aforesaid note. No interest charge was made. On October 6, 1902, a similar transaction occurred, whereby Foard & Anderson borrowed $1,000 and sent it to Ross, giving the plaintiffs their promissory note as before. Later Ross and Messrs. Foard & Anderson wrote to plaintiffs, asking for more money, and plaintiffs refused either to loan or advance any additional sum. About November 2, 1902, plaintiffs learned that the vessel had been attached. Thereupon Mr. Russell went to Oregon; paid $4,038.57 demanded by the attaching creditors, and settled other claims. These amounted in the aggregate to $9,178.30. He then placed Captain Peterson in charge as representing his firm, and proceeded to finish the hull, at a cost of $14,000. Ross remained as overseer or foreman without compensation. Ross' own testimony on this point is as follows: "I * * * had a pride in the boat, and would like to finish it if I was able. He then said he did not see anything to be done but finish the boat, and I offered him my services without charge or expense to him in completing her. I then went to Prosper with him, and he drew checks, paying off the claims and liens on the boat." Ross also remained on the vessel until its delivery in San Francisco. Upon these facts and others that will appear later in the discussion the District Court of Appeal reversed the judgment, and the order denying a new trial.

In the opinion rendered by the District Court of Appeal it is held that the transaction between Russell & Rogers Company and Messrs. Foard & Anderson, by which the latter were loaned amounts to be advanced later by them to Ross, with the knowledge of Russell & Rogers Company, amounted to the same thing as a payment directly to Ross by respondents, in violation of the terms of the contract; and that the Surety Company was thereby released from all liability under its agreement of suretyship. The case principally relied upon for the support of these conclusions is County of Glenn v. Jones, 146 Cal. 518, 80 Pac. 695. In opposition to these views, respondents contend that the question whether or not premature payments were made is one dependent for solution upon conflicting evidence, and that the jury having found no violation of the building contract, an appellate tribunal cannot set aside that conclusion. They also contend that, even granting the prepayment of amounts due under the contract, such advances do not of themselves release the sureties. Their theory is that no such release occurs unless prepayment places the surety company in a different and more disadvantageous position than that which it would occupy if no untimely payments had been made.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It seems to us that this case presents a sharp conflict of evidence. On the one hand there are declarations on the part of plaintiffs which seem to indicate that they believed their dealings were in effect directly with Ross. In answer to a letter of Foard & Anderson plaintiffs wrote on October 17, 1902: "We are in receipt of your letter requesting us to make a further advance to George Ross. In reply thereto would say that we have already paid all that the contract requires, and advanced $1,000 besides, and we cannot do anything more. Very truly yours, [Signed] Russell & Rogers Company." After the completion and launching of the vessel plaintiffs wrote to the Surety Company, "We have paid to George Ross the sum of $13,747.67 in excess of the contract price, and we now make demand on you for the payment of the amount of your bond, $10,000." They also sent to the persons for whom they were having the vessel built a statement containing, among other things, the following items: "Total cost of construction $40,472.67; contract price $26,725.00; amount George Ross exceeded his contract $13,747.67." And in the first complaint filed by them appeared the statement that "said plaintiffs were compelled to and did pay to the said George Ross in the completion of said boat a sum exceeding $10,000 in excess of the said contract price of $26,725." There were other circumstances supporting the theory that plaintiffs considered their advances as being made to Ross, and not to Foard & Anderson. These are indicated as follows in the opinion of the District Court of Appeal: "And as to the payment of $9,178.30 by plaintiffs when Russell went up and met Ross at Coquille, Or., this was paid by plaintiffs by giving checks to Ross, drawn in his favor, and by him indorsed to the parties to whom the bills were owing. Not only this, but all further sums for material and labor were paid by plaintiffs. The bills were made out against Ross, and certified to by him as being correct. The receipts were given to him and in his name. The amounts were charged on plaintiffs' books to him."

Let us now examine the evidence which supports the theory for which respondent contends. Plaintiff Russell testified that shortly prior to September 13, 1902, plaintiffs received a telegram from Ross requesting them to advance to him $2,500 upon the contract; that he took this dispatch to the office of Foard & Anderson, and informed a member of that firm that he had consulted his firm's attorney, and had been advised by the latter that if they made the advance requested by Ross, such action would release the Surety Company from all liability; that on the day following, Mr. Foard called upon plaintiffs and asked them to advance the $2,500; that they refused this request; that Foard & Anderson, who were the sureties of Ross to the Surety Company, requested plaintiffs to make them a loan of $2,500, which they would then advance to Ross and obtain from him an order on plaintiffs for the next payment of $2,500 when it should become due; that they did loan this sum to Foard & Anderson, paying by a bank check drawn to the order of that firm, and taking their note for $2,500 and interest; and that this transaction was entered on the books of Russell & Rogers Company, not as a payment to Ross, but as a dealing with Foard & Anderson. Witness Russell also swore that plaintiffs did not advance said sum of $2,500 or any sum to the defendant Ross, and did not make said loan either directly or indirectly to him, but, on the contrary, made it to Foard & Anderson, and to no other person or persons. He testified additionally that when the fifth payment became due Ross requested that it be made to Foard & Anderson, and that the indebtedness witnessed by the note was duly settled accordingly. Witness Anderson corroborated Mr. Russell in his account of the loan of $2,500. The alleged loan of $1,000 to Foard & Anderson was made, according to Russell's testimony, under practically the same circumstances, and with the same understanding which had existed with reference to the earlier one; but after the note came due, Foard & Anderson having refused to pay it, Russell & Rogers Company brought suit, recovered the amount due upon the note, and collected the judgment.

As to the abandoning of the contract by Mr. Ross, his own testimony was most positive. It appears from the testimony of plaintiff Russell that prior to November 1, 1902, plaintiffs received a letter from Ross, from which they learned that the boat had been attached, that Ross was in financial straits, and that he could not launch the boat unless he could get more money. This letter was immediately shown to the officers of the Surety Company, who declined to do anything, upon the ground that the liability of the company had not matured. Mr. Russell then went to Prosper, Or., where the boat was being built. He found that the hull had been attached for $4,038.50, and that there were clamorous creditors threatening other liens upon the property. The whole amount due he found to be $9,178.30. According to Russell, Ross abandoned the contract, and left the former nothing to do, if the boat was to be completed, but to settle the liens and to proceed with the work on behalf of his firm. While these claims were paid by checks drawn in favor of Ross, the checks were prepared in the presence of Ross and his creditors, and Ross immediately indorsed them and turned them over to the various claimants. Ross testified, speaking of the meeting with Russell, in part as follows: "Q. And you told him, did you not, that you could not complete the boat? A. I certainly did. I was willing to complete the boat but I did not have the means with which to do it. Q. Then you did abandon your contract? A. I was obliged to abandon my contract. I did abandon my contract. I could not do otherwise, as I did not have the money to pay the liens then on the boat and the other claims on which liens were threatened, nor did I have any money with which to complete the boat." After Russell went to Oregon and took charge of the further construction of the vessel, no more payments were made to Ross, but checks were drawn by plaintiffs in favor of those who furnished material and labor for the completion of the hull. This appears from uncontradicted testimony. Ross remained, without compensation, to direct the work, but no money passed through his hands, and no sum was paid out by him after he declared his abandonment of the contract.

It will be seen from the above discussion that the jury was compelled to pass upon a question presented by conflicting evidence. We cannot say as matter of law that the transaction between the plaintiffs and Messrs. Foard & Anderson amounted only to subterfuge, whereby plaintiffs really made untimely payments to Ross. On the contrary, the taking of the notes and the collection after suit of the $1,000 might have indicated to the jurors that plaintiffs were merely accommodating Foard & Anderson, who had an interest in helping Ross to construct the vessel under the terms of the contract. While the written declarations of the plaintiffs and other circumstances might properly form the basis for a different decision upon this point, we cannot usurp the function of the jury, and say that their conclusion was not supported by the weight of evidence. It is not within our province to determine which testimony is true, and which is false. Casey v. Leggett, 125 Cal. 664, 58 Pac. 264. If there is any evidence fairly tending to support the determination of a question of fact, we are bound by it. McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

The jury having found that no premature payments were made by the plaintiffs to the builder, and that the latter abandoned his contract, leaving the hull unfinished, it is not necessary for us to determine whether or not a premature payment to the contractor in a case like this would necessarily amount to a breach of conditions sufficient to exonerate the surety. Respondents present authorities sustaining the proposition that not every advancement made to a contractor by the person for whom he is erecting some structure, under an agreement providing for installments of the agreed price at different stages of the work, amounts to a violation of the contract, whereby the surety is relieved of all liability. Among the cases cited are Bateman Bros. v. Mapel et al., 145 Cal. 241, 78 Pac. 734; Hampton v. Christensen et al., 148 Cal. 729, 84 Pac. 200; Monroe v. Nat. Surety Co., 47 Wash. 488, 92 Pac. 281. The learned judge of the superior court in this case, however, instructed the jurors that if the plaintiffs made any payments to Ross prior to the time the same became due under the terms of the contract, such payments had the effect of releasing the Pacific Surety Company from all liability under the contract, and in such case the jury should find a verdict in favor of the Surety Company. The case having been tried upon the theory that any prepayment would have relieved the Surety Company from the duty of indemnifying the plaintiffs in any sum, and having been decided adversely to the litigant who contended for the correctness of that theory, the question whether the rule announced in County of Glenn v. Jones, 146 Cal. 518, 80 Pac. 695, should be applied in all strictness, or a more liberal doctrine should prevail in the case at bar, becomes purely academic.

Before the contract was abandoned by Ross the Russell & Rogers Company had paid him under the contract $15,000. This sum would have doubtless been almost, if not quite, a total loss to them if they had done nothing at that time, because the claims against the vessel aggregated more than $9,000, and it would indeed be remarkable if the incompleted hull would bring anything like its cost at a forced sale. Under the circumstances the most economical thing, both for the plaintiffs and the Surety Company, was the completion of the work by the firm of Russell & Rogers Company. It was the duty of plaintiffs to make the loss as light as possible. Winans v. Sierra Lumber Co., 66 Cal. 65, 4 Pac. 952. Upon the failure of Ross to complete the contract, and the refusal of the Surety Company to have anything to do with the matter, it was clearly the right of plaintiffs to do the work themselves. 1 Sutherland on Damages, § 91; Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33.

There is no merit in the contention that because Ross remained as foreman without salary, a new contract superseding the ol was made with him. Ross, as we have seen, was a mere volunteer. If he had chosen at any time to leave the place, there was not even such an agreement as would give Russell & Rogers Company the right to demand damages for any loss consequent upon such desertion.

From the foregoing it follows that the

judgment and order from which appeal is taken should be affirmed, and it is so ordered.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.

157 Cal. 182

DOW v. SUNSET TELEPHONE & TELEGRAPH CO. et al. (S. F. 4854.)

(Supreme Court of California. Jan. 4, 1910.)

1. Telegraphs and Telephones (§ 14*)—"Trouble Shooter."

A "trouble shooter" is a person employed by a telephone company to discover and repair minor troubles attending the telephone service, defective telephones, fallen wires, weakness of batteries, and grounding of wires.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 8; Dec. Dig. § 14.*]

2. Electricity (§ 9*)—"Ground."

By "ground," as used in describing difficulties attending the telephone service, is meant the interruption of the current by the crossing of wires or the breaking and falling of a telephone wire to the earth, or against some surface that acts as a conductor of electricity, and interrupts its continued flow along its proper wire.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 4; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 4, p. 3175.]

3. Electricity (§ 18*)—Injuries From Live Wire—Contributory Negligence—Inquiry By Person Injured—"Hot."

An inquiry by an employé of a telephone company sent out to fix a defective telephone, whether there was "anything hot on it," is an inquiry whether the wires of the telephone which he was sent out to fix had become surcharged from any cause with a dangerous quantity of electric fluid.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 10; Dec. Dig. § 18.*]

4. Electricity (§ 9*)—"Fuses."

The "fuses" used in telephones are thin hair-like wires of low fusibility, which immediately melt, and prevent any excess current of electricity from being carried over the telephone wires into the house.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 4; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 4, p. 3019.]

5. Electricity (§ 19*)—Actions—Pleading.

In an action by an employé of a telephone company for injuries received by coming in contact with a telephone wire heavily charged with electricity from contact with a light wire of defendant light company, a complaint which charges rottenness of insulation of the light wire, and that the telephone wire came in contact with the electric light wire by reason of natural sagging "and in consequence of having been suspended too closely above said light wire," charges both companies with negligence in allowing their wires to remain in too close proximity.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

6. Electricity (§ 19*)—Injury from Live Wire—Question for Jury.

In an action against an electric light company for injuries resulting from the escape of electricity from one of the company's wires to a telephone wire thereby injuring plaintiff who was an employé of the telephone company, evidence *held* sufficient to make the question of defendant's negligence in allowing the insulation of its wire to become defective a question for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

7. Electricity (§ 16*)—Injuries from Live Wires—Inspection.

It is the duty of a lighting company carrying electricity by its wires through the streets in dangerous quantities, not only to make the wires safe by proper insulation, but to keep them so by vigilant oversight and repair.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

8. Electricity (§ 17*)—Injuries from Live Wires—Persons Liable.

Where a telephone wire is placed dangerously close to an electric light wire, the continued maintenance of the wires in this position is negligence on the part of both companies, though the telephone wire was the last one placed in position.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 17.*]

9. Electricity (§ 19*)—Injuries from Live Wire—Evidence—Question for Jury.

In an action against an electric light company by an employé of a telephone company who was injured by coming in contact with a telephone wire that had been dangerously charged with electricity through contact with an electric light wire, evidence *held* sufficient to submit the question of contributory negligence to the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

10. Electricity (§ 19*)—Injuries from Live Wire—Admissibility of Evidence.

Plaintiff, an employé of a telephone company, was injured by coming in contact with a telephone wire which had been heavily charged with electricity through contact with one of defendant's electric light wires. One of defendant's witnesses was asked if after the accident he had found one of the telephone wires resting on the light wire, and, on replying that he did, was asked if he removed that wire, to which he also answered that he did. *Held*, that the evidence was not inadmissible as being evidence of subsequent repairs, but was admissible as tending to show the condition existing before and after the accident, as well as the cause of the accident, and tending to show that, when the condition was changed, the trouble was removed.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

11. Damages (§ 132*)—Personal Injuries—Excessive Amount.

A verdict for $3,500 for personal injuries from contact with a live telephone wire is not excessive where the plaintiff was burned to the bone on the back of his head, had burns on his hands, several burns on the sole of one of his feet, which at the time of the action caused him pain when walking any distance, and the arch of one foot had permanently broken down, and his ability to earn a livelihood was much impaired.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by George W. Dow against the Sunset Telephone & Telegraph Company and Oakland Gas, Light, & Heat Company. There was a judgment for plaintiff, and from the judgment and an order overruling a motion for a new trial defendant last named appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

John J. McDonald, Bernal Silvester, Garret W. McEnerney, and Wm. B. Bosley (Samuel Rosenheim, of counsel), for appellant. H. W. Pulcifer, Stanley Moore, and A. H. Orrick, for respondent.

HENSHAW, J. Plaintiff was a "trouble shooter" in the employ of the defendant telephone company. His principal duty was to discover and repair minor troubles attending the telephone service, defective telephones, fallen wires, weakness of batteries, and grounding of wires. Upon the day of the accident, he had been sent to locate and remedy the trouble with the telephone belonging to the Pure Water Company. He had been told by his superior that the telephone of the Pure Water Company was "noisy," and had asked in return if there was "anything hot on it." He was told in reply that it seemed to be "a ground." By "a ground" is meant the interruption of the current by the crossing of wires or the breaking and falling of a telephone wire to the earth, or against some surface that acts as a conductor of electricity, and interrupts its continued flow along its proper wire. By his question whether there was anything "hot" on the wire plaintiff's meaning was whether the telephone wires of the Pure Water Company had become surcharged from any cause with a dangerous quantity of electric fluid. Inasmuch as a telephone wire carries only about 30 volts, there is no danger attendant upon working amongst such wires under ordinary circumstances. But, where a telephone wire comes in contact with a wire belonging to some other kind of system using a high voltage, danger may result. Plaintiff inspected the telephone of the Pure Water Company, found it was working badly, examined the fuse box, and found that the fuses were in good condition. The fuses are thin hair-like wires of low fusibility which immediately melt and prevent any excess current of electricity from being carried over the telephone wires and into the house. He thus became satisfied that there was nothing "hot" on the wire, and proceeded down the street following the course of the wire to see if he could locate a "ground." He thus in his progress came to a test pole—that is to say, a pole with a double cross-arm—between which the wires could be scraped, testers applied, and the direction of the trouble located. He ascended this pole to apply his tester to the Pure Water Company wires in order to ascertain whether the trouble lay between that point and the office of the Pure Water Company, or was further on. On ascending the pole he braced himself with one leg thrust over the cross-arm, and took out his pliers to prepare the Pure Water Company's wires for the application of the tester. Running along this pole were numerous other telephone wires. Amongst them were two running out San Pablo avenue to Sixty-Third street, and there crossing the street and passing over electric light wires belonging to the defendant Lighting Company. These wires were the telephone wires of a schoolhouse known as the "Bay School." As Dow was working with his pliers upon the Pure Water Company telephone wires, his hand, or the instrument which it held, came in contact with the Bay school telephone wires, and Dow fell back unconscious, hanging in the air by the leg which he had thrust under the brace. For the injuries which he sustained by this electric shock he brought this action for the recovery of damages against the telephone company and the lighting company. It was made to appear that the defendant lighting company controlled a wire on Telegraph avenue carrying a high and dangerous voltage of electricity. The telephone company had strung the telephone wires of the Bay school across the street and over the wire of the lighting company and in dangerous proximity thereto. Originally about six or eight inches separated them, but by the sagging of the telephone wires, when the wind blew or other disturbance caused the swaying of the telephone wires, they came into occasional contact with the light company wires, and received from them electricity in quantities extremely dangerous to human life. This occasional contact or "bouncing" contact, as it is called, had been noted by employés of the Light Company, and some 10 days before the accident one had reported it to his superior, the foreman, saying that "somebody would get an awful rap out of it some time." But the foreman replied: "To hell with it. It is up to the telephone company. Let them attend to it." It appears that the trouble with the Pure Water Company telephone was caused by the fact that the Bay school telephone wires running near it were thus occasionally supercharged from the lighting company wire, and the Pure Water Company wires, in turn, by induction drew to themselves some of the electric current, thus causing the defective service through the telephone, or making it, as it was called, "noisy." After the accident, the cause of it, the proximity and occasional touching of the Bay school telephone wires with the lighting wire, was remedied, and an inspection showed that the insulation of the light wires was old and chafed, and that the voltage in them was transmitted to the Bay school telephone wires. Plaintiff charged that the Oakland Gas, Light & Heat Company negligently and carelessly allowed its insulation to become defective, and negligently and carelessly omitted to repair and renew it where it was crossed by the telephone wire; that the insulating material covering the lighting wires had become rotten, defective, and worn out, and in such condition that the current contained therein would escape into any wires which might come in contact therewith; and that this was well known to the defendants and unknown to plaintiff. Trial was had before a jury and verdict and judgment for plaintiff followed, from which latter and from the order of the court denying its motion for a new trial, the Gas, Light & Heat Company appeals.

Appellant first contends that the evidence fails to show any negligence upon its part. Herein it refers to the testimony that the insulation was that usually employed by companies engaged in the same service, and that, notwithstanding the number of years for which this wire with its insulation had been in use, it was still good and sufficient insulation. It is further urged in this connection that, as the rottenness of the insulation is the only charge of negligence against the telephone company, there may not be considered upon this appeal the argued negligence charged to both companies of allowing their wires to remain in too close proximity. But in this appellant is in error. The complaint not only charges the rottenness of the wires, but it further charges that the telephone wires came in contact with the electric light wires by reason of natural sagging "and in consequence of having been suspended too closely above said electric light wire." Much evidence of the existing conditions was freely admitted. It was shown that there was a "jumping arc" of light caused by the contact or close proximity of the two wires, and that this was known to employés of the lighting company and reported to their foreman who had charge of that department, and that an inspection of the lighting company's wire after the accident showed an abrasion or fusing or a rottenness at the place of contact which unquestionably allowed the electricity in dangerous quantities to escape to the telephone wire. But, even treating the case as one where the consideration of the negligence must be strictly limited to the defectiveness of the insulation, sufficient was shown to warrant the presentation of the question of appellant's negligence to the jury. Under the evidence offered by plaintiff, it was established that there was dangerous proximity between the wires of the two companies and occasional contact between them. Moreover, the circumstance of the jumping arc made clear the fact of escaping electricity and called direct attention to the circumstance that insulation must of necessity be at that point imperfect, for the duty of the lighting company carrying electricity by its wires through the streets in such dangerous quantities was not only to make the wires safe by proper insulation, but to keep them so by vigilant oversight and repair. Fitzgerald v. Edison Electric Co., 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; Hebert v. Lake Charles Ice, etc., Co., 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 519; Knowlton v. Des Moines Edison Light Co., 117 Iowa, 451, 90 N. W. 818; Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 59, 48 Am. St. Rep. 114; 2 Cooley, Torts (3d Ed.) p. 1492; Day v. Consolidated Light, etc., Co., 136 Mo. App. 274, 117 S. W. 81; Luehrmann v. Laclede Gaslight Co., 127 Mo. App. 213, 104 S. W. 1128. But, in addition, the charge contained in the complaint of the too close proximity between the wires itself embraced an allegation of negligence. It was shown that the wires were originally strung with six or eight inches space between the light wires and the telephone wires, while it is in evidence that a foot and a half or two feet clearance was necessary for safety, and that five or six feet would be even better if it were possible to gain that distance. It matters not that the telephone wire was the last placed, and that this company, therefore, became in the first instance directly responsible for the negligent work. With knowledge upon the part of the appellant that the wire was thus dangerously close and liable to sag, the continued maintenance of the wires in this position was negligence upon the part of both companies. McKay v. Southern Bell Tel. Co., 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59; Brown v. Consolidated, etc., Power Co. (Mo. App.) 109 S. W. 1032; Hebert v. Lake Charles, etc., Light Co., 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505; City Electric St. Ry. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; Atlanta, etc., St. Ry. Co. v. Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; Brubaker v. Kansas City Electric Light Co., 130 Mo. App. 439, 110 S. W. 12; Hamilton v. Bordentown Elec. Light Co., 68 N. J. Law, 85, 52 Atl. 290; Mayor of City of Madison v. Thomas, 130 Ga. 153, 60 S. E. 461; Gentzkow v. Portland Ry. Co. (Or.) 102 Pac. 614; Richmond, etc., Electric Ry. Co. v. Rubin, 102 Va. 809, 47 S. E. 834; W. U. Telegraph Co. v. Griffith, 104 Ga. 56, 30 S. E. 420. In 15 Cyc. 474, the principle is stated in the following language: "Due care requires those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact is not probable; and where wires maintained concurrently by different parties are so erected or strung that one is likely to fall upon or come in contact with the other, thereby producing possible destructive consequences, either or both of them must make efforts to abate such dangerous condition, and, if an injury occurs through a neglect of such duty, both are liable."

It cannot be said as matter of law that the plaintiff was guilty of contributory negligence. He had satisfied himself that there was no high tension upon the wires which he was examining and was about to test.

There was nothing within his knowledge to lead him to believe that any of the other telephone wires, which in normal conditions were perfectly safe, had become dangerously overcharged, and the question of his contributory negligence was therefore properly submitted to the jury. Paine v. Electric Illuminating & Power Co., 64 App. Div. 477, 72 N. Y. Supp. 279.

The only ruling of the court in admitting and rejecting evidence which calls for specific mention is that where defendant's witness, over its objection, was compelled to testify that after the accident he visited San Pablo avenue near the Bay school, and found one of the telephone wires on the light wire. He was asked the following question, "Did you remove that wire?" and answered that he did. It is contended that this was in the nature of objectionable evidence of subsequent repairs, which is not permissible to show prior neglect as to the condition of the machine or implement. Sappenfield v. Main St. R. R. Co., 91 Cal. 48, 27 Pac. 590; Limberg v. Lumber Co., 127 Cal. 604, 60 Pac. 176, 49 L. R. A. 33; Helling v. Schindler, 145 Cal. 313, 78 Pac. 710. The evidence, however, was not admitted for this purpose nor addressed to this end. It was proper for the plaintiff to prove, as he did, that there had been contact between these wires before the accident, as well as to show contact after the accident. And in fixing the cause for the accident it was quite proper in this connection to show that, when the wires were cleared, the effect was to relieve both the school telephone wires and the Pure Water Company wires of all their trouble. It was evidence, therefore, not of subsequent repairs, but of a condition shown to have existed before the accident, and continuing after the accident, and tending to establish the cause of the accident by further showing that, when the condition was changed, the trouble was removed. See Brunger v. Pioneer Roll Paper Co., 6 Cal. App. 691, 92 Pac. 1043; Dyas v. S. P. Co., 140 Cal. 307, 73 Pac. 972.

The instructions of the court to the jury make up some 44 pages of the printed transcript. It would be unprofitable to discuss the objections which appellant makes to some of them. A reading of them discloses that the jury was fairly and dispassionately instructed upon every phase of the question pertinent for their consideration. Nor can it be said that the verdict in the sum of $3,500 was excessive for the injuries sustained by Dow. He was burned to the bone on the back of the head. He had burns on his hands. Several burns on the sole of one of his feet, one of which was two or three inches long. They still caused him pain when on his feet to any extent or when walking any distance. A breakdown of the arch of one foot resulted and was a progressive and permanent condition. His ability to earn his livelihood was much impaired by the injuries to his hands and feet, and he suffers much pain in the use of them.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; MELVIN, J.; SHAW, J.

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11 Cal. App. 782

SPRAGUE v. HART et al. (Civ. 712.)

(Court of Appeal, Second District, California. Nov. 19, 1909.)

1. CONTRACTS (§ 332*)—ACTIONS FOR BREACH—SUFFICIENCY OF COMPLAINT.

In an action for breach of contract, the complaint alleged that plaintiff entered into seven contracts with defendant trust company to purchase certain lots, and made payments thereon; that the title to the lots was in said company as trustee for defendant H. and others; that the contracts were executed by said company as trustee; that thereafter defendant H. acquired all equitable rights of the other persons except plaintiff when plaintiff and H. entered into an agreement, reciting that plaintiff had demanded a rescission of the contracts of sale; that H. agreed to procure the cancellation of the contracts and restore to plaintiff the payments made, by conveying such of the lots as she might select equal; that on inability of the parties to agree on the valuation, a new agreement was made, under which defendant trust company was to hold the title to the lots; that defendants W. and B. agreed to sell as many of the lots as might be necessary to reimburse plaintiff before a date named; that defendant trust company was to convey the lots as sold, and pay over the purchase money, less expenses, to plaintiff; that under the last agreement plaintiff's original contracts were canceled; that nothing was ever done by defendants under the last-named agreement, and that plaintiff has never been repaid, and that a sum specified is now due her; and that title to the lots is still held in trust by defendant trust company for defendants named and plaintiff to secure payment thereof. *Held*, that the complaint states a cause of action against the three individual defendants upon which a personal judgment might be rendered.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.*]

2. CONTRACTS (§ 338*)—PLEADING (§ 8*)—ACTIONS FOR BREACH—ANSWER.

An answer, which denies that defendant trust company holds title as trustee for the benefit of plaintiff to secure her interests in the lots, or that it executed the seven contracts, and denies that the original contracts for sale were ever canceled, and that plaintiff is entitled to be reimbursed, or that any sum is due plaintiff from defendants H., W., and B., or either or any of them, and alleges that plaintiff never made the selections of lots required by her contract, and that defendant trust company never consented to act as trustee under the last contract, raises no material issue, all the denials being conclusions of law, except as to the seven original contracts, which denial was rendered unimportant by the later contracts and the denial that the seven contracts had been canceled.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 338;* Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. CONTRACTS (§ 245*) — CANCELLATION — EFFECT.

Plaintiff entered into seven contracts for the purchase of certain lots, and made payments thereon. Defendant trust company at the time held title to the lots as trustee for defendant H. and others, and subsequently H. acquired all the equitable rights of the other persons except plaintiff, and plaintiff and H. entered into an agreement by which H. agreed to procure the cancellation of the contracts and restore to plaintiff the payments she had made, by conveying to her such lots as she might select equal. Thereafter a new agreement was entered into, wherein the former contract was made a part of the new agreement, which provided that W. and B. would sell as many of the lots as necessary to reimburse plaintiff before a date specified, and the defendant trust company was to convey the lots sold, receive the purchase money, and pay the same to plaintiff's attorney, less expenses. *Held*, that the portion of the first agreement, necessitating a selection of the lots to be conveyed to plaintiff, was superseded by an agreement in the last to sell the lots and pay the money.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.*]

4. MORTGAGES (§ 386*)—PROPERTY HELD IN TRUST AS SECURITY—POWER OF EQUITY TO FORECLOSE LIEN.

Where a trust company holds title to land in trust to secure to plaintiff the payment of a certain sum, and the debt secured was not paid, and no power of sale in order to reimburse plaintiff was given to the trustee, equity could foreclose the lien or trust to apply the proceeds of sale on the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1151; Dec. Dig. § 386.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Sarah A. Sprague against George E. Hart and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Johnstone Jones and R. P. Jennings, for appellants. John D. Pope and Wellborn, Wellborn & Campbell, for respondent.

TAGGART, J. This is an action to recover the sum of $1,000, alleged to be due on a contract to reimburse and repay plaintiff payments made by her upon the purchase of certain real estate, and for a decree to sell the real estate and apply the proceeds of such sale to the payment of the amount due. Plaintiff had judgment on the pleadings according to the prayer of the complaint, and defendants appeal.

It is alleged in the complaint that plaintiff agreed to purchase from the defendant Merchants' Trust Company certain lots in Ocean Beach, San Luis Obispo county, and for that purpose, on March 28, 1906, entered into seven contracts with that company, and made certain payments thereon, amounting in the aggregate to $1,000; that the title to the lots at the time they were so purchased was held by said trust company as trustee for the defendant Hart and other persons unknown to plaintiff, and that the contracts were executed by the trust company as such trustee, and that thereafter the trust company held, and still holds, the title thereto, in trust for plaintiff and the other defendants named; that on December 15, 1906, the defendant Hart acquired all the equitable rights of all other persons, except plaintiff, in the lots mentioned, the legal title thereto remaining in the Merchants' Trust Company, and on the last-mentioned date plaintiff and Hart entered into an agreement in writing, wherein it was recited that the plaintiff had demanded a rescission of the contracts of sale on the ground that she had been induced to purchase the lots by representations which were not true, whereby Hart agreed that, while not admitting that any misrepresentations had been made, yet in order to avoid litigation, he would procure the cancellation of the contracts of sale, release plaintiff from all obligation to make further payments thereunder, and restore to her the payments which she had made thereon. By this agreement plaintiff was to be reimbursed for such payments, by accepting conveyances to her, free of incumbrances, of such of the lots as she might select, equal in value to the total amount paid by her, together with interest thereon to date of payment.

Owing to the inability of the parties to agree upon a valuation of the lots to be taken by plaintiff under this contract, a new agreement was made on March 23, 1907, wherein the defendants Williams and Brownstone are named as parties of the first part, Hart, the party of the second part, and the plaintiff, of the third part. The inability of the parties to agree under the contract of December 15th is recited. That instrument is made a part of the new agreement, and the purpose of the latter is stated as follows: "Now, therefore, for the purpose of adjusting said disagreement as to valuation, and to avoid further controversy"—the parties mutually agree, etc. By this instrument it is provided that the Merchants' Trust Company is to continue to hold the title to the lots; Williams and Brownstone agree to sell the lots, or as many of them as may be necessary to reimburse the plaintiff the original payments made by her, with interest, such sales to be made as soon as practicable, but in any event before the ——— day of September, 1907, and at such prices as would provide sufficient means to so reimburse plaintiff after paying all expenses and commissions. The Merchants' Trust Company is to make conveyances of the lots as sold, receive the purchase money, less expenses and commissions, which are not to exceed 40 per cent., and pay over the same to plaintiff's attorney for her. This instrument bears the signatures of the parties thereto, and written assent of the trust company to act as trustee thereunder.

It is also alleged that Hart interested the defendants Williams and Brownstone in the property (in a manner unknown to plaintiff) prior to the making of the agreement of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

March 23, 1907; that pursuant to the agreement of December 15th plaintiff surrendered up her seven original contracts to the Merchants' Trust Company and Hart and that they were canceled; that nothing was ever done by defendants under the last-named agreement; that plaintiff has never been reimbursed or repaid the sums paid out on the original contracts, and that the sum of $1,000 is now due to her from the defendants Hart, Williams, and Brownstone on account of the matters and agreements above set forth; and that the title to the lots is still held in trust by the Merchants' Trust Company for the defendants named and plaintiff to secure the payment of the $1,000.

The answer denies that Merchants' Trust Company holds title as trustee for, or to secure plaintiff, or for the benefit of plaintiff in any manner at all, or that it executed the seven contracts on behalf of the other defendants; denies that the original contracts of sale ever were canceled; denies that plaintiff is entitled to be reimbursed the moneys paid on the contracts, or that the sum of $1,000, or any sum, is now due plaintiff from the defendants Hart, Williams, and Brownstone, or either or any of them. By way of further answer, it is alleged that plaintiff never made the selections of lots, required by the writing of December 15th, and that the Merchants' Trust Company never consented to act as trustee under the instrument dated March 23, 1907.

That the complaint states a cause of action against the three individual defendants upon which a personal judgment might be rendered is, we think, apparent. As to Hart there is no doubt, and as to Williams and Brownstone their promise to make sales of the lots and pay over the proceeds to plaintiff brings them within the rule declared in Dunn v. Mackey, 80 Cal. 104, 110, 22 Pac. 64, 66. Says the court in that case: "Counsel contend that the defendant bound himself to pay only on condition that he made a sale of the property. But we do not so construe the contract. He bound himself absolutely to sell and pay over the money within a year, and to pay before the end of the year if he made sale of the property." The distinction drawn between the consideration for the promise in that case and in this does not affect the applicability of the rule, and under it the defendants Williams and Brownstone are liable to the plaintiff for the $1,000 on their promise to repay her, on behalf of themselves and their codefendant Hart.

There is nothing in the contention of appellants that because the last agreement expressly makes the first a part of it, the reimbursement to plaintiff must still be made by a selection of lots by her. This portion of the first agreement is superseded by the agreement in the last to sell the lots and pay the money.

There was no material issue raised by the answer. No allegation of fact necessary to the statement of plaintiff's cause of action is denied by the answer of defendants. All of the denials are of conclusions of law, except the denial that the seven original contracts were executed by the Merchants' Trust Company on behalf of the other defendants, which was rendered unimportant and immaterial by the later contracts, and the denial that these contracts had been canceled. With respect to the latter, the complaint having alleged that plaintiff surrendered them up in accordance with the agreement, it was not material to her right to recover that the defendants failed to cancel them as they agreed to. Neither do the matters set up by way of further answer affect her right. The necessity for the plaintiff to make her selection of lots under the first agreement was removed, and passed from consideration when the second instrument was executed. It was equally immaterial whether the Merchants' Trust Company accepted the trust under the last instrument. The company was not a party to that instrument, and no additional burden was placed upon it thereby if it did not assent to its provisions; but, as trustee for the benefit of plaintiff and defendants, and to secure plaintiff her interests in the lots as determined by the parties in interest, the trust company could have made the conveyances necessary to carry out the last agreement without additional authorization.

The relief which a court of equity may grant in such a case as this is to be determined by the respective rights of the real parties in interest as found and adjudicated by the court, and is not affected by the fact that the title to the property which is given as security is held by a trustee. Bell v. Staacke, 141 Cal. 186, 202, 74 Pac. 774. Under the allegations of the complaint the Merchants' Trust Company held the title to the lots in question in trust to secure to plaintiff the repayment of the $1,000. The debt secured was not paid in accordance with the contract; and, no power of sale for this purpose having been given to the trustee, we see no reason upon which to sustain appellants' contention that the court could not foreclose the lien or trust for the purpose of applying the proceeds of sale upon the indebtedness. To accept appellants' view would be to declare that defendants, by failing to carry out their agreement, could deprive plaintiff of the benefit of her security, which would be contrary to all conscience and equity.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

12 Cal. App. 56

BYRNE v. KNIGHT et al. (Civ. 720.)

(Court of Appeal, Second District, California. Nov. 29, 1909.)

1. Mines and Minerals (§ 83*)—Grub-Stake Contract.

Where under a grub-stake contract plaintiff was to furnish defendant with supplies, and to have an interest in mining claims located by defendant, that after obtaining goods on plaintiff's credit, defendant himself paid therefor did not impair the contract.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 83.*]

2. Mines and Minerals (§ 83*)—Grub-Stake Contract—Evidence.

In an action to have defendants declared to hold in trust for plaintiff an undivided half interest in certain mining locations, evidence *held* not to support findings that no grub-stake contract existed between plaintiff and defendant at the date of the locations, that plaintiff did not furnish the supplies required, and that the locations were not made in the name of the plaintiff as one of the locators.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 83.*]

3. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

Though where the evidence is conflicting the finding will not be disturbed, something must affirmatively appear to support a material finding when attacked, and when such finding is essential to support judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, Inyo County; Walter A. Lamar, Judge.

Action by Jack Byrne against Tom Knight and another. Judgment for defendants and from an order denying a new trial plaintiff appeals. Reversed and cause remanded.

P. W. Forbes and George Edgar Jackson, for appellant. S. E. Vermilyea, Ben H. Yandell (Wellborn, Wellborn & Campbell, of counsel), for respondents.

ALLEN, P. J. The action is one to obtain a judgment decreeing defendants to hold in trust for plaintiff an undivided half interest in certain mining locations. Plaintiff's claim of right thereto is based upon what is known in miners' parlance as a "grub-stake" contract. This contract, the court finds, was entered into between plaintiff and defendant Knight about the 3d of January, 1906, and that plaintiff and defendant performed all conditions imposed upon either up until January 12, 1906, upon which date, the court finds, the contract was abrogated, and that thereafter plaintiff furnished no supplies to Knight; that while Knight did, on and between February 14 and April 26, 1906, locate the following claims, known as "Last Hike" Nos. 1, 2, 3, 4, 5, 6, 8, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44, the "Mars" group, consisting of eight claims, numbered 1 to 8, inclusive, and the "Venus" group, consisting of eight claims, numbered 1 to 8, inclusive, he did not locate during that time "Last Hike" claims Nos. 7, 9, 11, 13, 27, 28, 45, 46, 47, and 48, or "Jupiter" Nos. 2 and 4; that defendant Knight did not locate all or either of the claims found to have been located in the name of plaintiff and himself as equal owners or owners in any other proportion, or at all; that all of said claims were located by said Knight in the name of himself and defendant Joe Simpson; that Knight filed such location notices of the locations made by him in the recorder's office of the "Wild Rose" mining district between the 14th of March and the 2d of April, and that the name of plaintiff did not appear in any of such recorded notices.

The accuracy of the finding of the court with relation to the abrogation of the grub-stake contract, and the further finding that after the 12th of January plaintiff furnished no supplies, and that the locations were not made in the name of plaintiff as originally agreed upon, is challenged. We think, if the findings of the court, to the effect that the grub-stake contract was not in force at the date of the making of the locations, and that plaintiff furnished no supplies between the 12th of January and the dates of the locations, have no support from the evidence, that it is of little materiality whether plaintiff's name was inserted in the location notices posted at the mines or recorded in the mining district. If, as a matter of fact, the uncontradicted testimony in the case demonstrates that the grub-stake contract did exist between the parties at the date of these locations, and that pursuant thereto plaintiff had furnished, as agreed, necessary supplies to defendant, plaintiff's right to the property located during the life of such contract attached, regardless of the character of the location notices actually posted or recorded.

We have examined the record with great care to discover some evidence from which the trial court would be warranted in finding that no grub-stake contract existed at the date of the locations mentioned, or that plaintiff was in default in relation to the obligations imposed upon him by such contract, and we are unable to find any testimony tending to show the abrogation of the contract or plaintiff's default. The uncontradicted testimony in the record is to the effect that, while plaintiff and defendant made the contract, as found by the court, in January, 1906, between that date and January 12th plaintiff was injured and went to Ballarat, a distance of 35 miles from Harrisburg, in the district surrounding which the prospecting was being done; that on the 12th of February defendant Knight came to Ballarat in a wagon driven by a Mrs. Adams, and on that day the grub-stake contract entered into on the 3d of January at Harrisburg was renewed. To use the language of plaintiff, "he told me that me and him was in on anything he found." Pursuant to this, it is in testimony that on that day plaintiff saw one Calloway, who, with a partner named Schober, was operating a little store at Ballarat, and that plaintiff inquired of Calloway—and this is corroborated by Calloway's testimony—if he (Calloway) would furnish Knight with a bill of grub to go prospecting with, and that plaintiff would pay for it later. This Calloway assented to; and it further appears that on the day following, being the 13th of February, Knight applied to Calloway at the store, and asked him if Byrne had made arrangements for some grub for him, and Calloway answered in the affirmative. It then appears that later in the day Knight got the supplies, but they were delivered by Schober, Calloway's partner, who was ignorant of the agreement between plaintiff and Calloway, and after the goods were delivered the same were charged on a tag to Knight and subsequently transcribed upon the books in that way. It further appears that when Mrs. Adams and Knight returned to Harrisburg from Ballarat, Knight told the husband of Mrs. Adams that the reason why he went to Ballarat for the supplies was because Byrne had stood Calloway off for them. It further appears that on the 14th or 15th of February Knight went up about 6 miles from Harrisburg to a locality now called "Skidoo," being the place where these controverted mining locations are situate, and after his arrival there told a fellow miner that he was prospecting for plaintiff and Joe Simpson. It further appears that when he went up to Skidoo he took with him a Dutch oven and some cooking utensils belonging to plaintiff; that the day following, and within a week thereafter, he located all of the mining claims found by the court to have been located by him. The uncontradicted evidence is further that a number of the location notices contained the name of plaintiff as one of the locators in connection with that of Knight and Simpson; and, further, it appears that when copies of the notices were presented a month later for record, the name of Byrne appeared on some of them examined by witnesses. It is true that there is evidence in the record tending to show that after Knight came back to Harrisburg he gave away the supplies obtained at Calloway's and accepted other supplies from Simpson, agreeing to locate for Simpson, and that Simpson was the acting recorder of the district where the location notices were recorded. But even conceding this to be true, a case is presented where a contract is made on the 13th of February, and an arrangement made by plaintiff at the store, the effect of which was to create a liability in favor of the merchant as against plaintiff for the value of the supplies furnished, and that Knight obtained these supplies, and within a time when such supplies would have been sufficient for his sustenance he made the locations, and we find nothing in the record controverting these established facts. It is true that after the locations were made and the notices recorded, and the controversy arose in relation to the interests of the parties, Knight, or some one for him, went to the store of Calloway and Schober and paid the bill; but most certainly, had Knight not paid the bill, plaintiff would have been liable for the goods, under the evidence in the record, and, being liable, and Knight having obtained the goods and made the locations, he could not destroy the force and effect of the contract, nor impair plaintiff's rights, by subsequently, without plaintiff's knowledge or consent, liquidating the demand for the supplies, nor could he destroy plaintiff's rights during the existence of this contract, and while he was subsisting upon plaintiff's supplies by entering into a new contract with Simpson.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

As a summary, then, we are of opinion that the record wholly fails to support the findings that no grub-stake contract existed at the date of the locations, that plaintiff did not furnish the supplies required, and that the locations were not made in the name of plaintiff as one of the co-locators. While we recognize fully the force and effect of the rule that where there is a conflict in the evidence the finding of the trial court will not be disturbed, we recognize another rule, that something must affirmatively appear in the record to support a material finding when the same is attacked by proper specifications, and when such finding is essential in support of the judgment.

The order denying a new trial is therefore reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 54

YEE v. CH. TETZEN & CO. (Civ. 702.)

(Court of Appeal, First District, California. Nov. 26, 1909. Rehearing Denied by Supreme Court, Jan. 24, 1910.)

1. Appeal and Error (§ 1011*)—Review—Finding of Fact on Conflicting Evidence.

The question as to whether title to goods had passed to a buyer when destroyed by fire, where the evidence was conflicting, was for the determination of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Sales (§ 218½*)—Passing of Title—Sufficiency of Evidence.

Evidence *held* to support a finding that title to goods had not passed to the buyer when destroyed by fire.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 218½.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Jue Yee against Ch. Tetzen & Co. From a judgment granting inadequate relief, and an order denying a new trial, plaintiff appeals. Affirmed.

Robert B. Gaylord, for appellant. M. H. Wascerwitz, for respondent.

COOPER, P. J. This action was brought to recover $5,129.92 for vanilla beans, alleged to have been sold and delivered by plaintiff's assignor to defendant corporation at its special instance and request. Plaintiff recovered judgment for only $272, and hence he prosecutes this appeal from the judgment, and from the order denying his motion for a new trial.

The subject of the controversy is 150 tins of vanilla beans, the gross weight of which was 15,838 pounds, the said beans having been shipped from Tahiti, and delivered into the possession of the defendant, and were, while in his possession in his storeroom, burned in the fire of April 18, 1906. There is no dispute as to the fact that the defendant was to pay 34 cents per pound for good vanilla beans. There is no question as to the fact that the defendant had, at the time of the fire, the actual possession of the beans. There is no dispute as to the right of the defendant to have good beans and to reject all bad beans. The question, therefore, before the trial court was as to whether or not the title had actually passed to defendant at the time the beans were destroyed. This question, under a conflict in the testimony, was one peculiarly for the trial court to determine. It determined the question in favor of the defendant, and there is sufficient evidence to support the finding. There is evidence which, if true, shows that the beans were delivered only for the purpose of inspection, and in order that the good beans might be selected. There is evidence that the assignor of plaintiff went to the defendant on the morning of the fire, and some two hours before the beans were burned, and asked the defendant to try to get a wagon and have the beans removed. There is evidence that in a long course of dealing between the parties as to the sale of the same kind of beans in the same kind of tins, defendant always inspected the beans and ascertained the amount of good beans before it paid for them. The facts bring the case so near the line that we cannot disturb the finding to the effect that the title had not actually passed to defendant. To express our views upon the question independent of the determination of the trial court would serve no useful purpose.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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12 Cal. App. 77

POWERS et al. v. PERRY et al. (Civ. 706.)

(Court of Appeal, First District, California. Nov. 30, 1909.)

1. NOTICE (§ 5*)—"CONSTRUCTIVE NOTICE."

"Constructive notice" is a knowledge of such facts that the party possessing such knowledge is conclusively presumed to know other things besides the facts which have been proved to have come to his knowledge.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 3; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 2, pp. 1472–1474; vol. 8, p. 7613.]

2. VENDOR AND PURCHASER (§ 244*) — BONA FIDE PURCHASER — CONSTRUCTIVE NOTICE — EXISTENCE OF EASEMENT.

Evidence *held* not to show that a purchaser of land embracing a spring had constructive notice of another's right, under an unrecorded grant, to take water from the spring.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 610; Dec. Dig. § 244.*]

3. VENDOR AND PURCHASER (§ 229*) — BONA FIDE PURCHASER—NOTICE—EASEMENTS.

The fact that the owner of the land containing the spring had three springs on his land, while the one claiming the easement had no other source of supply, would not affect the parties' rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 477; Dec. Dig. § 229.*]

4. ESTOPPEL (§ 72*) — ACTS MAKING INJURY POSSIBLE—PARTIES EQUALLY INNOCENT.

Where one of two innocent persons must suffer, the loss must fall upon the one through whose negligence it occurred.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.*]

5. JUDGMENT (§ 21*) — WATERS AND WATER COURSES (§ 107*)—EASEMENTS—ACTIONS TO PROTECT RIGHTS—CERTAINTY IN JUDGMENT.

A judgment must be sufficiently certain to constitute an estoppel between the parties and to be enforced by the court, and a judgment placing a servitude upon defendants' land, which gave plaintiffs the right "in and to sufficient water for household purposes," from a spring thereon, but did not state the amount of water plaintiffs would need for household purposes, nor mention the number of stock to be watered, or the number of houses to be supplied, was insufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 7, 8; Dec. Dig. § 21;* Waters and Water Courses, Dec. Dig. § 107.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by William Powers and others against Oliver A. Perry and others. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Reversed.

Wyckoff & Gardner, for appellants. James A. Hall, for respondents.

COOPER, P. J. This action was brought for the purpose of quieting plaintiffs' title to an alleged water right in and to sufficient water from a spring on defendants' land for "household purposes," for the right to convey the same through a pipe to the adjoining lands of plaintiffs on the west, and to enjoin the defendants from in any way interfering with such water right. The case was tried before the court without a jury, and findings filed, upon which judgment was entered for plaintiffs as prayed. This appeal is from the judgment and from the order denying defendants' motion for a new trial.

The main facts, concerning which there is no controversy, are substantially as follows: On the 28th day of April, 1898, one Edward White and his wife were the owners of a tract of land in Santa Cruz county, which tract embraced the lands now owned in separate tracts by plaintiffs, by defendants, and by White. On said day White conveyed to plaintiffs the lands described in the complaint, containing about 54 acres, by an ordinary grant, bargain, and sale deed, which deed contained no reference to any water right of any kind. This deed was immediately placed upon record. On the same day, and as a part of the consideration, White executed and delivered to plaintiffs a written grant to the waters of a spring on the adjoining land retained by White, "sufficient for household use," with the right of ingress and egress to and from the land on which the spring was situated. The plaintiffs entered into the possession of the land so conveyed to them, and used the waters of the spring for household purposes by taking the animals to the spring to water them, and by hauling the water to their dwelling house west of the spring. No controversy arose between the plaintiffs and White as to the use of the waters from the spring.

On November 1, 1900, White, by an ordinary deed of grant, sold and conveyed the tract of land now owned by defendants, and on which the spring is located, to one Patterson, which deed was duly recorded. This deed made no mention of the water right of plaintiffs, nor did it refer to it. Patterson, however, had actual notice of the claim of plaintiffs to the use of the waters of the spring, but he did not know of the water right being in writing. No question, however, arose between Patterson and plaintiffs as to the use of the water. During the year 1904, with the consent of Patterson, the plaintiffs ran a three-quarter inch pipe some 10 or 12 inches underground from a box at the spring down the hill, across a canyon, and thence up the hill, about 150 feet west of the boundary line between Patterson and plaintiffs, where the pipe again emerged from the ground by a standpipe which emptied into a trough on the land of plaintiffs. This pipe, at the point where it leaves the spring, was parallel to a similar pipe which extended from the box at the spring down the hillside to a trough on the Patterson land, where it emerged from the ground and emptied into the said trough for the use of Patterson. This condition appears to have continued without interruption until the 15th day of May, 1906, when Patterson, for a valuable consideration, sold the land to defendants, and executed a deed of conveyance to them. The sale by Patterson was made through an agent, who showed defendants over the premises, but neither Patterson nor the agent spoke to defendants as to any claim of any kind of a water right. In fact it is not now claimed that defendants had any actual notice as to the plaintiffs' claim to the water. Defendants had the records searched, but the grant to the water right claimed was not of record. It was not until July, 1907, that defendants, according to their testimony, discovered, and at the same time objected to, the use of the water through the pipe from their spring. In August, 1907, the plaintiffs placed the grant to the use of the water made to them by White of record.

The defendants thus became the innocent purchasers for a valuable consideration of their tract of land freed of any claim to the water right, unless the finding of the court that they had constructive notice can be sustained. In this regard the court finds: "That said defendant Margaret E. Perry and her husband, Albert A. Perry, had actual notice of circumstances sufficient to put a prudent man or woman upon inquiry as to the fact that the said plaintiffs were adversely, openly, notoriously, continuously, and uninterruptedly using the water from said spring on the land immediately thereafter purchased by said Margaret E. Perry, described and set out in finding No. 2 herein." If the defendants, at the time of their purchase, had actual notice of sufficient facts to put a prudent person upon inquiry, as found by the court, they are bound by the grant of the water to the plaintiffs.

This brings us to a consideration of the main question as to whether the evidence is sufficient to support the finding that defendants had constructive notice. Our Code (Civ. Code, § 19) defines constructive notice as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." It is said in the American and English Encyclopedia of Law, second edition, volume 21, page 582: "Constructive notice has been defined to be no more than evidence of notice the presumption of which is so violent that the court will not allow it to be controverted." The above definition is quoted with approval in the exhaustive note to Le Neve v. Le Neve on the question of constructive notice, in White & Tudor's Leading Cases in Equity, sixth edition, volume 2, part 1, star page 46, and the authorities for it are given as follows: Plumb v. Fluitt, 2 Anst. 438, and Kennedy v. Green, 3 My. & K. 719. It has been defined by our own Supreme Court in Wilkinson v. Thorp, 128 Cal. 224,[1] as follows: "Constructive notice is a knowledge of such facts that the party possessing such knowledge is conclusively presumed to know other things besides the facts which have been proven to have come to his knowledge. The

[1] 60 Pac. 681.

information or knowledge of facts possessed by a party must be such that he is conclusively presumed to have notice of the main fact to which the constructive notice is invoked."

Applying the above definitions, it is clear that the burden was upon plaintiffs to prove that the defendants had knowledge of facts sufficient to raise a conclusive presumption against them as to knowledge of the main fact; that is, the right of plaintiffs to the use of the water for the purposes named in the grant made to them by White. If the defendants had known that the water was being used by plaintiffs, it would have been their duty to make inquiry concerning the matter, and ascertain, or endeavor to ascertain, the true facts. And it matters not how such knowledge was obtained, whether by being told orally, or by seeing the plaintiffs taking and using the water, or by seeing the pipe leading from the spring, or patent evidence of such pipe leading from the spring down the hill off the defendants' land, across the canyon, and up to the trough of plaintiffs. In other words, there must be something visible upon the lands shown to defendants, and patent to any prudent person possessing ordinary faculties, that would at least suggest that plaintiffs were taking the water from the spring. We have carefully read the evidence, and do not find it such as to support the finding.

Defendants looked over the place, and at the spring, but they each testified that they saw no pipe or evidence of any pipe leading from the spring off their place. The agent Mann, who was with them, testified that he did not see any pipe, or anything to indicate a pipe, running from the spring to the lands of plaintiffs. It was in evidence that the end of a three-quarter inch pipe was in the spring; that it could be seen by looking down in the bottom of the spring, but the evidence clearly shows that this end of the pipe was near the end of the pipe conveying the water to the trough on the defendants' own premises, and that they both tapped the spring some 18 inches below its surface, and that the spring was partly covered with a heavy growth of briers and tall grass. It was testified by one or two witnesses that there was a depression in the ground leading off down the hill from the spring toward the trough on defendants' land sufficient to indicate that a pipe had been buried in the ground there; but this was perfectly consistent with the fact that it was only the pipe leading down from the spring to the trough on defendants' land. And not only this, but it was shown without contradiction that the ground at and near the spring, and for some distance between the spring and defendants' trough down the hill, is wet and covered with a heavy growth of briers and grass. It was also shown without dispute that below the trough on defendants' land, and from that west to the plaintiffs' boundary line, the land had been plowed and cultivated, and no evidence was found by any one plowing the land of any underground pipe. One of the plaintiffs testified that beyond the land of defendants and across the canyon there is a "visible depression," where the pipe line runs up the hill; but he did not pretend to state how far this depression extends, nor whether it was visible in any manner at the time the defendants purchased, or whether it was visible from the premises purchased by defendants. It was also shown that plaintiffs had plowed and cultivated the hillside through which the pipe was laid below their standpipe and box down the hill to or nearly to defendants' land. The plaintiff William Powers testified that the depression that he had mentioned in his testimony did not run any further down than from the spring to defendants' trough; that the surface is heavily covered with swamp grass and briers. He further testified that weeds and grass were growing around and hanging over the box at the spring so that you could hardly see the water unless you cleared away the weeds and grass.

It does not seem reasonable to impute notice by such facts. Defendants were not compelled to look down into the bottom of the box to see if the ends of two iron pipes were contained therein; nor were they required to dig up the soil to look for a hidden pipe leading off the property. It is said the standpipe and box were visible across the canyon, and where the water came out of the plaintiffs' pipe into the box on the hillside. Conceding that defendants saw the standpipe and trough on plaintiffs' land, they were not bound to inquire where the water came from simply on account of seeing such trough. It was perfectly natural to suppose that the water came from some other place, or from a spring on plaintiffs' own land.

Nor can the doctrine of adverse user aid the plaintiffs. The right of daily ingress and egress to and from and across the land for the purpose of taking water had not existed for five years when the pipe was laid by the consent of Patterson. This pipe had not been in the ground for five years when this action was brought, and not only this, but the use by a pipe covered with earth was not open nor notorious.

The court erred in allowing the plaintiffs to prove, over defendants' objection, that there are three springs of water upon defendants' land, and that plaintiffs have no other source of supply of water than the pipe line leading from defendants' spring. It is true the case was being tried by the court; but as the court, over defendants' objection, admitted the evidence, and seemed thus to deem it important, we cannot say that the evidence, when admitted, did not influence the decision of the trial judge. The fact that defendants have three springs and plaintiffs none, while a misfortune to plaintiffs, is not a reason for giving plaintiffs the use of that which in law belongs to the defendants. Plaintiffs in purchasing the land paid White for the water. Defendants in purchasing their land paid Patterson for the water. One of two innocent parties must suffer, and in such case the loss must fall upon the one through whose negligence it occurred. The plaintiffs, by taking the ordinary precaution of placing the conveyance to their water right of record, could have avoided this litigation.

The judgment is fatally uncertain, being "in and to sufficient water for household purposes." There is no allegation as to the amount of water the plaintiffs will need for "household purposes." No mention is made of the number of stock to be watered, or the number of houses to be supplied. The plaintiffs might erect several houses for their families or relatives upon the land, or build houses for tenants. It is evident that no one could tell by the present judgment the extent of the servitude sought to be placed upon defendants' land. The judgment must be sufficiently certain as to constitute an estoppel between the parties and to be enforced by the court. Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Steinberger v. Meyer, 130 Cal. 156, 62 Pac. 483. It was said in the latter case: "Indeed, as the judgment now stands, it can only serve the single purpose of furnishing the groundwork for future litigation, and plaintiff is certainly entitled to something more. He is entitled to a plain and explicit adjudication declaring what his rights are to these waters, and what defendants' rights are to the waters, if they have any."

The judgment and order are reversed.

We concur: KERRIGAN, J.; HALL, J.

12 Cal. App. 60

FISCH et al. v. NICE, Justice of the Peace, et al. (Civ. 695.)

(Court of Appeal, Second District, California. Nov. 30, 1909. Rehearing Denied Dec. 30, 1909; Denied by Supreme Court Jan. 27, 1910.)

1. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—DESTRUCTION OF PERSONAL PROPERTY.

A complaint, alleging that defendant willfully allowed his animals "to break into and enter plaintiff's premises" and destroy his personal property, shows a cause of action for the value of personal property which does not involve the title or right of possession of land as affecting the jurisdiction of a justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 85; Dec. Dig. § 36.*]

2. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—INJURY TO GROWING CROPS.

An action, under St. 1907, p. 999, c. 538, for injuries to growing crops by trespassing animals, does not involve the title to, or right to possession of, land as affecting the jurisdiction of a justice within Code Civ. Proc. § 838, as plaintiff need show only actual possession of the land as an incident, and not the basis, of the action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 85, 86; Dec. Dig. § 36.*]

3. ANIMALS (§ 91*)—DAMAGES BY TRESPASSING ANIMALS—PERSONS ENTITLED TO SUE—"LAWFUL POSSESSION."

In St. 1907, p. 999, c. 538, § 2, providing that the owner or other person in the lawful possession of land may recover damages by trespassing animals from the owner or person chargeable with the care of such animals, the words "lawful possession" mean only peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 329; Dec. Dig. § 91.*

For other definitions, see Words and Phrases, vol. 5, p. 4032.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Petition for prohibition by George Fisch and others against P. F. Nice, Justice of the Peace, and others. Defendants had judgment, and petitioners appeal. Affirmed.

Shaw & Brewer and Eshleman & Swing, for appellants. Noland & Birkhauser, for respondents.

ALLEN, P. J. Appeal from a judgment of the superior court of Imperial county. An action was originally commenced by one Wiest, as plaintiff, against Fisch and others in a justice's court of Imperial county. The complaint averred as a first cause of action that plaintiff was the owner of and in possession of certain described inclosed land, upon which was situate personal property belonging to him; that defendants, the owners of certain live stock, willfully allowed such stock to break and enter upon such premises and destroy the personal property of plaintiff to his damage. In a second and third cause of action it was alleged that the live stock belonging to defendants was by them willfully allowed to break into the inclosure of plaintiff and destroy growing crops therein. The demand for damages for all of the alleged causes of action was within $300. Service of process was had upon defendants; they appeared to the action, and thereafter applied to the superior court for a writ of prohibition requiring the justices to desist from further proceedings. An alternative writ was issued, but upon the final hearing the same was dissolved, and judgment ordered for the respondents. From this judgment petitioners for the writ appeal.

Appellants' contention is that it affirmatively appears from the complaint filed that the possession of real estate was involved. Hence the justice was without jurisdiction, and this is asserted upon the authority of Boyd v. Southern California Ry. Co., 126 Cal. 574, 58 Pac. 1046. It may be conceded that if it affirmatively appears from a complaint that title or possession to real estate is involved, the justice is without jurisdiction to hear and determine the action. It is appellants' contention that plaintiff's sole remedy is based upon the act of March 23, 1907 (St. 1907, p. 999, c. 538). This act makes it unlawful for any person owning or having possession of any animal to suffer or permit such animal to break into or enter upon any land owned by or in the possession of another person; and by section 2 it is provided that the owner of, or person who is in the lawful possession of, land trespassed upon in violation of this act is entitled to recover, by action in a court of competent jurisdiction, from the owner of, or person in possession of, or person chargeable with the care of, the trespassing animal. It is insisted, therefore, that because the statute restricts the right of maintaining the action to one in lawful possession, it follows that section 838, Code Civ. Proc., applies, which is that the parties to an action before a justice cannot give evidence upon any question which involves the possession of real property.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We think that appellants' contentions are fully answered by our Supreme Court in Pollock v. Cummings, 38 Cal. 684, cited and approved in Heilbron v. Heinlen, 72 Cal. 374, 14 Pac. 22. The "lawful possession" mentioned in the statute referred to is entitled to a construction by which it may be said that it means only "peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so." Michau v. Walsh, 6 Mo. 346. As to the first cause of action, which seeks to recover for the value of personal property, the injury to which was occasioned by the willful and permissive act of the defendants, we think that the right of action in no wise depends upon the section of the statute referred to, and plaintiff could have maintained such action regardless of the fact as to whether the property was situated upon his own land or upon the land of another. As to the remaining causes of action, which are on account of growing crops, and which may be conceded to be comprehended within the statute mentioned, it was not incumbent upon the plaintiff to show any possession other than actual possession, and this, upon the authority of the cases above cited, may be shown in actions before a justice of the peace; the fact of possession being but an incident, and not the basis of the action. Most especially should this be true in a controversy between one claiming the right of possession of land and a trespasser thereon. We think, therefore, the court was warranted in refusing the writ, and this without reference to the adequacy of the relief afforded the defendants to the action through an appeal.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 87

KOYER v. WILLMON. (Civ. 717.)

(Court of Appeal, Second District, California. Dec. 1, 1909. Rehearing Denied by Supreme Court Jan. 27, 1910.)

1. APPEAL AND ERROR (§ 1195*)—DETERMINATION—EFFECT ON NEW TRIAL—LAW OF THE CASE.

Questions of law arising out of documentary evidence which establishes undisputed facts or the sufficiency of pleadings, when determined by an appellate court, become the law of the case; but, when the fact which is to be decided depends upon the credit to be given the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence, to justify the decision, must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1195*)—DETERMINATION—EFFECT ON NEW TRIAL—LAW OF THE CASE.

In an action to have defendant adjudged to hold a one-half interest in property in trust for plaintiff, where one of the issues was whether a partnership existed between them for the purchase of the property, it was not error for the trial court, in delivering his opinion, to state that the burden was upon plaintiff to establish the allegations of his complaint by a preponderance of evidence, but that under the decision on a former appeal, he must hold that a partnership existed between the parties, and that when the plaintiff had given evidence of that, and that the property in suit was included in the agreement, then the burden shifted to the defendant to establish his case by a preponderance of evidence; this not amounting to a statement that the trial court was bound by the former decision as to a question of the existence of the partnership.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

3. APPEAL AND ERROR (§§ 1030, 1046*)—HARMLESS ERROR.

Irregularity in proceedings, or misconduct of a trial judge, only includes departures from the due and ordinary method of the disposition of an action by which the substantial rights of a party are materially affected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4037, 4134; Dec. Dig. §§ 1030, 1046.*]

4. TRIAL (§ 23*)—COURSE AND CONDUCT—PRESENCE OF COURT STENOGRAPHER.

Where the court reporter was present at the trial of a case, and took stenographic notes of those things required in civil actions by Code Civ. Proc. § 269, it was not error to dismiss him before the oral argument or decision of the case.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 23.*]

5. TRIAL (§ 106*)—ARGUMENT AND CONDUCT OF COUNSEL.

It is not error for the court, in a civil action, to fail to request argument of counsel as to the law of the case, or upon any other matters involved in it.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 106.*]

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6. APPEAL AND ERROR (§ 995*) — REVIEW — SUFFICIENCY OF EVIDENCE.

The weight of the evidence is not a question for the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. § 995.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by A. S. Koyer against J. C. Willmon. From a judgment for plaintiff, defendant appeals. Affirmed.

Sidney J. Parsons and O. P. Widaman, for appellant. Jones & Weller and Robert Young, for respondent.

ALLEN, P. J. Appeal from a judgment and an order denying a new trial. The action was one brought to obtain a judgment of the superior court adjudging defendant to hold an undivided one-half interest in and to certain described property in trust for plaintiff, and for a decree that upon the payment by plaintiff to defendant of one-half of the money advanced it be adjudged and decreed that plaintiff is the owner of an undivided one-half interest in said property.

This case was once heard upon appeal in the Supreme Court, and is reported in 150 Cal. 785, 90 Pac. 135. The complaint in the record upon this appeal is the same as was the complaint in the case above cited. In that case upon appeal the Supreme Court held that the allegations of the complaint, if true, were sufficient to make plaintiff and defendant partners, and that a partnership for the buying and selling of lands may be proved by an agreement resting in parol. After the remittitur was sent down in the case above mentioned, defendant filed an amended answer controverting certain matters not theretofore put in issue by the original answer. Having in view these facts, there should be no controversy over the proposition that, in any case, the questions of law arising out of documentary evidence which establishes undisputed facts, or the sufficiency of a complaint to constitute a cause of action, when once determined in an action by an appellate court, become and remain the law of the case. But it is likewise true that, "when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision." Allen v. Bryant (Sup.) 100 Pac. 704.

The primary and principal contention of appellant upon this appeal is that the presiding judge in delivering his opinion stated: "In all cases, in the first instance, the burden is upon plaintiff to establish the allegations of his complaint by a preponderance of evidence, but, taking the decision of the Supreme Court in this case into consideration, which binds me and is the law of the case, I must hold that a partnership has been established and did exist between the plaintiff and defendant for the purchase of lot 14. * * * The Supreme Court says that a partnership did exist. I am bound by that; and, as soon as the plaintiff had given evidence of that, and that the property in suit was included in the agreement, then the burden did shift, and it then became the duty of plaintiff to establish by preponderance of the evidence that he had offered to carry out the agreement—take the property in suit for the joint use of himself and defendant—and that the plaintiff had refused to carry out his part of the agreement. * * * I think, as I say, that as soon as the plaintiff had made his prima facie case, this decision being the law of the case, I am bound by it, and that the burden was upon and remained upon the defendant, and this burden I do not think he has met." From this it is insisted that the trial court was guilty of misconduct, or that there was an irregularity in the proceedings, in that it affirmatively appears that the court erroneously construed the decision upon the former appeal to have the effect of concluding the trial court upon questions of fact involved in the establishment of the partnership, and that, in effect, the trial court undertook to cast the burden of disproving such facts upon the defendant by reason of the language employed in the decision above referred to. We do not so construe the statement of the trial court. It will be observed that the trial court stated a correct legal proposition; that in the first instance the burden was upon the plaintiff to establish the allegations of his complaint by a preponderance of the evidence. This is all the burden which the law does cast upon the plaintiff, and the subsequent remarks of the court, in our opinion, were pertinent, and expressed the law when he said that, as soon as the plaintiff had given evidence that the partnership agreement was established, the burden was cast upon defendant to establish a plea in confession and avoidance, or the facts under which such a plea might be established, even though not formally pleaded.

Appellant concedes that the plaintiff, upon this second trial, "made out at most only the barest possible prima facie case, without the slightest bit of corroborative evidence." When he did make out a prima facie case he was at liberty to rest, and then the duty devolved upon the defendant to either present to the court evidence which overcame the prima facie proof, or tended to show, notwithstanding the existence of the partnership agreement, facts from which it would be inequitable and unfair to enforce its terms; and we cannot conceive how appellant or his counsel could be surprised or labor under a misunderstanding when the court made use of the term "burden of proof shifting," as technically it does not shift, for it is always upon the defendant to overcome the prima facie case made out by plaintiff, or to establish the facts which would avoid the equitable relief sought. The mere use of the term "shifting of the burden," when taken in connection with the affirmative statement of the court that the burden rested upon plaintiff in the first instance, should be given no effect other than as a declaration that the burden was upon the defendant to overcome the prima facie case, or to sustain a plea of confession or avoidance, or facts amounting thereto. It is but justice to the trial court to infer from his language: "The Supreme Court says that a partnership did exist. I am bound by that, and as soon as the plaintiff had given evidence of that, and that the property in suit was included in the agreement, then the burden did shift"—taken in connection with his other statement of the burden being upon plaintiff at all times to establish the allegations of his complaint, that the court only undertook thereby to declare that he was bound as of the law of the case by the decision which declared that certain facts, when established, created a partnership, and not that the mere introduction of the decision of the Supreme Court established a partnership. Any other construction would be unjust to as distinguished a jurist as the one presiding at this trial. The fact appearing in the record that testimony was received by the court upon the part of plaintiff tending to establish the partnership and every other allegation of the complaint, and that the finding of the court is based upon such evidence, conclusively shows to our mind that there was no intention by the court to express, nor could it reasonably be apprehended by counsel that he was expressing, an opinion that the questions of fact presented upon the former trial were conclusive upon this, or that the facts involved upon that appeal should conclude the rights of the parties upon the second trial. It is true that in Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742, it is practically determined that it is an irregularity upon the part of the trial court to express an opinion as to the weight and effect which should be given to the testimony of a witness during the progress of the trial, instead of waiting until its close and the summing up of the case, but we apprehend the doctrine of that case will be carried no further than is there declared, and that the rule laid down in Gay v. Torrance, 145 Cal. 144, 78 Pac. 540, to the effect that an irregularity in the proceedings or the misconduct of the trial judge will only include departures by the court from the due and orderly method of the disposition of the action by which the substantial rights of a party have been materially affected, is the correct one. We see nothing in this record, reading it all together, which would indicate either misconduct or irregularity requiring even as serious a consideration as we have given it, and in its treatment we have accorded to appellant all of the rights by which under any method he might be able to present the questions involved upon appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The second and further contention of appellant is that the court erred in dismissing the reporter before oral argument or decision of the case. We are unable to find any authority in support of the proposition that this was prejudicial error; in fact, in civil cases, we are not prepared to say that it would be error to try a case in the absence of the official stenographer, and certainly not where the record discloses that he was present and took stenographic notes of those things required in civil actions by section 269, Code Civ. Proc. Nor do we regard seriously another specification of error to the effect that the court did not request argument of counsel as to the law of the case, or upon any other matter involved in it.

We see nothing in the record indicating that by any action upon the part of the court defendant was deprived of an opportunity to raise and present any and every question involved in the case. Defendant enumerates 35 specifications of error, all with reference to the insufficiency of the evidence to sustain the findings of the court. The court finds upon the evidence, oral and documentary, the entering into of the agreement set out in the complaint; the understanding and agreement of the parties thereunder; the purchase of the property; the agreement that the title to the same should be taken in a certain manner in trust for plaintiff and defendant; the omission of defendant to cause the title to be so taken, but that, on the contrary, he took the title in himself; and generally as true every allegation of the complaint. As before said, it is conceded by defendant that there was a prima facie case made; that is to say, that there was evidence offered in behalf of plaintiff to show the truth of all the allegations of his complaint, and this concession is made necessary by an examination of the record, from which it appears that there was ample testimony offered upon the part of plaintiff to justify and warrant the court in each and every finding made by it. The weight and effect of all this evidence was for the trial court to determine, and it is not incumbent upon an appellate court, nor is it the policy of the law that it should, nor does the law warrant it in substituting, or seeking to substitute, its construction and opinion as to the weight of the evidence in the record, in opposition to the finding of the trial court, with its opportunities of seeing the witnesses, hearing their testimony, and determining with whom the truth lies.

We see no prejudicial error in the record, and the judgment and order appealed from are affirmed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 93

STERLING v. COLE. (Civ. 718.)

(Court of Appeal, Second District, California. Dec. 1, 1909. Rehearing Denied by Supreme Court Jan. 27, 1910.)

1. Appeal and Error (§ 994*) — Review — Findings—Credibility of Witnesses.

Since the jury could consider plaintiff's motives and interest, and his conduct in failing to speak when good faith under the circumstances required him to speak, in determining the probability of the existence of an agency by defendant's testator to purchase property for him, though plaintiff's testimony as to the agency was not directly contradicted, a finding against plaintiff's contention under such circumstances could not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3902, 3903; Dec. Dig. § 994.*]

2. Principal and Agent (§ 23*)—Actions—Sufficiency of Evidence—Existence of Agency.

In an action to recover money claimed on account of profits made by defendant's testator in purchasing property as plaintiff's agent, evidence *held* to sustain a finding that testator was not plaintiff's agent in purchasing the property.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

3. Appeal and Error (§ 994*)—Findings—Conclusiveness — Credibility of Witnesses.

Appellate courts cannot reverse findings based on the credibility of witnesses; the only remedy being a motion for new trial before the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3902, 3903; Dec. Dig. § 994.*]

4. Trial (§ 191*) — Instructions — Assumption of Facts.

Where, in an action to recover money due on account of profits made by defendant's testator in purchasing property as plaintiff's agent, the evidence was conflicting as to whether testator was plaintiff's agent in puchasing, instructions assuming the existence of the agency were improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 422; Dec. Dig. § 191.*]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by E. C. Sterling against Henrietta H. Cole, as executrix of John A. Cole, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Leonard & Surr, for appellant. Byron Waters and H. M. Willis, for respondent.

TAGGART, J. The exceptions mainly relied upon for a reversal are directed to the insufficiency of the evidence to support the general verdict and the findings of the jury upon the 13 special issues submitted to them. The principal question here involved is: Does the record show evidence to justify the jury in finding that the decedent, J. H. Cole, was not the agent of plaintiff in the transaction in question? Plaintiff testifies directly that he did employ Cole to purchase the property, and he is corroborated in some respects by one other witness; and, unless we can say that the circumstances of the transaction and the other testimony were such that the jury, in the exercise of their exclusive statutory right of judging of the credibility of witnesses (section 1847, Code Civ. Proc.), could discredit the testimony of the plaintiff and his witness, we must reverse the judgment.

While these witnesses were presumed to speak the truth, the jury were nevertheless entitled to weigh their evidence by their motives and interests, and to consider the conduct of the plaintiff in speaking or failing to speak when the circumstances required that in good faith he should do so. There was evidence of this character before the jury from which to determine the weight to be given the testimony of these witnesses. From such evidence the jury could ascertain the probability or improbability of the truth of the testimony, and accept or discredit it, although there was not one direct statement in the evidence in conflict therewith. If, basing their findings upon such evidence, the jury should find that the testimony of plaintiff was not entitled to any consideration, this court would not, for the purpose of reversing the judgment, say the verdict was not justified by the evidence. The inferences to be drawn from the circumstances of the transaction, as to the credibility of the witnesses, are peculiarly within the province of the jury. In other words, jurors are not bound to decide, in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a presumption or other evidence satisfying their minds. Section 2061, Code Civ. Proc. subd. 2.

Plaintiff's cause of action rests upon the allegations that he gave Cole $25,000 to purchase the interest of one H. E. Harris in a ranch in San Bernardino county, Harris' stock in the Rancho Verde Company, a corporation, in which the title to the ranch was held, and also Harris' interest in some government lands, upon which were located certain springs used in connection with the ranch, and that Cole only paid Harris $20,000 for the property, and concealed this fact from plaintiff. In answer to the special issues submitted to them the jury found substantially the following facts: That Cole did not agree to purchase the property from Harris as plaintiff's agent; that he did not purchase it as such agent, but on his (Cole's) own account; that Cole represented to plaintiff that the lowest price at which the property could be purchased from Harris was $25,000, and that this representation was true, and that this was the consideration paid by Cole to Harris but that the consideration did not all consist of money; that the purchase of this property by Cole from Harris was made, together with the purchase of Harris' interests in other properties, and the consideration as a whole for all these properties amounted to about $40,000, and was paid by assuming the payment of certain debts and obligations of Harris, consisting of taxes, interest, mortgage indebtedness, and contingent obligations due on a portion of the lands which were purchased from the Southern Pacific Railroad Company.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The testimony of Harris shows that he and Cole were the owners of all the corporate stock of the Rancho Verde Company, consisting of 600 shares, Cole of two-thirds (400 shares), and Harris one-third (200 shares), and half owners in other property, against some of which there were outstanding joint indebtedness of both for a considerable sum, besides the contingent liabilities that might have to be met if the railroad company should maintain against the government its rights to certain of the lands in question, which were held by Cole and Harris under contract from the railroad. In October, 1902, Harris gave Cole an option in writing on his interests in the properties, as follows: The 200 shares of Rancho Verde stock for $26,100. Interest in all other properties "over there," $15,000. Later on, October 28, 1902, a 30-day option, more formally drawn, and containing a more detailed description of the various properties, was executed by Harris to Cole, wherein Harris agreed to assign and convey to Cole the same property for a consideration of $25,000, and the assumption by Cole of the payment of all amounts due upon any contracts with the Southern Pacific Railroad, and of a mortgage of $20,000, of which Cole and Harris were each obligated to pay one-half. In explanation of these writings Harris testified that the two were, in effect, the same; that is, that the first showed the gross estimated values of the respective property, while those mentioned in the second were reduced to a net consideration. All the uncertainty as to the contingent liabilities was by the second instrument shifted, so that Cole was to assume them, and Harris could count on a fixed net sum. The later was also intended to be a more formal expression of the transaction. These options were executed in the deed of Harris et ux. to Cole, dated November 25, 1902, except that instead of paying the full $25,000 cash Cole only paid $24,000, which Harris accepted as a full consideration under the second option. The testimony of Harris contained evidence to sustain the findings of the jury as to the transactions between Cole and Harris, except, perhaps, the finding that $25,000 was paid by Cole to Harris. That $20,000 was assumed by the parties to be the net value of the Rancho Verde, and $5,000 the net value of the Las Flores, for the purpose of fixing a net consideration in the last option, in no way detracts from the support which the facts here mentioned give to the inferences of the jury. Neither is it material that subsequently it was developed that nothing need be paid on the railroad contracts. It also appears from the testimony of this witness that, while Mr. Potter (who at one time owned 200 shares of the Rancho Verde stock) held his stock the witness placed a net value of $25,000 on one-third of the corporate property by offering Mr. Potter that amount for his stock.

It also appears from the testimony of Harris that he did not consider any proposition of a separate purchase by Cole of the Rancho Verde property and stock, that in the negotiations he wanted to clear up everything between him and Cole, and that all of the operations between him and Cole after giving the option related to the entire property covered by the option. On the other hand, the plaintiff testified that in the negotiations which Cole was authorized to engage in on his behalf the Las Flores property was not mentioned, that he never took any interest in that property, never wanted to buy it, and that it was not included in his purchase. It is clearly established that the purchase by Cole from Harris was made on his own account, whether he had agreed to buy it for plaintiff or not, and, as we have heretofore said, the question upon which the case hinges is: Was the jury authorized to discredit the testimony of plaintiff?

During practically all of the same period of time covered by the transaction mentioned negotiations were being carried on, and the various steps of a sale and transfer by Cole to plaintiff of the stock of the former in the Rancho Verde Company were being taken, wherein and whereby plaintiff paid and agreed to pay to Cole the sum of $75,000 for his 400 shares of the stock of the corporation and his interest in the property used in connection with the Rancho Verde. In the written contract relating to this sale appears a recital that plaintiff had withheld a large sum of money out of the purchase price to cover the contingency that payment might be required to be made on the railroad contracts in order to make good the title of such portions of the lands as were held in this way. In this connection also appears the recital, "that if the party of the second part (Cole), or his heirs or assigns, or the party of the first part, his heirs or assigns, should * * * be the owner of the other one-third interest in the stock of said company. * * *" This contract is dated November 21, 1902, and the plaintiff testified that as early as October 24th or November 1st he began his conversations with Cole relative to the purchase for him of the Harris stock, and that on the same day (November 21, 1902), he authorized Cole to buy the stock for him for $20,000.

In October, 1905, according to the testimony of defendant, practically three years after both of the transactions (the sale of the Cole and the sale of the Harris interests) had been closed, other than the adjustment of this matter as to the railroad contracts between plaintiff and Cole, Cole asked plaintiff to repay him the sum of money so held out by him. Plaintiff replied that he was as anxious to pay it as Cole was to have it paid, but that he would have to see his attorney first. At that time no mention was made by plaintiff of the indebtedness upon which the present action was founded. Again, Mrs. Cole heard her husband address plaintiff by telephone in relation to this matter in December of the same year, and ask him if he had consulted his attorney in regard to the matter. Cole died November 8, 1906, and on January 17, 1907, defendant as executrix wrote a letter to plaintiff reminding him of the frequent requests of Mr. Cole for repayment of the money so withheld, and received a reply under date of January 19, 1907, to the effect that he (plaintiff) claimed that the estate of John A. Cole owed him a much larger sum than it could be reasonably claimed that he (plaintiff) owed to it. Although plaintiff alleges and testifies that he learned the facts upon which he bases this action between August and December, 1905, he does not testify that he made his claim known to any one until after the death of Mr. Cole. Indeed, the evidence does not disclose that he ever said anything about it prior to the letter of January 19, 1907.

We think there is evidence here upon which the jury might have distrusted and questioned the good faith of a claim made against an estate. They apparently discredited the testimony of plaintiff and his witness in regard to engaging Cole to purchase the property for plaintiff. Their estimate of the credibility of these witnesses might have been reviewed by the trial court on a motion for a new trial, but cannot be considered by this court on appeal. Appellate courts have no way of applying the rules by which the credibility of witnesses is determined. If a party is dissatisfied with the implied findings of the jury in this respect, he must find his remedy with the trial judge, who has had an opportunity to hear the testimony at the trial, and seen the witnesses on the stand. Fowden v. Pac. C. S. Co., 149 Cal. 151, 163, 86 Pac. 178.

Plaintiff's cause of action is based upon an alleged fraud of Cole. He discovered the fraud more than a year prior to Cole's death. He was well acquainted with Cole, knew the condition of his health, that he was failing and could not hope to live long, met him several times in the interval, and never mentioned that he claimed this $5,000 until Cole, the only person who could tell the other side of the story, if there was one, was in his grave, when he asserted his right to the return of the money. If we should say as a matter of law that under such circumstances the jury must accept the testimony of plaintiff, and a witness interested with him, as establishing the agency of Cole, then we would also be called upon to say to a jury that they must lay aside their common observation, knowledge, and experience in passing upon the credibility of a witness. We find nothing in the specifications of insufficiency of the evidence to justify a reversal.

The errors of law assigned need not be considered in detail. The question addressed to the witness Harris for the purpose of ascertaining the reason for the different figures given in the two options which he gave to Cole was a proper one. So, also, was the question intended to elicit the understanding with Mr. Potter. This enabled the jury to determine what liabilities Cole assumed in his contract with Harris, and was relevant to the issue, what was paid by Cole to Harris? The other question objected to had the same bearing. No such limitation of the use of special issues as that contended for by appellant here, was declared in Plyler v. Pacific Cement Co., 152 Cal. 125, 92 Pac. 56.

We are of opinion that the instructions given correctly declare the law. No instruction was proper in this case which assumed that an agency was proven. The rule that where there is no conflict in the evidence, or the evidence is such that the jury could not find otherwise, the court may instruct them that an agency exists as a matter of law has no application to this case.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

12 Cal. App. 71

GOSS v. GOLINSKY et al. (Civ. 646.)

(Court of Appeal, Third District, California. Nov. 30, 1909. Rehearing Denied by Supreme Court Jan. 28, 1910.)

1. BOUNDARIES (§ 3*) — COURSES AND DISTANCES.

Course and distances control incidental calls for monuments, except where there is a clear intention shown to make such calls locative, and they also control indefinite and conflicting calls for monuments, where surrounding circumstances show them to be more reliable, or where such is the intention of the parties, or where monuments are called for by conjecture.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 38-40; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*) — COURSES AND DISTANCES.

Distances called for between corners to creeks or roads, unless specially designated in such manner as to show the intention to make them locative, are not such, and will not ordinarily have precedence over a call for course or distance.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 38-40; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 3*)—CALL FOR MONUMENT.

Whenever precedence is given to a call for a monument or natural object over a course or distance, it is because the former is considered more reliable evidence than the latter of the actual survey.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 12; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 3*)—CALLS FOR MONUMENTS.

Where calls for natural objects were intermediate and apparently incidental, and were not referred to or marked in such manner as to identify them or show that the original surveyor considered that they were controlling, and confusion would result from attempting to locate the land from such natural objects, resort must be had to the distances given as controlling.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 3840; Dec. Dig. § 3.*]

5. BOUNDARIES (§ 37*)—EVIDENCE.

Evidence *held* to show that the north line of a section was so located as to include certain disputed territory within another section.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 37.*]

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by Eugenie J. Goss against B. Golinsky and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Braynard & Kimball, for appellant. W. D. Tillotson and James E. Isaacs, for respondents.

BURNETT, J. The action is to quiet title and to restrain defendants from mining upon land claimed by plaintiff. The property involved lies in township 34 N., R. 5 W., M. D. M., and the only question in controversy is whether the mines in dispute are located in section 28 or section 33 of said township. The north line of said section 33 is the south line of said section 28. As admitted by both parties, the issue is to be determined by the solution of the question whether or not the northwest corner of section 33 is a lost corner. It is so asserted by respondents, and the findings and judgment are based upon the proposition that said corner is what is known as a lost corner, and must be located by the system of surveying designated as the system of proportionate measurements. Plaintiff claims that said mines are located upon her land in the northwest quarter of said section 33, basing the contention upon the theory that the lines should be run in accordance with the calls for natural objects set forth in the field notes of the original government survey. According to appellant's theory, the northwest corner of said section 33 is more than 1,000 feet north of the point where it naturally would be in the ordinary course of United States government surveys and as shown upon the map of the original survey and as called for by the courses and distances of the original field notes. It is admitted that the official plat shows all of the sections apparently square and of the normal size, that the southwest and northeast corners of said section 33 are known, and that the northwest corner as located by the court is substantially 80 chains from said known corners, as called for in said field notes, but the ground for appellant's contention is found in these considerations: The said map shows a stream running across the west line of section 33, 12 chains south from the northwest corner of the section as shown upon the map. This stream is marked "creek," where it crosses said line, but some distance below it is marked "Little Backbone Creek." There is a smaller stream, designated as a "gulch," coming from the northeastward a short distance east of said theoretical corner, and it intersects the stream designated as "creek." These streams, as represented on the map, satisfy the distances called for in the field notes of the original survey, but as a matter of fact they are not correctly delineated. The first stream is approximately 17 chains, or about 1,100 feet, further north. The reference to the natural objects in the calls of the deed upon which appellant relies is as follows: "52.50 Cross gulch Course N. E. and descend; 68.00 Cross creek 10 lks wide Course S. E. and ascend." The contention of appellant, therefore, is that the corner should be moved north to correspond with the actual location of said creek, thus making the western boundary of said section 33 more than 1,000 feet longer, as we have stated, than as represented on the map or indicated by the distances in the field notes.

There seems to be no controversy as to the rules by which such discrepancies are to be resolved; the only difficulty being in their application to the facts. If the only question were the relative importance of natural objects or monuments, clearly identified, and courses or distances, the former would be entitled to precedence, but, as stated in the American & English Encyclopedia of Law (volume 4, page 786): "Courses and distances control incidental calls for monuments, except where there is a clear intention shown to make such calls locative, and they also control indefinite and conflicting calls for monuments. They govern where surrounding circumstances show them to be more reliable, or where such is the intention of the parties, or where monuments are called for by conjecture, and not by actually running out the lines upon the ground according to rule. The doctrine that monuments control courses and distances is never followed where to do so would lead to an absurdity, or where they are inconsistent with the meaning of the deed." Jones v. Andrews, 72 Tex. 5, 9 S. W. 170, is cited as an illustration of an incidental call for monuments. It is therein said: "Appellants asked the court to instruct the jury that a call for a natural object, such as a creek, or for an artificial object, such as a well-marked and long-established public road, will control course and distance, and also the lines of the survey, unless such lines are actually marked upon the ground.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

* * * This is only true when they are selected as locative calls, and they are not then always absolute. When they are noted in the field notes as mere incidental calls, in passing, their reliability is weakened, and sometimes rendered wholly worthless. Distances called for between corners to creeks or roads, unless specially designated in such manner as to show the intention to make them locative, are not such, and will not ordinarily have precedence over a call for course or distance."

There are several reasons, in our judgment, why the location of the Little Backbone creek should not have such controlling influence as is claimed by appellant. In the first place, assuming that reference is made to this stream, there is nothing in the field notes to show that it was not a mere incidental call; there is certainly nothing in the surrounding circumstances to indicate an intention to make this stream a locative point. There can be no basis for holding that without reason the United States surveyor, departing from the usual custom, should locate this particular ground in the shape of a distinct trapezoid, increasing the area of section 33 and correspondingly diminishing that of section 28, and introducing irregularity and inequality into the survey, where uniformity and continuity are supposed to be observed as far as possible. But again, the reason for applying the rules to which reference has been made is to ascertain what ground was actually located by the original survey. Whenever precedence is given to a call for a monument or natural object over a course or distance, it is because the former is considered more reliable evidence than the latter of the actual survey. But in the case at bar, without doing violence to the competency of the surveyor, it is impossible to conclude that he actually located said creek as the terminus of said call in the deed, since a mistake of over 1,000 feet in the distance would not be made if any degree of care or skill were exercised. If he had in view this natural object, it is more reasonable to infer that he observed it from a remote point, and guessed at its distance, than that he actually located it by the survey.

There are other circumstances also lending support to respondents' position. Appellant's witnesses, who attached so much importance to said stream, could not and did not locate definitely said northwest corner. The best they could do was to say that it was within a radius of 250 feet from a certain point, and, again, there is evidence of other streams crossing said western line of section 33, and it is impossible to determine which is referred to in the field notes. As already seen, a monument or natural object is of importance only when clearly identified. It is manifestly of no value as an aid to the intention of the parties when its identity cannot be determined. It is true that there is no stream crossing said line at the distance from the southwest corner called for in the field notes, but this circumstance does not aid in the identification of Little Backbone creek as a monument established by the original survey. It would seem, indeed, that if said stream had been intended, it would have been designated by its name, so that this element of uncertainty would not have remained. To recapitulate: The calls for these natural objects are intermediate and apparently incidental calls, and are not referred to or marked in such manner as to identify them, or show that the original surveyor considered that they were controlling. Mendenhall v. Paris, 84 Cal. 196, 23 Pac. 1095. It is clear that confusion would result if we attempt to locate the land from these natural objects, and hence resort must be had to the distances given as controlling. Hostetter v. Los Angeles T. R. Co., 108 Cal. 38, 41 Pac. 330. Since the marks of the government survey are obliterated, and the corner cannot be located by witnesses or by reference to identified monuments, the measurements indicated in the field notes should be followed. Stangair v. Roads, 41 Wash. 583, 84 Pac. 405. The irregular shape of the two sections, and the departure from the accepted method of surveying the government land involved in the adoption of appellant's contention, should lead to its rejection, in the absence of any reliable evidence that such an arbitrary and unusual proceeding was adopted in the original survey. In our opinion, this artificial rule of construction for which appellant contends, if applied here, would only lead to confusion and uncertainty, and unjustly deprive respondents of valuable property, which they have occupied without question for 10 years.

As appellant admits in her brief that "the only question in this case is as to where the north line of section 33 runs on the ground," and as we think it clear that it was so located as to include the disputed territory within section 28, it is unnecessary to consider any other point. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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12 Cal. App. 63

WESTERMAN v. CLELAND et al., County Board of Education. (Civ. 612.)

(Court of Appeal, Third District, California. Nov. 30, 1909. Rehearing Denied by Supreme Court, Jan. 27, 1910.)

1. EVIDENCE (§ 450*)—SCHOOLS AND SCHOOL DISTRICTS (§ 135*) — PAROL EVIDENCE—EXPLAINING CONTRACT.

An entry in the minutes of the county board of education purporting to authorize W.'s employment as principal of a high school, "Ukiah High School, principal P. B. W. $1,500," did not constitute a contract of employment of W. for a year at a salary of $1,500, or any other contract; so that, in an action to recover his salary on the basis of such a contract, parol evidence was admissible to explain the entry by showing what it meant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2079; Dec. Dig. § 450;* Schools and School Districts, Cent. Dig. § 296; Dec. Dig. § 135.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 145*)—TEACHERS—ACTIONS—SUFFICIENCY OF EVIDENCE—TERMS OF CONTRACT.

In an action by the principal of a high school for an amount claimed as the remainder due on his yearly salary, evidence *held* to support a finding that plaintiff's contract of employment was at a monthly salary for no specified time.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 316; Dec. Dig. § 145.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Mandamus by P. B. Westerman against B. L. Cleland and others, constituting the Board of Education of the County of Mendocino. From a judgment for defendants, petitioner appeals. Affirmed.

J. E. Pemberton and Mannon & Mannon, for appellant. Robert Duncan, for respondents.

CHIPMAN, P. J. Mandamus. Petitioner alleged that he was employed by defendants as a teacher and principal of the Ukiah High School for the year ending June 30, 1907, "at a fixed and agreed salary of $1,500 and petitioner accepted such employment"; that he performed all the duties required of him as such principal during said year for which he received the sum of $1,350 and no more, and there is now due him the further sum of $150. He prays for the peremptory writ of the court commanding the defendants "to draw and deliver to petitioner their order on the county superintendent of schools of the said county for the sum of $150 payable to petitioner out of the county high school fund." Defendants deny that petitioner was employed by defendants as a teacher or principal of said school "for and during the year ending June 30, 1907, or for any greater period of time than the pleasure of said Board of Education at a fixed or agreed salary of $1,500, or for any other compensation greater than $150 per month for each month that said petitioner should actually teach." It is further averred in the answer "that it was understood and agreed by and between said petitioner and said board of education that his salary and full compensation was to be $150 per month for the actual time served by him as such teacher and principal as aforesaid; that said petitioner under such employment actually served for the period of nine months, and received therefor in full payment the sum of $1,350." It is further averred that for reasons set forth the board of education on May 10, 1907, duly passed a resolution "that said school should be closed for the year on the 31st day of May, 1907, and that notice of such order and resolution was duly and properly and within the time required by law, served upon said petitioner, * * * and * * * said board of education, for the best interest of said high school, ordered the same closed, as herein alleged and the said school was closed on the 30th day of May, 1907; that said petitioner was thereupon discharged; * * * that for each month during the time that he served as such teacher and principal he accepted and received the sum of $150 as full payment for each month's services, and signed receipts therefor." It is also alleged that petitioner failed to perform his duties in many particulars as set forth, but the court found the fact to be otherwise, and this feature of the answer need not be further noticed.

Except as above stated, the court made findings of fact substantially as alleged in the answer. Plaintiff appeals from the judgment on transcript of the reporter's notes, contending that the findings are not supported by the evidence in respect of the time for which petitioner was employed and the salary to be paid. Plaintiff offered in evidence the minutes of July 2, 1906, and they were admitted over defendants' objection as irrelevant and immaterial. They related exclusively to the salaries for the several teachers of the Mendocino High School. The entry claimed to have some bearing upon the matter reads: "Principal, Robert Butter, at a salary of $1,500.00." Other entries concerning other teachers follow in like form. The minutes for the next day were then admitted and read as follows: "July 3rd, Ukiah High School. Principal, P. B. Westerman, $1,500.00." Other similar entries follow as to other teachers. There is a minute entry relating to the time for beginning the Mendocino High School and then follows this entry: "High School [not designating which high school]. To open Sept. 10th, 3¾ mo. term —one week's vacation—begin Dec. 31st, a mid term vacation of one week—school to close June 30th." The next entry introduced read as follows: "May 10 '07. The following resolution was adopted: Resolved, that the Ukiah High School be closed the 31st day of May, 1907, on account of the lack of harmony among the members of the faculty in said school, and for the further reason that the general disorder and lack of good discipline in said school is causing a serious injury to the school and further that due notice to close said Ukiah High School on the 31st day of May, 1907, be sent to the principal of said high school by the secretary of this board, and through the principal to the several teachers of the school." It appears from the testimony of plaintiff that, after the board had agreed upon his appointment, he called upon the board—"dropped in" as he expressed it—"and the board fixed the calendar for 10 months' term. It ran up to June 28th. They had considerable difficulty getting the calendar so as to get in 10 months." On cross-examination he testified that all the notice he received of his appointment was orally given. "I just went in and shook hands with them, thanked them for the appointment. That is about all there was to it." He testified to nothing relating to the terms of his appointment—either as to his salary or any specified time of employment and upon the foregoing rested his case. A motion for nonsuit was denied, and defendants called plaintiff as a witness, who admitted that there was nothing said to him as to the length of time he was to be employed nor as to his compensation. He inferred that there would be the usual 10 months' term. Witness testified to having received pay monthly for his entire service of nine months, at $150 per month, on requisitions and orders which were identified by witness and introduced in evidence. On the form of these orders is printed the following: "Note. All claims except for teachers' and janitors' salaries must be itemized on the back hereof, or on a bill attached hereto, which are hereby made a part of the order for such claims. Orders for teachers' salaries must give the time taught, and the monthly salary paid. Likewise, monthly salary of janitor." Then follows one of the orders, dated October 6, 1906, directing the county superintendent of schools to draw a requisition on the county auditor against the state school fund in the amount of $150, "in favor of P. B. Westerman, or order, for teaching from Sept. 10 to Oct. 5, during the school year ending June 30, 1907, in the Ukiah High School District. Monthly salary of teacher, $150. Note. Claim for which this order is given was allowed in pursuance of an agreement made at a meeting of this Board on the ——— day of ———, 19—— [Signed by the board]." This order went to the county superintendent for approval, and from him to the county auditor, who approved and ordered it paid by the county treasurer. Indorsed on back: "P. B. Westerman." There were nine of these in substantially the same form on which plaintiff was paid $150 monthly.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Witness Cleland, a member of the board, testified: That at the meeting when plaintiff was employed the question of salary was talked about. "Q. What was said at that time in regard to his (P. B. Westerman's) salary, principal of the high school? A. $150 a month." He was asked on cross-examination why the minutes read as they do and answered that he could not tell for he did not make the entry and had no recollection of having heard the minutes read. "Q. You wouldn't attempt to name a person who said a word about monthly salary? A. I know it was talked. I know I did myself for one. Q. Well, it was an employment for 10 months, wasn't it? A. No, sir; it was employment for principal of the Ukiah High School. Q. For how long? A. No time set." He could not remember that any motion was made fixing salary. "It was talked over and discussed." "Q. You didn't tell Mr. Westerman he was employed at $150 a month, did you then? A. I don't know. I usually talked to him about it." He testified that the school "had been run on a 10 months' basis for several years." It was admitted that plaintiff received notice of the resolution to close the school at the end of May, shortly after its passage, and also read the minute entry, but it was claimed that it did not purport to discharge plaintiff or have that effect. The school was in fact closed pursuant to the order.

Mr. Cotton, a member of the board, testified that he was present July 3, 1906, when plaintiff was employed. He testified: "Q. What salary did the board determine upon for Mr. Westerman as principal of the high school, what he should receive? A. $150 per month." Mr. Greenough, another member of the board, then present, testified that there was nothing said "in substance or effect that Mr. Westerman was employed up to June 30, 1907." He also testified that the board at that meeting, July 3, 1906, fixed plaintiff's salary at $150 per month, and that it was the intention to continue the salary as it had been previously. It was admitted that a 10 months' school had been decided upon by the board.

Plaintiff in rebuttal, over defendants' objection, introduced certain minutes of the board for 1903, 1904, and 1905. The minute entry for July 1, 1903, recorded the election of teachers. As to salary the entry was: "L. W. Babcock, principal, salary $1,500.00 per year," and like entry as to other teachers. The minute entry of July 2, 1904, showed that a resolution was passed "that the salary of the principal of the Ukiah High School be $1,500 per year." The minute entry for July 1, 1905, read: "L. W. Babcock, principal, salary $1,500.00." Objection was made to these minutes as irrelevant and immaterial, on the ground that the contract with plaintiff for 1906–7 could not be established "by proving a contract two years before with somebody else. The Court: That is correct. Objection overruled." Having held with defendants that these previous minutes would not establish the express contract sued upon, the court probably overruled the objection on some other ground not disclosed. Upon the point, it was held in Swafford v. Board of Education, 127 Cal. 484, 59 Pac. 900, that "evidence of employment of plaintiff's predecessor at the same monthly salary, and of his continuing to act for one year, and the wages paid plaintiff as his successor, is irrelevant and immaterial, and does not tend to prove the contract alleged."

It will be observed that plaintiff nowhere testifies or shows otherwise that he was ever told what salary he was to receive or the period of his employment. He relies on the minute entry of July 3, 1906, and inferences to be drawn therefrom and from other minute entries in other years and of July 2, 1906. The entry of July 3d alone is wholly insufficient to establish a contract such as is pleaded. Unexplained, it is meaningless. The admitted facts that he taught the school as principal, was paid $150 per month for nine months, which was at the rate of $1,500 for a school year of 10 months, with such inferences as might be drawn from all the minute entries admitted in evidence, if they may be considered, would probably be sufficient, without further evidence, to support his claim. But there was the uncontradicted testimony of members of the board of education that plaintiff was employed at the monthly salary of $150, and was not employed for any specific period of time; that the school was closed at the end of nine months, and plaintiff performed no service thereafter. If the minute entry of July 3, 1906, had stated what is claimed in the complaint—that plaintiff was employed for one year to be paid $1,500 for the year—the question raised by appellant that the minutes could not be impeached or contradicted might be considered. The minute entry, however, fails to import on its face such a contract as is claimed for it, or, indeed, any contract at all, and it was competent for defendants to show what the contract was, not as contradicting the minutes, but as explanatory thereof.

Appellant cites many cases to show that the minutes of the board of trustees cannot be impeached or varied in a collateral proceeding. Our Code of Civil Procedure makes the entries in public or official books or records made in the performance of official duty by a public officer prima facie evidence of the facts stated therein (Code Civ. Proc. §§ 1920, 1926); and prima facie evidence is defined in section 1833, Code Civ. Proc., to be "that which suffices for the proof of a particular fact until contradicted or overcome by other evidence." See Swamp Land District v. Gwynn, 70 Cal. 566, 12 Pac. 462; Same v. Wilcox, 75 Cal. 443, 17 Pac. 241. We do not think it necessary to affirm or deny the correctness of appellant's position. Appellant concedes that the cases hold that something actually done, but omitted from the record entirely, may be proved orally as not really contradicting the record. In the entry purporting to authorize plaintiff's employment the record is: "July 3rd. Ukiah High School. Principal, P. B. Westerman, $1,500.00." In itself this entry does not establish a contract of employment for the specified time of one year at a salary of $1,500, as alleged in the complaint. Plaintiff found it necessary to introduce the minutes of other years in an endeavor to explain what was here meant. Defendants introduced evidence not to contradict the record, but to supply facts entirely omitted from it. This, we think, it was competent for defendants to do.

Appellant claims that his case is identical with Williams v. Bagnelle, 138 Cal. 699, 72 Pac. 408. In that case "the contract of plaintiff with the trustees was to teach one year from July 5, 1899, at a salary of one thousand dollars, payment to be made by drawing requisitions upon the county superintendent of schools." As we understand the facts in that case, the provisions of the contract were not disputed, except as to the meaning of the term "year," which the court held to mean "school year." The year for which the teacher was engaged it was expected would last nine months, and the trustees apportioned the monthly salary on a basis of a nine months' school; i. e., for each month plaintiff was given a requisition for one-ninth of his salary. The trustees recognized the mistake made, and, agreeably to their contract, drew their warrant for the remaining one-ninth of the salary. The county school superintendent refused to issue a requisition. The questions decided in that case settle most of the questions arising in the present case and appellant could with much confidence rest upon that decision if his facts warranted it. The trial court, however, upon sufficient evidence, found that the contract averred in the complaint was never made, and that the employment was at a monthly salary for no specified time. That the trustees contemplated a 10 months' term and did not order otherwise until in May, 1907, is not inconsistent with the fact proven that plaintiff was to be paid $150 per month for such time only as he taught the school. The order made to close the school the last day of May operated plaintiff's discharge. If the contract had been for the full school year of ten months and his pay to be for a full school year, the case cited would seem to sustain plaintiff, whether the school remained open and whether he was or was not discharged. No such contract, however, was proven.

Respondent makes the point that section 1699 of the Political Code prescribes the remedy and the only remedy to which plaintiff could resort, and therefore the writ will not lie. Williams v. Bagnelle, supra, construes this section, but the decision does not quite touch the point. We do not think it necessary to consider the question.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

157 Cal. 192

LILLY-BRACKETT CO. v. SONNEMANN et al. (L. A. 2,287.)

(Supreme Court of California. Jan. 6, 1910.)

1. JUDGMENT (§ 142*)—DEFAULT JUDGMENT—SETTING ASIDE.

Under Code Civ. Proc. § 473, providing that when the summons has not been personally served on defendant, the court may allow him on terms any time within one year after judgment to answer to the merits, where the summons was served by mail pursuant to an order for publication, defendant was entitled to have his default set aside without any showing of mistake, inadvertence, surprise, or excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

2. LIMITATION OF ACTIONS (§ 165*)—NATURE OF PLEA.

A plea of limitations is an answer to the merits.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 649; Dec. Dig. § 165.*]

3. LIMITATION OF ACTIONS (§ 197*)—STRIKING OUT PLEA—LIMITATIONS.

Code Civ. Proc. § 361, declares that, where a cause of action has arisen in another state, and is there barred, an action thereon shall not be maintained, except in favor of a citizen of the state who has held the cause of action from the time it accrued. *Held* that, where defendant in an action to foreclose a mortgage pleaded limitations, and offered evidence that the cause of action on the mortgage note, which was executed in Massachusetts, would have been barred in that state if its statute of limitation had been the same as that of California, such proof, coupled with the presumption that the law of another state is the same as that of the forum, was sufficient to sustain a finding in defendant's favor.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

4. STATUTES (§ 281*)—FOREIGN LAW—NECESSITY FOR PLEADING.

One relying on a foreign law must allege it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 380, 381; Dec. Dig. § 281.*]

5. LIMITATION OF ACTIONS (§ 183*)—FOREIGN LAW—PLEADING.

Code Civ. Proc. § 458, provides that in pleading limitations it may be stated generally that the cause of action is barred by the provision of the section of the Code relied on. *Held* that, where a foreign law was a part of a plea of limitations, it was sufficiently pleaded by an averment that the action was barred by section 361, providing that, where a cause of action has arisen in another state, and is there barred, an action thereon shall not be maintained, except by a citizen of this state who has held the cause of action from the time it accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 183.*]

6. EVIDENCE (§ 80*)—FOREIGN LAWS—PRESUMPTIONS.

Where the fact as to a foreign law is properly alleged, the presumption that the law is the same as that of the forum must be applied in the absence of proof whether or not the effect will be to sustain a substantive defense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

In Bank. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the Lilly-Brackett Company (a corporation) against A. H. Sonnemann and another. From the judgment, said Sonnemann appeals. Reversed, and cause remanded for new trial.

J. W. McKinley, for appellant. H. L. Camahan, Herbert Cutler Brown, and George H. Moore, for respondent.

PER CURIAM. After this case had been heard and decided in department 1, a rehearing was granted, in order that we might further examine the authorities touching upon the defense of the statute of limitations, and particularly that we might consider whether or not, at the time of the adoption of section 473 of the Code of Civil Procedure, the rule was that given in the decision by the department. A further consideration of this subject has convinced us that the weight of recent authority is overwhelmingly in favor of the rule announced in the decision rendered in department, and that even at the time of the adoption of section 473 the modern doctrine had been adopted in many jurisdictions. That part of section 473 of the Code of Civil Procedure which has reference to the reopening of judgments in cases in which personal service has not been obtained was adopted in 1872, and was based upon section 68 of the practice act (St. 1851, c. 5) as amended. St. 1865–66, c. 619, § 1. The case of Ekel v. Snevily, 3 Watts & S. (Pa.) 273, 38 Am. Dec. 758, cited in the department opinion, was decided in 1842, and was the first Pennsylvania case announcing the rule quoted by Mr. Justice Sloss. The earlier cases of Shock v. McChesney, 4 Yeates (Pa.) 507, 2 Am. Dec. 415, and Bank v. Israel, 6 Serg. & R. (Pa.) 294, cited in Ekel v. Snevily, were decided, respectively, in 1808 and 1820, but do not declare the rule as emphatically as it is set forth in Ekel v. Snevily, supra. Sanders and Davis, Administrators, v. Robertson, 23 Miss. 389, decided in 1852, squarely determined that the plea of the statute is one to the merits. Gourlay v. Hutton, 10 Wend. (N. Y.) 595, was a case in which it was determined that, on an ordinary application to set aside a default, the court will not impose the condition that the statute of limitations be not pleaded. This case was decided in 1833. It will thus be seen that, at the time of the adoption of section 473, Code Civ. Proc., there was a conflict of decision in the various states of the Union; some of the courts of last resort adhering to the doctrine of Brown v. Sutter, 1 Dall. 239, 1 L. Ed. 118, and the cases depending thereon, and others following the rule which is supported by the great weight of later authority, and announced in the opinion rendered in department. We, therefore, adopt the aforesaid opinion as that of the court. It is as follows:

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Sloss, J. This action was brought to foreclose a mortgage given by the defendants Sonnemann and Brackett, to secure their promissory note for $10,000, made on the 7th day of December, 1896, and payable to plaintiff, a Massachusetts corporation, one year after date. Both note and mortgage were executed in Massachusetts. The action was commenced on November 23, 1906. On the same day the court made an order providing for the service of summons on the defendant Sonnemann by publication. Pursuant to this order, which was based upon a sufficient affidavit, the summons was duly published, and a copy thereof, together with a copy of the complaint, were, on November 23, 1906, mailed by plaintiff to Sonnemann at his residence in the state of Washington. Sonnemann did not appear within the time allowed by law, and his default was duly entered, as was that of Brackett, on February 27, 1907, and a decree of foreclosure was made and entered against said defendants. Shortly thereafter Sonnemann appeared, and moved the court to set aside the decree and open the default, and this motion was granted by an order reading: 'It is ordered that the decree be set aside and the default opened, and that the case be tried upon its merits. It is further ordered that the defendant pay all costs that have accrued to this date.' The defendant Sonnemann promptly paid the costs so required to be paid by him, and filed his answer. In it he set up two defenses—that the note and mortgage were not supported by any consideration, and that the cause of action is barred by section 361 of the Code of Civil Procedure. The cause came on for trial some months later, and, before any testimony had been offered, counsel for Sonnemann in effect withdrew the first defense set up in his answer, and placed his reliance solely upon the plea of the statute of limitations. Code Civ. Proc. § 361. At a later stage of the trial plaintiff moved the court to strike out that portion of the answer pleading section 361, upon the grounds that it was not a plea of a meritorious defense, and was filed in violation of the order setting aside Sonnemann's default. The court granted the motion, and entered judgment of foreclosure in favor of plaintiff. Sonnemann appeals from the judgment, maintaining that the court erred in striking out his plea of the statute of limitations.

"The affidavits filed in support of the motion to vacate the default showing that he had in fact received copies of the summons and complaint mailed to him, and alleged circumstances tending to make out a case of excusable neglect on the part of the attorney who had been employed by him to defend the suit. But such mailing, pursuant to an order for publication of summons, was not a 'personal service,' and he was therefore entitled to have the default set aside under the third clause of section 473 of the Code of Civil Procedure, without making any showing of 'mistake, inadvertence, surprise, or excusable neglect.' Gray v. Lawlor, 151 Cal. 352, 90 Pac. 691. We need not consider whether his actual knowledge of the pendency of the proceedings would have authorized the court to attach to its order opening the default any conditions as to the character of the defense to be made. No such conditions were here imposed. The order that 'the case be tried upon its merits' merely followed the Code section (473) which provides that when the summons has not been personally served on the defendant, the court may allow him, within one year after the rendition of the judgment, to 'answer to the merits of the original action.' If the court had discretion to limit the effect of its order opening the default, it had not so exercised its discretion, but had made the order general. The cases holding that it is not an abuse of discretion to refuse permission to amend an answer by adding a plea of the statute (Cooke v. Spears, 2 Cal. 409, 56 Am. Dec. 348; Bank v. Heron, 122 Cal. 109, 54 Pac. 537) are therefore not in point.

"The sole question, then, is whether a plea of the statute of limitations is an answer to the merits. The point is one that has come before the courts of various states; and, while the earlier cases showed a tendency to hold that such a plea is merely technical, and should not be permitted to a defendant who has been in default (Hawes v. Hoyt. 11 How. Prac. [N. Y.] 454; Brown v. Sutter, 1 Dall. [Pa.] 239 [1 L. Ed. 118]; Pennington v. Gibson, 6 Ark. 447; Sheets v. Baldwin's Adm'rs, 12 Ohio, 120; Newsom's Adm'r v. Ran, 18 Ohio, 240; Carr v. Dawes, 46 Mo. App. 351), the decided weight of authority, and particularly of modern authority, supports the view that the statute of limitations is to be viewed as a statute of repose, and, as such is a meritorious defense which may with propriety be set up after a default has been vacated. In Ekel v. Snevily, 3 Watts & S. 273 [38 Am. Dec. 758], the Supreme Court of Pennsylvania thus referred to the rule which had theretofore (Brown v. Sutter, supra) been declared in that state; 'It was said in Brown v. Sutter (1 Dall. 239 [1 L. Ed. 118]) that a judgment will not be opened to let in the statute of limitations; but, as the plea of that statute has since been considered in Shock v. McChesney (4 Yeates, 507 [2 Am. Dec. 415]) and the Bank of Israel (6 Serg. & R. 294) to be no longer an unconscionable one, the rules of practice would scarce be so held now.' This language was quoted with approval in Sossong v. Rosar, 112 Pa. 197 [3 Atl. 768], the court adding: 'Many times since we have commended it as a meritorious defense.' See, also, Ellinger's Appeal, 114 Pa. 505 [7 Atl. 180]. Other cases holding that an affidavit disclosing the defense of the statute of limitations is good as an affidavit of merits on an application to open a default, or that, after a general order opening a default, the statute may be pleaded, are Sanders v. Robertson, 23 Miss. 389; Gourlay v. Hutton, 10 Wend. [N. Y.] 595; Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381 [61 L. R. A. 746]; Garvie v. Greene, 9 S. D. 608, 70 N. W. 847; Mitchell v. Campbell, 14 Or. 454, 13 Pac. 190; Hane v. Goodwyn, 1 Brev. (S. C.) 461. See, also, Benedict v. Arnoux, 85 Hun [N. Y.] 228 [32 N. Y. Supp. 905]; Freeman v. Hill, 45 Kan. 435 [25 Pac. 870] 23 Cyc. 964.

"As has been suggested, most of these decisions rest upon the position, not formerly held, that statutes of limitations are to be viewed favorably as affording to parties who may, by the lapse of time, have lost the ability to procure evidence, repose and security from stale demands. In Wood v. Carpenter, 101 U. S. 135 [25 L. Ed. 807], the Supreme Court of the United States says that: 'Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence; they promote repose by giving security and stability to human affairs; important public policy lies at their foundation; they stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary.' This language has twice been quoted with approval by this court (Shain v. Sresovich, 104 Cal. 406 [38 Pac. 51]; Nichols v. Randall, 136 Cal. 432 [69 Pac. 26]), and the views so declared furnish satisfactory ground for holding that a defendant is answering to the merits when he asserts that the action is barred by lapse of time. The plea in this case being one that was permitted by the provisions of the Code section, as well as by the terms of the order opening the default, it should not have been stricken out.

"We cannot regard the error so committed as harmless. The particular provision relied on by Sonnemann was Code Civ. Proc. § 361, which declares that, where a cause of action has arisen in another state, and an action there is barred by the laws of that state, an action thereon shall not be maintained in this state, except in favor of one who has been a citizen of this state, and has held the cause of action from the time it accrued. The appellant offered evidence tending to show that a cause of action on the note, which was executed in Massachusetts, would have been barred in that commonwealth if its statutes of limitation had been the same as ours. No proof was made of the law of Massachusetts, and it is argued that, as the burden of sustaining the plea of limitation was on defendant, and a necessary part of that defense was the law of another state, no harm was done him in striking out his plea. It is true that the order striking out was made after the conclusion of the trial, and that it did not prevent appellant from putting in any evidence which he desired to offer. But we think his proof, coupled with the presumption that the law of another state is the same as that of the forum (Hickman v. Alpaugh, 21 Cal. 226; Bovard v. Dickenson, 131 Cal. 162 [63 Pac. 162]; In re Harrington's Estate, 140 Cal. 244 [73 Pac. 1000, 98 Am. St. Rep. 51]; Flood v. Dunphy, 147 Cal. 95 [81 Pac. 315]) was sufficient to have sustained a finding in his favor. No doubt this presumption, like that of the continuance of things once shown to exist (Code Civ. Proc. § 1963, subd. 32) is one of evidence, and not of pleading (Fredericks v. Tracy, 98 Cal. 658 [33 Pac. 750]). The appellant, relying on a foreign law, was bound to allege it. But since this law was a part of a plea of the statute of limitations, it was, under the provision of section 458 of the Code of Civil Procedure, sufficiently pleaded by the averment that the action was barred by the provisions of section 361. We see no reason for holding that the presumption of identity of foreign law with that of the forum should not apply as well to this as to any other case. Richardson v. Mackay, 4 Okl. 328 [46 Pac. 546], is cited by respondent to the point that this presumption will not be indulged in support of a 'substantive defense' (i. e., that the action was barred by a statute like Code Civ. Proc. 361), but the case appears to be one in which the defendant failed to allege facts showing that the bar had attached in the other state. Where, however, the fact as to the foreign law is properly alleged, we think the presumption that the law is the same as that of the forum must be applied in the absence of proof whether or not the effect will be to sustain a 'substantive defense.'"

In the petition for rehearing it was urged by respondent that the statute of limitations upon which appellant relied (Code Civ. Proc. § 361) had no application to this case, and that consequently the order striking out the plea of that statute, although made for another declared reason, was not prejudicial to appellant's rights. As this is an action to foreclose a mortgage upon real estate located in California, and as there can be in this state but one form of action to recover a debt secured by a mortgage (Code Civ. Proc. § 726), respondent's contention is that the relief is sought primarily against the land, and that the mortgagor is liable only in the event the proceeds of a sale will not prove sufficient to meet the debt. An action on the debt alone could not be maintained in California. Neither could an action to subject land in California to the payment of a debt be maintained in Massachusetts. It is argued, therefore, that the action is indivisible and founded upon the note and mortgage, constituting one inseparable contract (Meyer v. Weber, 133 Cal. 685, 65 Pac. 1110; Trinity County Bank v. Haas, 151 Cal. 555, 91 Pac. 385), and that, as no suit upon the mortgage and note could be tried in Massachusetts, a statute of limitation of that commonwealth applicable to personal actions can have no relevancy to the suit in California. This position finds support in other states. For example, in Gillett v. Hill, 32 Iowa, 220, it was held that, in an action somewhat similar to this, an answer setting up a plea of the New York statute to the note was insufficient because it failed to state that the law of New York also barred the foreclosure of the mortgage. That case was cited in one of the briefs in Allen v. Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646, and in that case this court said: "In this state, when an action on a promissory note, secured by mortgage of the same date upon real property, is barred by the statute of limitation, the mortgagee has no remedy upon the mortgage. Lord v. Morris, 18 Cal. 482; Heinlin v. Castro, 22 Cal. 100. The debt is regarded as the principal, and the mortgage is a mere incident. When the debt is barred, the remedy upon the mortgage is also barred. McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754. If, therefore, respondents could not maintain an action in New York for the recovery of the money due, they could not maintain an action in this state to foreclose the mortgage. Code Civ. Proc. § 361."

In San Jose Deposit Bank of Savings v. Bank of Madera, 144 Cal. 577, 78 Pac. 7, the following language was used: "We have here, therefore, the ordinary case of a mortgage given to secure a debt; and, as the debt in this case rests merely in parol, and not upon a written instrument, it was barred by lapse of time in two years, and, being thus barred, the lien of the mortgage sued on was 'extinguished' at the time of the commencement of this action. Civ. Code, § 2911. We have not overlooked the authorities cited by respondent, and have examined many others on the subject. There are decisions in which it has been held, in the absence of statutory provisions to the contrary, that the bar of a debt by limitation is not such a 'discharge' thereof as will bar a mortgage securing it. It may be that the general law on the subject is correctly stated in Jones on Mortgages (section 899), as follows: 'The rule that a discharge of debt is a discharge of the mortgage has no application where the debt is merely discharged by the statute of limitations, or by discharge in bankruptcy.' But section 2911 of the Civil Code provides as follows: 'A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.'"

Both parties to the contract were in Massachusetts at the time it was made. When the time for payment of the note arrived they still resided in Massachusetts, and on breach of the obligation a cause of action on the note alone arose in Massachusetts, regardless of the fact that the remedy of foreclosure must be pursued in California, where the land subject to the mortgage was situated. Felton v. West, 102 Cal. 266, 36 Pac. 676. The note is the principal obligation, and the mortgage is an incident; and, although the note and mortgage are one inseparable contract, the statute which operates as a bar to the action on the debt deprives the mortgagee of the right to enforce the lien of the mortgage. San Jose Safe Deposit Bank of Savings v. Bank of Madera, supra; Puckhaber v. Henry, 152 Cal. 423, 93 Pac. 114, 125 Am. St. Rep. 75. We are therefore of the opinion that the point last discussed, which was raised for the first time upon application for rehearing, cannot prevail to change our conclusions, and that, in spite of the peculiarity of our action of foreclosure in California, the plea of the Massachusetts statute as a bar to the action on the note is available.

The judgment is reversed, and the cause remanded for a new trial.

BEATTY, C. J., does not participate in the foregoing.

157 Cal. 189

RANKIN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 5,449.)

(Supreme Court of California. Jan. 6, 1910.)

1. Criminal Law (§ 977*) — Time for Pronouncing Judgment.

Pen. Code, § 1191, as amended in 1909 (St. 1909, c. 589, § 1), provides that the court must pronounce judgment within not less than two nor more than five days after the verdict or plea of guilty, but that to hear a motion for a new trial this time may be extended not more than 10 days, and it may be extended not more than 20 days to consider the question of probation under section 1203, and that, if defendant's present sanity is questioned under sections 1367–1373, the court may further extend the time until that is determined. Section 1202, as amended in 1909 (St. 1909, c. 589, § 2), requires judgment to be pronounced at the time fixed therefor unless cause to the contrary is shown, and that if not rendered within the time as fixed or extended, under section 1191, or if the court refuses to hear or neglects to determine defendant's motion for a new trial within the time as fixed or extended, then defendant shall be entitled to a new trial. *Held* that, under section 1191, the court may not fix a time for pronouncing judgment later than five days after the verdict; that, if a motion for a new trial is made, the court may extend the time for 10 days, and on the question of probation the court may extend the time 20 days, but that these two extensions are not cumulative, but that the latest date to which the court can extend the time, unless present insanity is involved, is not more than 25 days after verdict, and failure to render judgment within the proper time entitles defendant to a new trial, but does not oust the court of jurisdiction so as to require a dismissal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 977.*]

2. PROHIBITION (§ 10*)—GROUNDS FOR RELIEF.

If a court should refuse a new trial in a criminal prosecution and render judgment against defendant after the authorized time has passed, the judgment would be reversed on appeal, if an appeal should be taken, but, as the judgment would be rendered by a court having jurisdiction of the subject-matter and of the person, it would not be void nor subject to collateral attack, and therefore, if the court is about to give judgment after the proper time has passed, it will not be acting without or in excess of its jurisdiction, and prohibition is not maintainable under Code Civ. Proc. § 1102.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37–56; Dec. Dig. § 10.*]

In Bank. Charles E. Rankin was convicted of grand larceny, and makes application for a writ of prohibition to the judge of the superior court of the city and county of San Francisco. Writ denied.

Charles H. Fairall, for petitioner.

PER CURIAM. The petitioner was convicted of grand larceny in the superior court of the city and county of San Francisco by a verdict returned on September 10, 1909. Judgment has not yet been pronounced on the verdict, and the superior court has set the 7th day of January, 1910, as the time for passing sentence. The petitioner, claiming that by this delay the court has lost jurisdiction to give judgment, asks for a writ of prohibition to restrain the superior court from pronouncing judgment, or further proceeding in the case.

Section 1191 of the Penal Code, as amended in 1909 (St. 1909, c. 589, § 1), provides that the court must pronounce judgment within not less than two nor more than five days after the verdict or plea of guilty; but that for the purpose of hearing and determining a motion for a new trial, or in arrest of judgment, this time may be extended not more than 10 days, that it may extend the time not more than 20 days to consider the question of probation under section 1203, and that, if the question of defendant's present insanity is raised under sections 1367 to 1373, the court may further extend the time until his sanity is determined. No question of his sanity is raised and no proceeding to determine such sanity has been initiated. The effect of this section is that the court has no authority to fix the time for pronouncing judgment for a day later than five days after the verdict; that, if a motion for new trial or in arrest of judgment is made, the court may for the purpose of deciding the same extend the time for 10 days, and that, where the question of probation is considered, the court may for that purpose extend the time 20 days. These two provisions for extension of time are not cumulative, and the latest date to which the court is authorized to extend the time for rendering judgment, where present insanity is not involved, is a day not more than 25 days after the date of the return of the verdict.

Section 1202 of the Penal Code, as amended in 1909 (St. 1909, c. 589, § 2), provides that, if at the time fixed for pronouncing judgment no sufficient cause appears why judgment should not be given, it must then be rendered, and that, "if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of section eleven hundred and ninety-one of this Code, then the defendant shall be entitled to a new trial," and further, that "if the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same is continued under the provisions of section eleven hundred and ninety-one of this Code, then the defendant shall be entitled to a new trial."

The purpose sought to be accomplished by the amendment of these and other sections of the Penal Code amended by the same Legislature evidently was to prevent the delays which sometimes ensued in the superior courts in criminal cases between the time the verdict was rendered and the time of passing sentence, and between the time of sentence and the time of filing in the appellate courts the record on appeal, in case an appeal was taken. For the latter end, bills of exceptions were practically abolished and a reporter's transcript of the evidence substituted therefor. Sections 1191 and 1202 were directed to the end of preventing delay in rendering judgment. For that purpose the power of the court to extend the time was abridged, and, to prevent the superior courts from arbitrarily ignoring or disobeying the law in that respect, it was declared that, if the time was extended beyond that authorized, the defendant should perforce be entitled to a new trial. If judgment was not pronounced within the time limited, a new trial was made imperative if the defendant so desired. He became "entitled" to it. This does not indicate a legislative intent that the lapse of time and failure of the court to render the judgment within the time fixed should oust the court of further jurisdiction to proceed in the case and render a dismissal necessary. On the contrary, it necessarily implies that the jurisdiction shall continue and that the court shall retain authority to order the new trial and proceed therewith to verdict and final judgment. If the court should refuse a new trial and render judgment against the defendant after the authorized time has passed, its action would be erroneous and the judgment would be reversed on appeal, if an appeal should be taken. But, as it would be a judgment rendered by a court having jurisdiction of the subject-matter and of the person, it would not be void, nor subject to collateral attack upon the ground of its untimely rendition. As the court, even if it does give judgment, as the petitioner alleges it to be about to do, will not be acting without, or in excess of its jurisdiction, prohibition is not maintainable. Code Civ. Proc. § 1102.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

For these reasons, the application for an alternative writ of prohibition is denied.

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12 Cal. App. 85

BERNHEIM DISTILLING CO. v. ELMORE. (Civ. 658.)

(Court of Appeal, First District, California. Dec. 1, 1909.)

1. Corporations (§ 672*)—Actions—Foreign Corporations.

The failure of plaintiff, a foreign corporation, to allege compliance with the provisions of the Civil Code requiring the filing with the Secretary of State of a certified copy of its articles of incorporation, and also a designation of some resident on whom process might be served, was not a failure to allege a cause of action, and hence was not a ground of demurrer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2647; Dec. Dig. § 672.*]

2. Pleading (§ 406*)—Waiver.

Under Code Civ. Proc. § 434, providing that, if no objection be taken either by demurrer or answer, defendant must be deemed to have waived the same, defendant by failing to plead in its answer that plaintiff, a foreign corporation, failed to file with the Secretary of State a certified copy of its articles, and also a designation of some resident on whom process might be served as required by the Civil Code, waived such failure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355–1359; Dec. Dig. § 406;* Corporations, Cent. Dig. § 2645.]

3. Pleading (§ 106*)—Pleas in Abatement.

Pleas in abatement are dilatory pleas, and are strictly construed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 219; Dec. Dig. § 106.*]

4. Pleading (§ 258*)—Amendments.

Where the trial was nearly concluded, the court did not abuse its discretion in refusing to permit defendant to amend its answer by pleading in abatement that plaintiff, a foreign corporation, had not complied with the Civil Code; such amendment not going to the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 773; Dec. Dig. § 258.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by the Bernheim Distilling Company, a corporation, against H. Elmore. From the judgment, defendant appeals. Affirmed.

A. H. Jarman, for appellant. C. L. Witten and R. V. Burns, for respondent.

COOPER, P. J. The only question attempted to be raised in this case is that plaintiff was a foreign corporation, and that prior to the commencement of the action it had not filed in the office of the Secretary of State a certified copy of its articles of incorporation and also a designation of some person residing within the state upon whom process might be served, as required by the provisions of the Civil Code.

The failure to allege this compliance with the requirements of the Code was not a failure to allege a cause of action, and therefore was not a ground of demurrer. South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222. Defendant in its answer did not plead such failure upon the part of plaintiff, and thus waived it. Code Civ. Proc. § 434; Cal. Sav. & Loan Society v. Harris, 111 Cal. 133, 43 Pac. 525.

Nor did the court err in refusing leave to defendant to amend its answer by pleading such matter in abatement during the progress of the trial. Pleas in abatement are dilatory pleas, are strictly construed, and have never been favored. The amendment sought did not go to the merits. The trial had been nearly concluded, and the trial court properly exercised its discretion in denying the amendment sought, as it was not in furtherance of justice, but for the purposes either of defeating justice or delaying the action.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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12 Cal. App. 133

AMERICAN CAN CO. v. AGRICULTURAL INS. CO. OF WATERTOWN, N. Y. (Civ. 624.)

(Court of Appeal, First District, California. Dec. 8, 1909. On Rehearing, Jan. 7, 1910. Rehearing Denied by Supreme Court Feb. 5, 1910.)

1. Insurance (§ 131*)—Parol Contract—Validity.

A parol contract of insurance is valid and enforceable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 204; Dec. Dig. § 131.*]

2. Insurance (§ 665*)—Parol Contract—Sufficiency of Evidence.

The proof of an oral contract of insurance must clearly show that a contract was actually entered into, that each of the parties understood it in the same light, and that it related to the same subject-matter.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709; Dec. Dig. § 665.*]

3. CONTRACTS (§ 15*) — NATURE OF "CONTRACT."

A contract is an agreement to do or not to do a particular thing, and it must be by consent which is free, mutual, and communicated by each to the other, and the consent is not mutual unless the parties agree on the same thing in the same sense.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 61–66; Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 2, pp. 1513–1534; vol. 8, pp. 7615–7616.]

4. INSURANCE (§ 665*)—PAROL CONTRACT OF INSURANCE—EVIDENCE.

Evidence *held* not to establish a parol contract of fire insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709; Dec. Dig. § 665.*]

On Rehearing.

5. INSURANCE (§ 665*)—CONTRACT OF INSURANCE—EVIDENCE.

On the issue of the existence of a parol contract of fire insurance in renewal of a prior written contract of insurance, the testimony that insurers customarily sent out expiration notices, and, that if a policy was to be dropped, they marked it on the expiration notice, did not justify a finding that an insurer sent to insured a request for the renewal of the insurance, and that the renewal slip delivered by insured was an acceptance of the request so as to create a contract of insurance, especially in view of the evidence that insurer usually went around for renewals a week or 10 days before a policy expired, and that if insurer would not renew the insurance because the line was full it would place the risk with some other insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709; Dec. Dig. § 665.*]

6. CUSTOMS AND USAGES (§ 10*)—EFFECT AS APPLIED TO CONTRACTS.

Proof of usage or custom is admissible only as an aid or instrument tending to aid interpretation.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 11–21; Dec. Dig. § 10.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the American Can Company against the Agricultural Insurance Company of Watertown, New York. From a judgment for plaintiff, defendant appeals. Reversed.

Goodfellow & Eells and T. C. Coogan, for appellant. Chickering & Gregory, for respondent.

COOPER, P. J. This appeal is from a judgment in favor of plaintiff upon an alleged parol contract of insurance. On April 1, 1905, the defendant executed its written contract, by the terms of which it insured plaintiff against loss by fire not to exceed $3,000 from April 18, 1905, at noon, until April 18, 1906, at noon, on certain personal property situate on certain described premises belonging to plaintiff. The property of plaintiff was not destroyed until about 10 o'clock p. m. in the great fire of April 18, 1906, and the plaintiff does not claim that defendant is liable under the terms of the written policy which expired at noon on said day. It is alleged and claimed by plaintiff, however, that the defendant orally agreed on the 17th day of April, 1906, to insure, and it orally insured, the said property. In plaintiff's brief it is said: "The essential and ultimate fact is that on April 17, 1906, an agreement was entered into effecting a contract of insurance." The court found in this regard: "That on April 17, 1906, the firm of Watson, Taylor & Sperry, acting as agents for the plaintiff, American Can Company, notified defendant that plaintiff desired to renew its said policy of insurance, and served upon the defendant a written notification to that effect, and thereupon defendant agreed to said renewal, and promised to execute a new policy of insurance which would embody the contract of insurance then and there entered into." It is also found that the plaintiff, within the time required by the policy, made out and delivered to the defendant proofs of loss duly verified, and that it has "performed all the conditions upon its part required to be performed by said contract of insurance, and that prior to the commencement of this action more than sixty days elapsed since said proof of loss as required by said contract of insurance was delivered to defendant by plaintiff."

A parol contract of insurance may be made and is enforceable; but as such contracts are rarely made, and are not made in the usual and ordinary course of business, the proof of such oral contract must be clear and convincing. In fact it is the universal custom of insurance companies to issue written policies, with full and minute specifications as to their liability and the exceptions that would make the policy void. The preliminaries, as in contracts for the sale of real estate, are usually only negotiations which are afterwards merged into the written contract. Hence it is at once apparent, even to the layman, that in the somewhat unusual claim that an oral contract of insurance was entered into, the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood it in the same light, and in regard to the same subject-matter. Kerr on Insurance, 52, § 33; Eng. & Am. Ency. of Law, vol. 13, p. 221; Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co., 34 Or. 228, 55 Pac. 435.

The only evidence in support of plaintiff's claim is that the witness Roy, who testified that he was at the times mentioned the chief clerk of Watson, Taylor & Sperry, who were and had been for some time the insurance brokers for the plaintiff; that Edward Brown & Sons were the agents of defendant, and Fred Brown was the clerk of Edward Brown

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

& Sons, with authority to accept business and issue covering notes, but not to make out or sign policies; that on the 17th day of April, 1906, he prepared slips for the renewal of the said policy which was to expire at noon on the following day, and also of two other policies in companies for which said Brown & Sons were agents—one in the Globe & Rutger's and one in the Delaware. There were nine of these slips, three for each intended policy, and the slips contained in effect a description of the risk and were prepared with a view of being pasted on the printed policies instead of filling up the blank space in the policy by writing; that usually he went around with such slips to the office of the company at any time within a week or 10 days before a policy would expire; that in many cases they did not have time to prepare slips, and then they would go out and get a covering note and send the slips in in a few days afterwards. The language of the witness as to what then took place is as follows: "I had those slips prepared. After I got ready to go home, about 20 minutes past 5 or half past 5, I stepped into Edward Brown & Sons' office on California street. They had a regular insurance office. So I stepped in behind the counter, as in fact I was accustomed to do, and Mr. Brown here (pointing to a person in the courtroom) was at his desk putting his things away, that is, Mr. Fred Brown; he had charge of the city department; so I said: 'Here, Fred, are some renewals for you,' and Fred says: 'All right.' As I turned around and went out I think he put them in a drawer of his desk. This was about all that was said about it." In cross-examination the witness testified: "I went in there late in the afternoon and was in a hurry. I rushed right into the office and threw these slips down. There were three for each company—nine papers. I just slapped them down one on top of the other on his desk and said: 'Fred, here are some renewals for you.' He said: 'All right.' Then I went right out. It was after business hours at that time and he was just closing up. I think he picked them up in his hand and put them in a drawer; don't think he took time to read them. I just turned around—I went in there in a hurry—I turned around and went out, and I had the impression that he just opened his drawer and put them in like he did before. Q. He did not take time to read and look over nine slips of paper? A. No, sir."

It is quite evident that these slips were only applications for the renewal of the three policies described therein. The answer of Fred Brown "All right" did not mean anything more than that he would take the matter up in due course. He did not even know what policies were referred to in the slips. He had the right to suppose that it would be sufficient if he looked into the matter during business hours of the next day, as it was the custom to bring such applications in a week or 10 days before the policy would expire. He had no authority to issue policies but only to receive applications. No application was made to him for a covering note and no such note was issued. The name of the plaintiff was not even mentioned, the rate of insurance, the time of payment of the premium, the property to be insured, were not either of them mentioned. Of course when the slips would come in the ordinary course of business to be examined it would be seen that there was among them an application for a new policy of insurance upon the property of plaintiff; but it does not follow that the defendant then and there orally agreed to insure the plaintiff's property or to renew the insurance thereon. No policy was ever issued and no covering note taken.

A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual, and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract. How can it be said that the defendant agreed to issue a policy to plaintiff when the name of plaintiff was not even mentioned nor in any way communicated to defendant in the oral conversation? How can it be said that defendant agreed to issue a policy covering certain property when no reference was made in the conversation to any property? It could as well be said that if the applications, instead of being for renewals, had been for new policies from new customers, putting the applications in the desk and the answer being "All right" was an oral agreement to insure. It was not incumbent on defendant because it made a contract of insurance which would expire on April 18, 1906, to make another similar contract for another year, and Roy knew this, for in his testimony he said: "In case it should happen when we made applications to them, either for original insurance or for renewals or for reinsurance, and they could not do the business because the line of the company was full, in such case we would place the risk with some other company."

This case is similar to Taylor v. Phœnix Ins. Co., 47 Wis. 365, 2 N. W. 559, with the exception that the oral contract in this case is not near so clearly made out as it was in that case and there the court said: "We fail to find in the above testimony satisfactory evidence of the renewal of the policy in præsenti. The purport of the conversation on the subject between the plaintiff and Mr. Dean was that the policy should be renewed thereafter, not that it was then renewed. The plaintiff said to the agent that he wanted it renewed, and desired that it should be renewed before he left home. The agent assented. They then agreed upon the premium to be paid therefor. The agent said that there was nothing more for the plaintiff to do, but that he (the agent) had the description of the property to be insured in his office and promised to attend to the matter of the renewal. The plaintiff then directed the agent to renew the old policy the same as it was before, in the same company, for the same amount, and the agent promised to do so. That is all there is of the alleged parol contract of renewal. It seems to us that the whole conversation pointed unmistakably to some further act to be done to renew the policy, to renew in futuro, else why the talk about the agent having the description in his office and his promise to attend to the business, and why the closing direction to the agent to renew the old policy in the same company and for the same amount? And if the policy was then and there renewed the description ceased to be material and the promise was superfluous, as was also the final direction to the agent to renew. Indeed both the promise and direction tend strongly to prove—if they do not prove conclusively—that neither of the parties intended a renewal in præsenti, or supposed that they had made any contract than an executory oral contract that the company should renew the policy and the plaintiff should pay the premium at some early future time. There is no evidence whatever inconsistent with the hypothesis that the agent was to make a certificate of renewal, and the plaintiff was to pay the premium, as conditions precedent to the renewal, or to show that the parties intended to contract out of the usual course of the business of insurance." See, further, Idaho Forwarding Co. v. Firemen's Fund Ins. Co., 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586; Consumers', etc., v. German Ins. Co., 70 N. J. Law, 226, 57 Atl. 440; Whitman v. Milwaukee Fire Ins. Co., 128 Wis. 124, 107 N. W. 291, 5 L. R. A. (N. S.) 407, 116 Am. St. Rep. 25; Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co., 34 Or. 228, 55 Pac. 435; William Dinning v. Phœnix Ins. Co., 68 Ill. 414.

The case of Gold v. Sun Ins. Co., 73 Cal. 217, 14 Pac. 786, does not aid the plaintiff. That was an action to recover damages for failure to comply with an oral contract to issue a fire insurance policy. A demurrer to the complaint was overruled in the lower court, and the defendant failed to answer. Therefore the only question for the Supreme Court to pass upon was as to whether or not the facts stated in the complaint were sufficient to entitle the plaintiff to relief. The court held that the complaint was sufficient; that it stated the date, the amount of the original policy and the property which was insured; that the insurance company received a valuable consideration, and promised to renew the policy, and in consequence of such promise and such agreement the plaintiff had failed to procure other insurance upon the property; that at the time he suffered the loss he was under the belief that the defendant had complied with its contract and issued to it a policy of insurance as it had agreed to do. In that case there was no uncertainty about the time of the contract, or the parties, or the property to which it referred.

We conclude that the finding is not supported by the evidence, and the judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

On Rehearing.

PER CURIAM. On petition for rehearing the respondent calls our attention to the fact that in the opinion the court failed to refer to the first and primary ground upon which the respondent relied in support of the judgment of the trial court, that "prior to the expiration of the previous insurance the defendant company had sent to the plaintiff a notice that this policy would expire, and that it was the custom between the companies to make annotation upon such notice if the policy was to be dropped; that no such annotation notice was placed upon the expiry notice sent out in this case." The only testimony relied upon in support of such proposition is that of the witness Roy, who testified that the companies always send out expiration notices, and if the policy was to be dropped they mark it on the expiration notice; that he thought it was customary to do so; he could not say that such notice was sent in this particular case.

This testimony is not sufficient to support a finding, even if there had been such finding, to the effect that the company sent to the respondent a request for the renewal of the insurance, and that the renewal slip delivered was an acceptance of such request. Particularly is this so when the evidence referred to is considered in connection with the evidence of the same witness, that his company usually went around for renewals a week or 10 days before a policy would expire; and that if the company would not renew the insurance because the line was full, they would place the risk with some other company.

We know that in this particular case the request claimed to be a renewal request was not delivered until the close of business hours the day before the policy expired, and therefore Roy had not followed his usual custom of going around a week or 10 days before the policy expired to request a renewal. We cannot hold that because the witness Roy thought that it was customary for the companies to send out renewal notices, that this particular company in this particular case did send to this plaintiff a renewal notice. Proof of usage or custom is admissible only as an aid or instrument tending to aid interpretation. In fact in this case the complaint alleged, and the court found, that plaintiff notified defendant of its desire to renew, and the defendant agreed and promised to renew the policy. This appears to have been the theory upon which the case was tried. There is no allegation and no finding as to defendant's requesting and plaintiff agreeing to a renewal.

Rehearing denied.

12 Cal. App. 129

PEOPLE v. JONES. (Cr. 189.)

(Court of Appeal, First District, California. Dec. 7, 1909. Rehearing Denied by Supreme Court, Feb. 5, 1910.)

1. FORGERY (§ 8*)—NAME USED.

By the express provisions of Pen. Code, § 470, "forgery" may be committed by signing the name of a fictitious, as well as of a real, person to the instruments therein enumerated.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 26; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 3, pp. 2900–2910; vol. 8, p. 7665.]

2. FORGERY (§ 7*)—NATURE OF INSTRUMENT.

The indorsement of a check is equivalent to an "order for the payment of money" within Pen. Code, § 470, enumerating the subjects of forgery.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 12; Dec. Dig. § 7.*]

3. CRIMINAL LAW (§ 1043*)—APPEAL AND ERROR—RESERVATION OF GROUNDS OF REVIEW—EFFECT OF OBJECTIONS.

An objection to the admission of a book containing a relevant entry, among several that are irrelevant, is too general to be available on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. § 1043.*]

4. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

Plaintiff was indicted for forging the indorsement of W. S. on a check, which he had obtained by representing that W. S. had had an accident. To get the check, he showed the maker of the check a book containing other subscriptions for the same purpose, in which the maker of the check also wrote his name, and the amount of the check, marking it paid. Admission of the book in evidence was objected to as tending to prove other crimes. *Held*, that the book was properly admitted, as the other entries had no tendency to prove any other offense without further evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

Appeal from Superior Court, Alameda County; W. S. Wells, Judge.

Daniel Jones was convicted of forgery, and he appeals. Affirmed.

Frank Thunen, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was tried and found guilty of the crime of forgery as charged in the information. He moved for a new trial and in arrest of judgment, which motions were denied. From the judgment, and from the order denying his motion for a new trial, he prosecutes this appeal.

It appears from the record that the defendant, in company with one John Lewis, on December 3, 1908, called at the place of business of Smith Bros., a corporation, and the defendant, acting as spokesman, represented that they were a committee for the collection of funds for the benefit of Walter Miller, who, they said, was either ill or had been injured. Upon this representation a check was drawn in favor of Walter Miller on the First National Bank of Oakland for the sum of $5, signed "Smith Bros. Inc. J. Frank Smith, Secretary President." Thereafter John Lewis, in the presence of the defendant, indorsed the name of Walter Miller on the back of the check, and received from the Forum Cafe, a corporation, the sum of $5 in payment thereof.

One of the contentions of defendant is that it is not shown, either in the information or by proof, whether Walter Miller was a real or fictitious person. The information is drawn under section 470 of the Penal Code, and charges that on or about December 3, 1908, the defendant, "Daniel Jones, with intent to prejudice, damage, and defraud Smith Bros., Inc., * * * did unlawfully * * * make and forge a certain indorsement of said check and order by then and there falsely indorsing thereon the name of Walter Miller," etc. Said section 470, as amended in 1905, reads as follows: "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to * * * any acceptance or indorsement of any bill of exchange, promissory note, draft, order * * * or other contract for money * * * is guilty of forgery." Section 476 provides as follows: "Every person who makes, passes or utters, or publishes, with intent to defraud any other person; or who, with like intention, attempts to pass, utter or publish * * * any fictitious bill, note or check, purporting to be the bill, note or check, or other instrument in writing for the payment of money or property, of some bank, corporation, copartnership or individual, when in fact there is not such bank * * * or individual in existence, knowing the bill * * * or other instrument in writing to be fictitious, is punishable by imprisonment in the state prison," etc. Appellant contends that a check by reference is a fundamental part of the indorsement, and that it bears such an intimate relation to the instruments specially named in section 476 (notes, bills, and checks) that it is covered by that part of the section which reads "or other instrument in writing for the payment of money"; that under the doctrine laid down in the case of People v. Chretien, 137 Cal. 450, 70 Pac. 305, the information should have been founded on section 476, instead of section 470. In

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that case the name of a person not in existence was forged to a deed. A deed is not included in section 476, but is set forth in section 470 as one of the instruments which may be the subject of forgery. There it was claimed that, the deed being fictitious, the defendant should have been prosecuted under section 476. The court, however, held that where an instrument uttered, issued, or passed was fictitious, and mentioned in section 476, the charging paper must be laid under that section; that where, however, as in the Chretien Case, the instrument is not enumerated in that section, but is named in section 470, although fictitious, the information or indictment must nevertheless be laid under section 470. And the court further held that where the charging paper is framed under section 470 it was unnecessary to allege the fictitious nature of the forged instrument. But, assuming that the act complained of here comes within section 476, still defendant's contention cannot be sustained, for after the decision in the Chretien Case section 470 was amended, so that the crime of forgery may be committed under that section by signing the name of a fictitious, as well as of a real, individual to any of the instruments therein enumerated. The indorsement of a check is equivalent to an "order for the payment of money," and therefore is included within section 470. It seems plain to us that the case falls within that section, and it was unnecessary either to allege or prove whether or not Walter Miller was a real or fictitious person.

When the defendant and Lewis called at the place of business of Smith Bros., Inc., and solicited a subscription for Walter Miller, the defendant handed John F. Smith, the secretary of that corporation, a certain book containing the names of individuals, firms and corporations, opposite to each of which names was written a sum of money, and also in many instances the word "Paid." The secretary wrote on the third page of the book "Smith Bros. $5 paid," returned the book to the defendant, and gave him a check payable to Walter Miller for $5. The defendant contends that the admission of this book in evidence tended to prove that he was guilty of other crimes, and that therefore its admission over his objection was prejudicial error. This book was found in the possession of the defendant at the time of his arrest, although he had tried to conceal it. The entry by Smith Bros. was clearly relevant and material as being part of the res gestæ, relating as it did to the procurement of the check. The objection went to this part of the book, as well as to the possibly inadmissible portions, and therefore it was too general, and defendant cannot now be heard to complain. Moreover, such irrelevant entries, unless supplemented by other evidence, would have no tendency to prove other offenses.

The assistant district attorney, in his closing argument, indulged in some vituperative language concerning the defendant. While we think this language transcended the proper limits of argument, still we believe it was not of such a grave character as to require the reversal of the judgment.

From the evidence it is quite clear that the defendant and Lewis were acting in concert from the beginning to the end of this transaction, and that they were fellow conspirators.

The instructions fully and fairly covered the law applicable to the case.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 113

FRITZ v. MILLS et al. (Civ. 686.)

(Court of Appeal, First District, California. Dec. 3, 1909. Rehearing Denied by Supreme Court Feb. 1, 1910.)

1. ESTOPPEL (§ 107*)—PLEADING.

A plaintiff whose cause of action is based on an estoppel must plead the facts constituting the estoppel; and, in an action by a vendee to specifically enforce a contract to convey land, the court cannot find that defendant was estopped to deny the execution of the contract, where plaintiff did not plead the facts.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 297; Dec. Dig. § 107.*]

2. ESTOPPEL (§ 121*) — FINDINGS — SUFFICIENCY.

In an action by the vendee to specifically enforce a contract to convey land, a general statement by the court that defendant is estopped to deny the execution of the contract is only a conclusion of law, and insufficient as a finding of an estoppel, since the facts constituting the estoppel should have been found.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 121.*]

3. VENDOR AND PURCHASER (§ 42*)—PART PERFORMANCE—ESTOPPEL.

The facts that a vendor has continued in force a mortgage on the premises which, under the contract, the vendee was to assume, and that the vendee had the use and occupation of the premises since the execution of the contract, are insufficient to show a part performance of the contract so as to estop the vendor from denying its execution, since to do so the acts of part performance must be done by the party seeking to enforce the contract in pursuance of the contract, with a design of carrying it into execution, and with the consent and knowledge of the other party.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 42.*]

4. SPECIFIC PERFORMANCE (§ 43*)—PART PERFORMANCE—STATUTE OF FRAUDS.

Nor did these facts show a part performance sufficient to take it out of the statute of frauds.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 125–139; Dec. Dig. § 43.*]

5. VENDOR AND PURCHASER (§ 42*)—ESTOPPEL TO DENY—EXECUTION OF CONTRACT.

A vendor was not estopped to deny the execution of a contract to convey by the fact that she, after a suit had been started for specific performance, tendered to the vendee a deed to the premises upon conditions different from those in the contract, which offer, her supplemental answer undertook to keep good.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 42.*]

6. JUDGMENT (§ 251*)—PLEADING—ESTOPPEL.

A vendee suing for specific performance, having pleaded the execution of a contract by the vendor, and tried the case on that theory, cannot recover upon the theory that the vendor was estopped to deny the execution of the contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

7. SPECIFIC PERFORMANCE (§ 114*)—PLEADING—ESTOPPEL.

In an action for specific performance of a contract to convey land, plaintiff must allege that the consideration to be paid is adequate, or that the contract is as to defendant just and reasonable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles Wesley Reed against Laura J. E. Mills and another, in which Mary A. Fritz, assignee of Reed, was substituted as plaintiff. From a judgment for plaintiff, defendants appeal. Reversed.

F. H. Dam, for appellants. Charles Wesley Reed, for respondent.

HALL, J. This is an appeal upon the judgment roll from a judgment enforcing against defendant Laura J. E. Mills a contract to convey land. The action was brought by Charles Wesley Reed, the vendee under the contract set out in the complaint, but before entry of judgment the cause of action was assigned by him to Mary A. Fritz, and she was thereupon substituted as plaintiff. Frederick J. Mills is the husband of Laura J. E. Mills, and is made a party defendant for this reason only. He has no other interest in the controversy. Hereafter in this opinion whenever we refer to the defendant we mean the defendant Laura J. E. Mills, and whenever we refer to the plaintiff we mean the original plaintiff.

It is alleged in the complaint that on the 9th day of April, 1906, defendant, "through her duly authorized agent, executed her agreement in writing, wherein the said defendant agreed to sell, and the plaintiff agreed to buy," the premises in controversy. The agreement is set out in hæc verba, and does not appear to be signed by defendant, but by "Center and Spader, by C. N. Gompertz, Agents." Defendant is not named in the instrument at all. Defendant in her answer denied that she, through her agents or otherwise or at all, ever executed the agreement set out in plaintiff's complaint, or any agreement to sell the premises described in plaintiff's complaint, or any part thereof. Upon the issue thus presented the court found that defendant did not, through her duly authorized agents, or otherwise or at all, execute the agreement set out in plaintiff's complaint, or any agreement wherein the defendant agreed to sell the premises described in plaintiff's complaint, or any part thereof, "but, that said defendant is nevertheless estopped, for the purposes of this action, to deny that she did not" execute the agreement set out in the complaint. The insertion of the word "not" in the sentence above quoted is doubtless the result of a clerical error; and, so treating it, the court found that defendant is estopped for the purposes of this action to deny that she executed the agreement set out in the complaint. The plaintiff in his complaint did not attempt to plead any estoppel, but on the contrary counted on a written contract alleged to have been executed by defendant through her duly authorized agent. Appellant insists that the finding as to an estoppel is outside the issues presented by the pleadings, and must be disregarded. That a plaintiff, whose cause of action is based upon an estoppel, must plead the facts constituting the estoppel is clearly the law. The rule is thus stated in Ency. of Plead. & Prac. (volume 8, p. 9): "Where an estoppel is relied upon, it must be pleaded with particularity and precision. In such plea nothing can be supplied by inference or intendment; and, where the matter relied upon is not thus specially and precisely alleged, it will be no estoppel. The estoppel must be pleaded fully and sufficiently in all respects, and with all necessary incidents. In short an estoppel must be certain to every intent." That a party, who has an opportunity to plead an estoppel, upon which his cause of action or defense depends, must do so is the recognized rule in this state. Clarke v. Huber, 25 Cal. 594; Davis v. Davis, 26 Cal. 39, 85 Am. Dec. 157; Etcheborne v. Auzerais, 45 Cal. 122; Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673.

In Davis v. Davis, supra, defendant relied upon facts found in a special verdict as constituting an equitable estoppel against the plaintiff, but which had not been specially pleaded. The court said: "But equitable estoppels in pais generally, if not universally, are applied to prevent injury which would ensue to one from the acts or declarations of another, were he permitted to gainsay the truth of such acts and declarations. The principle is invoked and applied for the prevention of fraud, or that which is tantamount thereto, on the one side, and injury on the other; and it is but just, and is in accordance with the rules of pleading in equity cases, that the party relying upon an equitable estoppel in pais should inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet. To do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry, in suits of equity." The case of Blum v. Robertson, 24 Cal. 128, supports the same principle. It was there held that a defendant sued in ejectment, relying upon part performance of an oral agreement for the sale of the demanded premises, must both allege and prove such equitable defense. The court said: "It is not enough that a defendant may have such a defense in fact. He cannot avail himself of it without pleading it, in which case his answer must, in substance at least, possess the elements and essential qualities of a bill in equity, on which the court could, upon proper proofs, pronounce a decree for his present protection or final relief." Furthermore, the general statement that defendant is estopped, in the absence of any finding as to the facts constituting the estoppel, is but the statement of a conclusion of law, and cannot be deemed a finding of fact at all. By such a finding we are left entirely at sea as to what facts the court considered as constituting the estoppel. The rule is that the facts constituting the estoppel must be pleaded. See authorities above quoted. By the same rule the facts constituting the estoppel must be found.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Respondent frankly admits that his complaint was not drawn upon any theory of an estoppel, or that the case was tried upon any such theory by plaintiff, and that it was not until the findings were served upon him, after the trial was concluded, that he learned that the theory of an estoppel would be the basis of the judgment. In his brief he says: "This theory of an estoppel is not our theory, but we have to support it." In the effort to support it he invokes the rule that under some circumstances omissions and defects in the complaint may be aided or supplied by matters set out in the answer, and calls our attention to some matters alleged in the answer.

Defendant pleads several separate defenses. The first is a denial of the execution of the agreement. In another defense or partial defense she alleges the expenditure by her since the alleged execution of the alleged contract of certain sums of money in order to continue in force a mortgage on the premises, which by the terms of the alleged contract was to be assumed by the purchaser. In this connection she also alleged that ever since the 9th day of April, 1906 (the date of the alleged contract), plaintiff has enjoyed the use and occupation of said premises. This, however, falls far short of stating facts sufficient to constitute such part performance of an oral contract to sell land as to take the contract out of the statute of frauds, or to estop a seller from denying the execution of the contract. It does not necessarily follow from the fact that plaintiff enjoyed the use and occupation of the premises from the date of the contract that he entered into possession in pursuance of the contract, or that he entered into such possession with the knowledge or consent of the defendants. Such use and occupation is suggestive as evidence. The simple allegation thereof is not sufficient as a pleading. To estop the seller, or to take the contract out of the statute of frauds "the acts of part performance must be done by the party seeking to enforce the contract, and must be done in pursuance of the contract, and with a design of carrying the same into execution, and must be done with the consent and knowledge of the other party." Foster v. Maginnis, 89 Cal. 264, 26 Pac. 828. See, also, Anson v. Townsend, 73 Cal. 415, 15 Pac. 49.

Again in a supplemental answer defendant pleaded that on the 10th day of December, 1907 (which was long after the action had been commenced), she tendered to plaintiff a properly executed deed of the premises, upon condition that he pay to her $1,771.76 in cash, which he refused to do, and also refused to accept said deed. We fail to see in this any element of estoppel that would prevent defendant from denying the execution of the contract sued on. Plaintiff took no action thereon to his detriment, or in any way in reliance thereon changed his attitude with regard to the contract. He refused the tender, and justifies his refusal upon the ground that the amount demanded of him was not warranted by the terms of his alleged contract.

Respondent lays stress upon the fact that, after pleading in the supplemental answer the tender of the deed, made on December 10, 1907, the said defendant "has been and now is ready and willing to make and keep the said offer and tender good." There might be some force in respondent's contention upon this point if the judgment of the court simply enforced the keeping of this offer. For it is probable that an appellant would not be heard to complain of a judgment that in effect was an acceptance of his own offer, solemnly made by a pleading filed with the court. The judgment in this case does not appear to be such, however. The offer pleaded by defendant clearly contemplated the payment to her of the sum of $1,771.76 cash in hand upon the acceptance of her deed, leaving the purchaser to take care of the mortgage for $5,000 then being foreclosed, and the costs and expenses incident to such foreclosure, and other liens, if any. The decree of the court directs the payment into court of a stated sum, and directs the payment therefrom of various sums and charges, some of which are as yet undetermined in amount, and to be fixed by the court hearing the foreclosure proceedings, and finally directs that whatever balance shall be left out of the sum deposited shall be paid to defendant for her deed. It is thus quite impossible to determine whether such balance will equal $1,771.76 or not.

We find nothing in any of the separate defenses pleaded by defendant that constitutes an estoppel of her right to deny the execution of the contract in suit.

Plaintiff having pleaded that defendant executed a written contract to sell the land, and tried the case upon that theory, cannot be allowed to recover upon the theory of an estoppel. A plaintiff must recover, if at all, upon the cause of action pleaded, and not upon some other, neither pleaded nor relied upon at the trial. Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044; Schirmer v. Drexler, 134 Cal. 134, 66 Pac. 180.

No attempt is made in the complaint to allege that the consideration to be paid under the alleged contract is adequate, or that the contract is as to defendant just and reasonable.

In an action to enforce the specific performance of a contract for the sale of land, such an allegation is essential to the statement of a cause of action. Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; Stiles v. Cain, 134 Cal. 170, 66 Pac. 231; Herzog v. Atchison, etc., R. R. Co., 153 Cal. 497, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Kaiser v. Barron, 153 Cal. 788, 96 Pac. 806; White v. Sage, 149 Cal. 616, 87 Pac. 193. For this reason the complaint does not support the judgment.

Some other points are made for a reversal. There appear to be some contradictions and inconsistencies in the findings, which will probably not appear if the case be retried, for which reason we do not discuss the other points raised by appellant.

For the reason above set forth, however, the judgment must be reversed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

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12 Cal. App. 122

PERREAU v. PERREAU. (Civ. 705.)

(Court of Appeal, First District, California. Dec. 6, 1909.)

1. Trusts (§ 95*) — Constructive Trusts — Fraud.

Under Code Civ. Proc. § 1971, providing that no trust of real estate can be created otherwise than by operation of law or a conveyance in writing, oral declarations, representations, or promises, made by a son who had purchased with his own money real estate of which his parent had been regularly divested prior to the purchase without the fault of the son, will not impress a trust thereon in favor of the parent or the other children on the parent's death.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 95.*]

2. Trusts (§ 100*) — Constructive Trusts — Fraud.

A mortgage of an incompetent mortgagor for whom a guardian had been appointed was foreclosed. The guardian was a party defendant, and was served with process, and permitted a default judgment and a sale. The purchaser at the sale conveyed the property to a son of the mortgagor. There was nothing to show that the son had any money of the incompetent with which he could have paid the mortgage or redeemed, or that he had any knowledge of the mortgage or the foreclosure proceedings prior to his purchase. The guardian relied on the son, who agreed to protect and preserve the property of the incompetent. This promise was made after the appointment of the guardian and before foreclosure proceedings. *Held* not to show that the son was guilty of any fraud in the purchase of the property which would impress it with a trust in favor of the mortgagor or the other children on the mortgagor's death.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 151; Dec. Dig. § 100.*]

3. Trusts (§ 371*) — Constructive Trusts — Fraud.

The facts constituting a fraud or a fraudulent breach of duty so as to make the wrongdoer a trustee of real estate must be clearly alleged, and cannot be left to depend on conjecture and inference in the pleading.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588–591; Dec. Dig. § 371.*]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by Howard J. Perreau, administrator of Eliza Ann Perreau, deceased, against William E. Perreau. From a judgment for defendant, plaintiff appeals. Affirmed.

Z. N. Goldsby, for appellant. Johnson & Shaw, for respondent.

HALL, J. Plaintiff brought this action to obtain a judgment, decreeing that defendant held title to a certain piece of real estate as trustee for the estate of Eliza Ann Perreau, deceased. To plaintiff's second amended complaint defendant demurred upon the ground that the same stated no cause of action. This demurrer was sustained, with leave to plaintiff to file a third amended complaint, which he failed to do, whereupon judgment was entered for defendant. From this judgment plaintiff has appealed, and the only question presented by the record is as to the correctness of the ruling of the court sustaining defendant's demurrer to the second amended complaint.

It appears from the complaint: That Eliza Ann Perreau in her lifetime was the owner in fee of a certain described piece of land situate in the city of Oakland. That on the 18th day of January, 1897, she mortgaged the same to the Oakland Bank of Savings to secure the sum of $700. She was subsequently, by the superior court of Alameda county, adjudged to be insane, and was thereupon committed to the Hospital for Insane, and thereafter in 1899, by the same court, Mary C. Garrett, a daughter of said insane person, was duly appointed guardian of her person and estate, and duly qualified as such. Thereafter, on the 26th day of July, 1901, the said Oakland Bank of Savings brought an action against the said Eliza Ann Perreau and Mary C. Garrett, as her guardian, to foreclose said mortgage. In this action judgment by default was taken against the defendants therein on December 4, 1901. The property was regularly sold under this judgment to the Oakland Bank of Savings on the 13th day of January, 1902, for the sum of $814.74, and upon the expiration of the time for redemption a deed to said premises was regularly executed to said Oakland Bank of Savings. The value of the property is alleged to be $5,000. On the 28th day of August, 1902, defendant, for the consideration of $814.74, obtained a conveyance of said property from said Oakland Bank of Savings to himself. The allegation in the complaint as to this conveyance is qualified by many vituperative adjectives and adverbs as to the fraudulent purposes and intent of defendant, which can have no force as allegations of facts in the absence of allegations of facts that would preclude a son from purchasing property for his own benefit that had once belonged to his mother, but of which she had previously been divested of all interest by deed given upon sale, under judgment given upon regular foreclosure proceedings.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

No attempt is made in the complaint to impeach the regularity or validity of the foreclosure proceedings, or the title acquired by the bank thereunder, so far as the bank is concerned. It is alleged in the complaint that said Eliza Ann Perreau died intestate on the 18th day of December, 1903, leaving surviving her as her only heirs at law five adult children, including plaintiff, defendant, and Mary C. Garrett, who had been her guardian, and thereafter, on the 22d day of April, 1907, plaintiff was appointed administrator of her estate. As to defendant, it is further alleged, apparently in an attempt to charge him with some duty to account to his mother or her estate for the property conveyed to him by said bank, "that long after the said sale of said mortgaged premises, and the conveyance thereof to said bank, and after the conveyance thereof by said bank to said defendant," he represented to the children of said mortgagor other than himself that said mortgage had not been foreclosed and "did then and there willfully, intentionally, and fraudulently conceal and keep from said mortgagor and from said other children of (said) mortgagor any and all knowledge or information of the said foreclosure and sale to the said bank and the said conveyance by said bank to said defendant." It is further alleged that defendant "concealed said facts for the purpose and with the intent of deceiving, misleading, and defrauding said mortgagor, and in the event of her death of defrauding her estate and heirs at law, * * * that at the same time it was mutually understood and agreed by and between the said children of said mortgagor * * * and the said defendant that he, the said defendant, should and would control and manage the property of said mortgagor, and the whole thereof, in and for the best interests of the said mortgagor during her lifetime, and of her estate in the event of her death, and of all parties interested therein."

It will be observed that the representations and agreements alleged in this paragraph of the complaint occurred long after the sale to the bank and after the conveyance by said bank to defendant and apparently before the death of the said mortgagor. At this time, so far as any allegations in the complaint are concerned that we have thus far considered, the said mortgagor had been divested of all right, title, and interest in the premises, and without fault or dereliction of duty on the part of defendant. It is not alleged or suggested in the complaint that he had any knowledge of or was connected with the foreclosure proceedings prior to his purchase from the bank. After this it is alleged that he concealed from the other children the fact of the foreclosure. How he could do this, as to Mary C. Garrett, who was the guardian of the mortgagor, and as such a party to the foreclosure suit, and necessarily served with process therein, it is difficult to understand. She it was who, as guardian, represented the mortgagor, and as such guardian was primarily charged with the duty of caring for and protecting the property of her ward. No mere oral declarations, representations, or promises, made by defendant after he had acquired by purchase with his own money the property of which plaintiff's intestate had been regularly and without fault of defendant divested prior to his purchase, could impress a trust thereon. Code Civ. Proc. § 1971; Smith v. Mason, 122 Cal. 426, 55 Pac. 143.

This brings us to the consideration of the only allegation in the complaint that charges or attempts to charge defendant with any duty in respect to the property of his mother. Quite out of its proper chronological order in the complaint, and after the allegations that we have heretofore examined, we find in paragraph 12 of the complaint this allegation: "That, after the said Eliza Ann Perreau was adjudged an insane and incompetent person, the said other children and heirs at law of the said Eliza Ann Perreau (now deceased), and each of them, and at all times thereafter until after the death of said Eliza Ann Perreau, trusted and confided the said property hereinbefore described, and all the property rights and interests of said Eliza Ann Perreau in her lifetime, and of her estate after her death, to him, the said defendant, William E. Perreau, and he, the said William E. Perreau, promised and agreed at all times that he would care for, attend to, protect, and preserve the said property, and the whole thereof, for and on behalf of the said Eliza Ann Perreau, during her life, and in and for the best interests of her estate after her death, and for the mutual interests of the said children and heirs at law, and of all of them, after the death of their said mother." The allegations of this paragraph, considered as matters upon which to predicate a charge of fraud, are in several respects quite general and vague. It is alleged that the "other children and heirs at law of Eliza Ann Perreau" trusted and confided the property to defendant. This action, it must be remembered, is brought by the administrator of the estate of decedent. The only one of her children who had authority to represent her or to entrust and confide her property to any one was Mary C. Garrett, her guardian. In the face of a general demurrer, it may perhaps be conceded that the allegation sufficiently informs the court in connection with the other allegations of the complaint that at all times after Eliza Ann Perreau had been adjudged an incompetent her guardian trusted and confided her property to defendant. The allegation that he "promised and agreed at all times that he would care for, attend to, protect and preserve the said property" is also somewhat vague and indefinite, both as to when he made the promise and as to the person to whom he made it. But, applying the same liberal construction, we may assume that it sufficiently alleges a promise made to the legal representative of the incompetent, to wit, her guardian, and that it was made after the appointment of such guardian and before the foreclosure proceedings.

Thus conceding that the allegations of this paragraph sufficiently charge defendant with a duty in regard to the property of the said mortgagor, we look in vain for any direct or sufficient allegation of any fraudulent dereliction of such duty. It is not alleged that he had any notice of the foreclosure proceedings prior to the conveyance of the property to him. It does not even appear from any allegations of the complaint that he had any knowledge of the existence of the mortgage prior to his purchase of the property from the bank. Although Mary C. Garrett, as the guardian of the incompetent, was a party to the action, and must necessarily have been served with process, she did not, so far as the complaint charges, give notice thereof to defendant, but apparently without any action whatever permitted judgment to be taken by default and the property to be sold thereunder. It does not appear that defendant had any money of the incompetent with which he could have paid the mortgage or redeemed from the sale. Mary C. Garrett, as guardian, is the only person who had any authority to raise money on the property itself. It does not even appear that defendant had any money of his own prior to his purchase with which he could have paid the mortgage or redeemed from the same.

There are no allegations of facts in the complaint that directly or at all charge defendant with any dereliction of duty that resulted in the foreclosure, sale, and conveyance to the bank. It is not even alleged in general terms that he was guilty of any act of omission, wrongful or otherwise, that resulted in the divesting of the mortgagor's title. The facts constituting fraud or a fraudulent breach of duty must be alleged. The existence of facts constituting fraud cannot be left to depend upon conjecture and inference in a pleading. Albertoli v. Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; Applegarth v. McQuiddy, 77 Cal. 408, 19 Pac. 692; People v. McKenna, 81 Cal. 158, 22 Pac. 488. The bank having acquired a perfect title as against the mortgagor without fault of defendant, no reason exists why defendant could not subsequently purchase with his own money for his own benefit the property.

The court did not err in sustaining defendant's demurrer, and, plaintiff having declined to further amend his complaint, judgment was properly entered against him.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 93

WOODS v. BANK OF HAYWARDS. (Civ. 569.)

(Court of Appeal, First District, California. Feb. 17, 1909. Rehearing Denied by Supreme Court April 17, 1909.)

1. FIXTURES (§ 15*)—TERMINATION OF LEASE—TRADE FIXTURES.

A bank, in possession of a building as a tenant, constructed at its own expense a brick vault, on which was placed a steel safe which was necessary in the conduct of its business. The safe could be removed, and the pieces reassembled and used again for the same purpose, without injury to the safe or to the freehold. *Held*, that the safe was a trade fixture within Civ. Code, § 1019, authorizing a tenant to remove a trade fixture, and the bank, before the termination of the tenancy, could remove it.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 23–29; Dec. Dig. § 15.*]

2. FIXTURES (§ 33*)—TRADE FIXTURES—TERMINATION OF LEASE.

Where a tenant at the close of his term renews his lease, he should reserve his right to remove the fixtures he could sever under the original tenancy, as otherwise his right to remove is determined, and he is in the situation as if the landlord, being seised of the land, together with the fixtures, had leased both to him.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 64, 65; Dec. Dig. § 33.*]

3. FIXTURES (§ 33*)—TRADE FIXTURES.

Where a tenant remained in possession of the premises after the term at an increased rent, as a tenant from month to month, the tenancy was an extension of the term of the lease, which governs the rights of the parties, save as modified as to the monthly rent; and the tenant, authorized by the lease to remove a trade fixture, may do so during the tenancy from month to month.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 64, 65; Dec. Dig. § 33.*]

4. LANDLORD AND TENANT (§ 91*)—TENANCY AFTER EXPIRATION OF ORIGINAL TERM.

Where the lessor notifies the lessee before the beginning of a new tenancy that the terms of the original tenancy will be changed in a specified respect, and the tenant assents to the change, the terms of the original lease are applicable, except as to the change.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 280; Dec. Dig. § 91.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Jesse H. Woods against the Bank of Haywards. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Dudley Kinsell, for appellant. Powell & Dow, for respondent.

KERRIGAN J. This action was commenced to obtain an injunction, perpetually restraining the defendant, a tenant of the plaintiff, from removing a vault from the premises described in the complaint. The court denied the injunction, and rendered judgment in favor of the defendant. Plaintiff appeals from the judgment, and also from the order denying his motion for a new trial.

In 1891 the Bank of Haywards, defendant, went into possession of the premises under a written lease, which provided that the bank might at any time remove any improvements erected or placed by it upon the demised premises, including vault, fixtures, and furniture. Shortly after the defendant entered into possession, it constructed in the building situated upon said premises, at its own expense, a brick vault or arch, the foundation of which rested upon the basement floor of the building, and on the top of which there was placed a steel structure or safe 8 feet in height, 6 feet 10 inches in width and 8 feet in depth. Each surface was made of sheets of steel three-eighths of an inch thick, fastened together with rivets, and as an entrance thereto there was a neck or vestibule 7 feet in height, 3 feet in width and 18 inches in depth, leading from a steel door to the main interior of the safe. The vestibule and door were made of sheets of steel similar to those described, and fastened together in like manner. Around and over this safe there were erected brick walls and a roof, in such manner, however, as to leave between them and the steel safe a vacant space of not less than 12 inches. In 1903 another lease was made to the defendant by Lucinda F. Prowse, the predecessor in interest of plaintiff, wherein it was provided that defendant might remove its vault, fixtures, and furniture at any time during the existence of the lease. At its termination the defendant remained in possession by permission of the plaintiff (who had in the meantime become the owner of the premises), at an increased rent as a tenant from month to month. The defendant, at the time of the commencement of this action, was about to vacate the premises, and threatened to remove the safe, claiming a right to do so. first, on the ground that the safe is personal property; and, secondly, that even if it be not, it is a trade fixture, removable at any time during the term of the lease or any extension thereof, and in this connection defendant claims that its present tenancy from month to month is merely an extension of its preceding term.

In one of the findings of the court the steel part of the vault is described as a "separate and distinct article of personal property," and under this finding defendant claims in effect the right to remove it, even after the termination of the tenancy. We think that the steel structure is not a thing separate from the vault; but that it is an essential part of it—the steel lining thereof; in other words, that the whole structure, comprising the brickwork, steel lining, vestibule, and door constitute what is referred to in the lease as the vault. The steel structure was not built independent of and unattached to the brickwork in order to have it regarded as a separate and distinct article of personal property. It was so made—as are all such vaults—to keep its contents dry, and to afford them better fire protection. However that may be, the court found upon uncontroverted evidence that the whole structure had been built by the bank at its own expense; that it had ever since been used by the bank, and that it was a necessity in the conduct of the bank's business; that the parts composing the steel structure could be removed, the pieces reassembled, and used again for the same purpose, without injury to the safe or to the freehold. The court having thus found, the steel structure may be regarded —as we believe it should be—as a trade fixture.

Section 1019, Civ. Code, provides that "a tenant may remove from the demised premises, any time during the continuance of the term, anything affixed thereto for purposes of trade * * * if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises." In Moody v. Aiken, 50 Tex. 65, a safe was placed in a brick foundation, and incased in brick walls and a roof of iron and cement. It did not touch any of the walls of the vault, nor was it fastened or attached thereto. Held to be a removable fixture. In Dostal v. McCaddon, 35 Iowa, 318, a safe inclosed in a brick and stone vault, erected and used for carrying on a banking business, was denominated a trade fixture, and held removable during the life of the lease. See, also, section 1019, Civ. Code; 19 Cyc. 1041; Wiggins v. Ohio, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055.

Defendant, as we have seen, did not vacate the premises at the end of the term specified in the lease of 1903, but remained in possession as a tenant from month to month; and the real question in the case is whether a new lease was thereupon created, or whether such tenancy from month to month con-

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stitutes an extension of the term of the old lease. If it constituted a new lease, the case is governed by the rule laid down in Taylor's Landlord and Tenant, at section 552, where it is said: "If a tenant, at the close of his term, renews his lease, and acquires a fresh interest in the premises, he should take care to reserve his right to remove such fixtures as he had a right to sever under the old tenancy. For when his continuance in possession is under a new lease or agreement, his right to remove is determined, and he is in the same situation as if the landlord, being seised of the land, together with the fixtures, had demised both to him." See, also, Marks v. Ryan, 63 Cal. 110; Wadman v. Burke, 147 Cal. 354, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192. We, however, with defendant believe that its continued occupancy of the premises must be regarded as an extension of the lease of 1903, and that the parties are deemed to have assented to the terms of that lease, save as modified in respect to the monthly rent. One of the terms of the old lease thus surviving was the right of the defendant to remove its vault at any time during the existence of the lease. Section 1945, Civ. Code, provides: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time not exceeding one month when the rent is payable monthly, nor in any case one year." In 18 Am. & Eng. Ency. of Law (2d Ed.) p. 200, the rule is thus stated: "If the landlord notifies the lessee before the beginning of a new tenancy that the terms of the original tenancy will be changed in a certain respect, such as that an increased rent will be required, to the extent of such change the terms of the original lease do not apply, as it will be held that the tenant assented to the change; but the original lease is applicable, in all other respects." See, also, Id. p. 408; Jones on Landlord & Tenant, §§ 213, 337, 717; 24 Cyc. 1379; Coatsworth v. Ray (Sup.) 52 N. Y. Supp. 498; 32 Am. Dig. 883, § 796; Wood's Landlord & Tenant, p. 28; Rand v. Purcell, 58 Ill. App. 228. Here it appears that the tenant held over, not after notice, but by permission of the landlord at an increased rent; this slight difference, however, in circumstances cannot affect the application of the rule just stated. In Zippar v. Reppy, 15 Colo. 260, 25 Pac. 164, it is held that where a lessee upon the expiration of his term continues in possession by consent of the lessor, with no alteration of the agreement between them, save an increase in the rent, he becomes a tenant at the increased rent; but, as to all other matters, the terms expressed in the former lease will govern. The defendant held over after the end of the term fixed in the lease of 1903, plaintiff consenting, with no change in the terms of the tenancy except as to the monthly rent; and, under the authorities cited, we are of opinion that the parties are presumed to have continued the old lease and assented to its terms, except as to the time and the amount of rent.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 101

RICHARDS v. BLAISDELL (VAN NEST et al., Interveners). (Civ. 715.)

(Court of Appeal, Second District, California. Dec. 2, 1909. Rehearing Denied by Supreme Court Jan. 31, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 521*)—FOREIGN ADMINISTRATION—ALLOWANCE OF CLAIMS—CONCLUSIVENESS.

The allowance of a claim against the estate of a decedent by an administrator in one jurisdiction is not only not conclusive against an administrator in another, but is not even evidence of the debt on which the claim is based.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2327; Dec. Dig. § 521.*]

2. EXECUTORS AND ADMINISTRATORS (§ 521*)—FOREIGN ADMINISTRATION—ALLOWANCE OF CLAIMS—CONCLUSIVENESS.

This is true whether the administrators are the same or a different person in both jurisdictions.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2327; Dec. Dig. § 521.*]

3. EXECUTORS AND ADMINISTRATORS (§ 521*)—FOREIGN ADMINISTRATION—ALLOWANCE OF CLAIMS—CONCLUSIVENESS.

This rule applies to an action against any other person having assets of the decedent in a jurisdiction other than that in which the letters were granted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2327; Dec. Dig. § 521.*]

4. EXECUTORS AND ADMINISTRATORS (§ 521*)—FOREIGN ADMINISTRATION—ALLOWANCE OF CLAIMS—CONCLUSIVENESS—"PRIVITY."

The term "privity" denotes mutual succession or relationship to the same rights of property, and administrators of the estate of the same person appointed in different jurisdictions are not privies.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2327; Dec. Dec. § 521.*

For other definitions, see Words and Phrases, vol. 6, pp. 5606–5611; vol. 8, p. 7764.]

5. EXECUTORS AND ADMINISTRATORS (§ 272*)—ADMINISTRATION OF ESTATE—PAYMENT OF DEBTS.

The executor or administrator takes possession of all the estate of a decedent for the purpose of administration, and all his property is subject to his debts with no priority between the personal and real property in its application to this purpose.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052–1057; Dec. Dig. § 272.*]

6. EXECUTORS AND ADMINISTRATORS (§ 521*)—FOREIGN ADMINISTRATION—ALLOWANCE OF CLAIMS—CONCLUSIVENESS.

The sections of the Code of Civil Procedure relating to probate matters justify no distinction between an executor and an administrator with the will annexed and a general administrator with respect to the allowance of, or a judgment establishing, a probated claim in a foreign state.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2327; Dec. Dig. § 521.*]

7. EXECUTORS AND ADMINISTRATORS (§ 521*)—FOREIGN ADMINISTRATION—ALLOWANCE OF CLAIM AGAINST DECEDENT'S ESTATE.

Under Code Civ. Proc. § 1913, providing that judicial records of a sister state have the same effect as in the state where they are made, except that they can only be enforced by an action or special proceeding, and that the authority of an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with authority, a judgment establishing a claim against the executor of a decedent in a foreign state is not only not conclusive upon the administrator with the will annexed, but it cannot be the basis of an action against him, or even evidence to establish the indebtedness, even though the exception in the statute as to executors and administrators has no bearing.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2327; Dec. Dig. § 521.*]

8. EXECUTORS AND ADMINISTRATORS (§ 521*)—FOREIGN ADMINISTRATION—ALLOWANCE OF CLAIM AGAINST DECEDENT'S ESTATE—CONCLUSIVENESS.

This is true whether the proceeding to establish a claim against the estate of a decedent is a proceeding in rem, having for its res the the assets of the estate within the jurisdiction where presented as distinguished from the entire estate or in personam against the executor or administrator in the jurisdiction in which it is brought, and payable only out of the assets in that jurisdiction.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2327; Dec. Dig. § 521.*]

9. EXECUTORS AND ADMINISTRATORS (§ 272*)—ALLOWANCE IN PAYMENT OF CLAIMS—PROPERTY SUBJECT.

Under Civ. Code, § 1359, providing that the property of a testator be applied to the payment of his debts in the order directed in the will, if there is enough of the kind indicated to pay them, where a testator directed the payment of his debts out of his personal property in so far as it would do so, a creditor cannot subject his real estate in another state to the payment of his claim without a showing that the personal property has been exhausted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1052; Dec. Dig. § 272.*]

10. EXECUTORS AND ADMINISTRATORS (§ 227*)—PROOF AND PAYMENT OF CLAIMS—AFFIDAVITS.

Under the statute (Code Civ. Proc. § 1494), requiring an affidavit of a claim against an estate of a decedent to state that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant, an affidavit that the claim is due and unpaid, and that there are no offsets against the same and no credits thereon, is insufficient.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 815; Dec. Dig. § 227.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by V. W. A. Richards against Robert P. Blaisdell, administrator, in which Rachel E. Van Nest and others intervened. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant and interveners appeal. Reversed.

Sam L. Baker and W. C. Batcheller, for appellants. Cryer & Tuttle, for respondent.

TAGGART, J. This is an action on a claim reduced to judgment against an executor in the probate court in Minnesota, the testator's domicile, and rejected by the ancillary administrator with the will annexed in this state. Judgment was for plaintiff, and defendants and interveners appeal from the judgment, and from an order denying their motion for a new trial.

William K. Blaisdell died testate in the state of Minnesota, being a resident of that state at the time of his death. He left estate in Minnesota and also in California, that in the latter state consisting of real property only. Letters testamentary on his will were issued by the probate court of the state of Minnesota to the person named as executor therein. Thereafter letters of administration, with the will annexed, on his estate were granted to the defendant Robert P. Blaisdell in the state of California. Plaintiff presented his claim to the executor in Minnesota, who refused to approve or allow the same; whereupon the matter of such allowance and the exceptions of the executor to the claim were heard before the probate court having jurisdiction of the estate, and an order of allowance made by that court. This order, under the laws of the state of Minnesota, has the same force and effect as a judgment of a court of general jurisdiction.

After the rendition of this judgment and also after the time for presentation of claims in California had expired, the plaintiff presented to the administrator c. t. a. in California his claim in the following language: "Jan. 9, 1904. To amount of claim allowed and entered by the probate court of Hennepin county, Minnesota, by a certain judgment duly given, made and entered, as appears by the authenticated record of said judgment which is attached (and said probate court of Hennepin county, Minnesota, being a court of record and of general probate jurisdiction)—$2448." Annexed to this claim were copies of the several papers which composed what may be designated the judgment roll in the proceeding in the Minnesota court, to wit: The original demand—a promissory note for $1800, with interest, the objections thereto, filed by the executor, and the judgment or order allowing the claim. It was also accompanied by an affidavit showing that plaintiff was a resident of Minnesota at all times when the administration in this state had been pending and had never been in the state of California, and had no knowledge of the proceedings being taken, or of the notice to creditors of said estate given in California. The claim was also verified, the verification reading as follows: "That said claim is due and unpaid, and there are no offsets against the same, and no credits thereon." The claim was rejected by the local administrator, and hence this action. Defendant and interveners plead that the claim and original demand were both barred by the statute of limitations, to wit: By sections 1493, 1499, 353, and 339 of the Code of Civil Procedure, that the testator was released from the original demand by a discharge in bankruptcy, and that the action is barred because the original indebtedness was secured by a mortgage on real estate in Minnesota, which security was not exhausted, and the claim being rendered void by the provisions of sections 726 and 1497, Code of Civil Procedure. The indebtedness of the testator on the original demand was also denied, and evidence was introduced upon all the issues so raised, except that relating to the mortgage, evidence of which was refused admission.

On the issues so raised the trial court found in favor of plaintiff, setting out in full the instruments and orders attached to the claim, and found that the order of the probate court of Minnesota allowing the claim had the force and effect of a judgment, that no decree of distribution had been entered in the California administration at the time plaintiff's claim was presented, and that the affidavit of plaintiff attached to the claim made a satisfactory showing to the court that plaintiff did not have notice to present his claim by reason of absence from the state of California; that the promissory note in question was not scheduled in the bankruptcy proceedings by said William K. Blaisdell, and plaintiff had no knowledge of the bankruptcy proceedings until after the order had been made discharging Blaisdell from all his provable debts. The conclusion of law of the trial court, based upon these findings, "that the certified copy of the record of such allowance of said claim in Minnesota duly verified constitutes a valid claim against the estate of William K. Blaisdell in California," is challenged by appellants, who also raise the same question of law upon their objection to the admission of the Minnesota record in evidence.

Under the Code, "The effect of a judicial record of a sister state is the same in this state as in the state where it is made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority." Section 1913, Code Civ. Proc. In its general provisions the section cited declares merely the rule at common law based upon comity. This is stated in Chitty on Contracts (11th Am. Ed., vol. 2, p. 1177): "But the rule may now be taken to be, that if a question has been decided by such a court (a foreign court having jurisdiction), in a proceeding in personam, between parties properly brought before it, this will preclude an inquiry in our courts between the same parties into the merits of the case upon the facts so found." Banister v. Campbell, 138 Cal. 455, 459, 71 Pac. 504, 506.

Independent of the effect of the exception in the section, which restricts the jurisdiction of executors and administrators to the territory of the government which invested them with authority, it appears to be the settled rule that the allowance of a claim by an administrator in one jurisdiction is not only not conclusive against an administrator in another, but it is not even evidence. The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is res inter alios acta. It cannot be even prima facie evidence of a debt, for if it have any effect at all it must be as a judgment, and operate by way of estoppel. And this is true whether the person appointed administrator be the same or a different person in both jurisdictions, and is true, also, in an action against any other person having assets of the deceased in a jurisdiction other than that in which the letters were granted. Cherry v. Speight, 28 Tex. 503, 516; McLean v. Meek, 18 How. 16, 15 L. Ed. 277; Johnson v. Powers, 139 U. S. 156, 159, 11 Sup. Ct. 525, 35 L. Ed. 112; Stacy v. Thrasher, 6 How. 44, 61, 12 L. Ed. 337.

In Stacy v. Thrasher the United States Supreme Court considers the question of how the "faith and credit" clause of the Constitution of the United States and act of Congress are affected by such a construction, and says: "The answer is that it (the foreign allowance of, or judgment against, an administrator) is evidence, and conclusive by way of estoppel, first, between the same parties; second, privies; and on the same matter where the proceeding is in rem. But the parties to these judgments are not the same. Neither are they privies. The term privity denotes mutual succession or relationship to the same rights of property." The argument to sustain the view of privity seems to be this: "That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff having once established his claim against the estate by the judgment of a court should not be called on to make proof of it again. This argument assumes that the judgment is in rem and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. A judgment may have the 'effect' of a lien upon all the defendant's lands in the state where it is rendered, yet it cannot have that effect on lands in another state by virtue of the faith and credit given to it by the Constitution and act of Congress."

The Massachusetts court says the doctrine of the Supreme Court of the United States appears to be that there is no privity between executors or administrators appointed in different jurisdictions, and the only exception is in the case where executors are appointed in different states by the same will. To support the exception, the case of Hill v. Tucker, 13 How. 458, 14 L. Ed. 223, which is relied upon by respondent here, is cited. Considering the question here before us and applying to it that which it declares to be the general rule of the United States court to a judgment obtained against an ancillary administrator with the will annexed in Vermont, which it was sought to enforce against the executor of the domicile holding letters in Massachusetts, the Supreme Court of the latter state says: "But it is said that they are in privity with the testator and that this creates a privity of estate between them. It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in Massachusetts and within the jurisdiction of its courts; and the administrator is in privity with the testator in respect to the estate in Vermont which he can administer upon. But as the privity relates to different property and different matters and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator." Low v. Bartlett, 8 Allen, 259.

The one case cited by respondent which is in direct conflict with the decision in Low v. Bartlett is that of Latine v. Clements, 3 Kelly (Ga.) 426. In that case the Georgia court bases its decision on the following reasoning: The executor derives his powers from the will, his duties are not imposed by law and his powers are not derived from the ordinary, but are delegated to him by the testator; an administrator de bonis non is the successor and privy of the executor and necessarily of the testator, and therefore, "all this is eminently true of the administrator with the will annexed." The decision also discusses the matter of privity in the manner following: After quoting from Greenleaf the same definition of "privity" upon which the United States and Massachusetts courts predicate their conclusions, to wit: "The term 'privity' denotes mutual and successive relationship to the same rights of property," the learned judge writing the opinion says: "The authority to act flows, in either case, from the testator. Now, the executor is in privity with the testator; so is the administrator with the will annexed, and if both are in privity with the common testator, it is difficult to imagine that they are not in privity with each other." The reasoning in the United States and Massachusetts decisions seems to be more in harmony with the decision of our own court and the language of our statute. The decisions in the other cases cited by respondent in support of the action of the trial court, are all to be distinguished from the case before us, if they are not, by reason of the premises upon which based, inapplicable in this state. Hill v. Tucker, 13 How. 458, 14 L. Ed. 223, was a Louisiana case in which it was held that where the same person was appointed executor in Virginia and Louisiana, a judgment obtained against him as executor in Virginia was admissible in evidence in Louisiana to show that the demand was prosecuted to judgment in Virginia, for the purpose of meeting a plea of the statute of limitations upon the original cause of action. It also appeared that the reason why the action was permitted in Louisiana was because the estate was exhausted in Virginia without payment of the claim.

Hopper v. Hopper, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237, rests upon the case of Hill v. Tucker, and holds that a New Jersey executor becomes in effect a domestic executor in the state of New York when he also takes out letters testamentary in the latter state, and that as such he may be sued by a nonresident creditor. The court says it would not be idle for the nonresident creditor to sue in the ancillary jurisdiction as, under the authority of Hill v. Tucker, while the judgment obtained will not be conclusive, it might be prima facie evidence to answer a plea of the statute of limitations. The New York court expressly declines to decide the question, whether such a creditor would be entitled to be paid in the New York administration, or be relegated to New Jersey to await the return to the domiciliary administration of the balance left after the payment in full of the New York creditors from the New York assets.

Garland v. Garland, 84 Va. 181, 189, 4 S. E. 334, which also relies on Hill v. Tucker, holds that a decree against the domiciliary executor of a decedent may be enforced against an administrator de bonis non in any jurisdiction. In Turley v. Dreyfus, 33 La. Ann. 885, the same person named as executor obtained letters testamentary in two states, and it was held that a judgment obtained against him as executor in one state could be enforced against the administrators de bonis non who succeed upon the death of the executor to the administration in the other jurisdictions. This case is much weakened as an authority by the fact that upon another hearing of the matter the chief justice dissents from this part of the decision, and holds that the judgment obtained in the other jurisdiction (Tennessee) was not binding upon the executor or real estate in Louisiana, 35 La. Ann. 514. The Wisconsin case cited rests upon such a peculiar state of facts as to render it of no assistance in determining the question before us. In Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640, the action was against the same person acting as executrix, and if not sufficiently distinguished by that circumstance alone, it is by the fact that the action was one to establish a constructive trust, rather than an action on a creditor's claim against the estate. See Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861. In support of the view adopted as between administrators in different states, see, also, Churchill v. Boyden, 17 Vt. 319, 322; Rosenthal v. Renick, 44 Ill. 202; McGarvey v. Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861; Smith v. Goodrich, 167 Ill. 46, 47 N. E. 317; Hatchett v. Berney, 65 Ala. 39, 49; Durston v. Pollock, 91 Iowa, 668, 60 N. W. 221; Brodie v. Bickley, 2 Rawle (Pa.) 431; Barry's Appeal, 88 Pa. 131; Aspden v. Nixon, 4 How. 467, 497, 11 L. Ed. 1059.

The decisions which are rested upon the doctrine of privity between the executor in one jurisdiction and the administrator c. t. a. in another are the natural deductions from the rules of succession and administration at common law. By the common law the title to the personal property vested in the executor, while that of the real estate vested in the heir. At first it was held under the English rule that the executor of the domicile was charged with the collection of the personal assets from all parts of the world, and the corresponding duty of paying all the debts of the estate was imposed upon him. Either in person or by representative he was required to act in every jurisdiction in which personal assets of the decedent were to be found. His powers were derived from the will, and those of the administrator c. t. a., who acted in his behalf, were also derived from the will through him, and, as the Georgia court said, it is difficult under such conditions to imagine that they are not in privity with each other. But even in England this rule was relaxed until the executor in the domicile was held responsible only for such of the estate as was there located and such as otherwise came into his possession, and the ancillary administrator came to be entitled to and chargeable with all the personal property having its situs within his jurisdiction. Some of the litigation in the cases examined arose through the attempt of nonresident creditors in one jurisdiction to subject the real estate of the heir in another to the payment of their debts, while in others the contest arose between the personal representatives in the different states. The question of privity became of importance and the rights of the respective parties were determined, as we have said, with relation to the common-law rules of succession. Owing to a failure to always distinguish between the right of action of one executor or administrator as against another executor or administrator, and the right of such executor or administrator against the heirs in another jurisdiction, the decisions even in common law are not all in harmony. These rules evolved under the common-law system have never prevailed in this state, where all the property, real and personal, descends to the heir, subject only to the right of the personal representative, under statutory authority, to administer thereon. Here the executor or administrator takes possession of all the estate of the deceased for the purpose of administration. Section 1581, Code Civ. Proc., and section 1384, Civ. Code. All property is chargeable with the decedent's debts, there being no priority between the personal and real property in its application to this purpose. Section 1516, Code Civ. Proc.; Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90. This local administration is provided for the protection of local creditors and claimants. No state should allow property to be taken from its borders until debts due its own citizens have been satisfied. Our statute provides for administration upon the estate of any nonresident who has died leaving property in this state. To obtain such letters it is not necessary to show that there are creditors or that the property requires care to preserve it, and the law provides a mode for ascertaining whether there are any local creditors after the administration is begun. The administration, though called ancillary to distinguish it from the administration of the last residence of the decedent, is wholly independent of it. Only the surplus remaining after full administration can be remitted to the domiciliary representative for distribution. See section 1667, Code Civ. Proc. Whether there are any local creditors can only be determined by giving the notice to creditors required by the law of this state. McCully v. Cooper, 114 Cal. 263, 46 Pac. 82, 35 L. R. A. 492, 55 Am. St. Rep. 66.

In holding that the will of a resident of California cannot be admitted to probate in this state as a "foreign will" after it has been probated in another state, our Supreme Court declares: Every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction. By the comity under which full faith and credit is to be given to judicial proceedings of sister states, it was never intended that the state should part with any of its sovereign rights, with any of its rights of primary jurisdiction, nor with any rights of its subjects, to have the will of a fellow resident originally proved in the county of his residence, where, presumptively, he is the best known, and where they may the better litigate all questions touching the validity of the solemn instrument offered for probate. Estate of Clark, 148 Cal. 108, 112, 113, 82 Pac. 760, 762, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197. In the decision of this case the court says: "It would be said with exact truth that the full faith and credit which is accorded to the adjudications of sister states is a full faith and credit consonant with complete jurisdiction and control of the sovereign state over all its inhabitants, and over all the property within its boundaries." Other cases tend to assert for, and afford to, the local creditor the same protection and preference over foreign creditors that the Clark Case does to the persons locally entitled to the estate of the deceased upon distribution. See Estate of Apple, 66 Cal. 432, 6 Pac. 7; Estate of Ortiz. 86 Cal. 306, 24 Pac. 1034, 21 Am. St. Rep. 44; Fox v. Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474. In one instance this is extended far enough to declare that a foreign domiciliary executor has no power against an ancillary administrator with the will annexed, in this state, to sell and assign certificates of stock in a national bank located in this state, notwithstanding the certificates of stock were in the possession of the deceased and came into the hands of the foreign executor. Murphy v. Crouse, supra. An inspection of the sections of the Code of Civil Procedure relating to probate matters justifies no distinction between an executor or administrator c. t. a., and a general administrator in respect to the effect of the allowance of, or a judgment establishing, a probate claim in a foreign state.

Considering the effect of section 1913, Code Civ. Proc., upon the judgment of the Minnesota court in the light of the rule declared by the cases above reviewed, if it be held that the exception therein as to executors and administrators has no bearing, we are still of the opinion that the judgment is not only not conclusive upon the California administrator c. t. a., but that it cannot be the basis of an action against him, or even evidence to establish the indebtedness. This is the result whether we accept the implied view of some of the cases that a proceeding to establish a claim against an estate is a proceeding in rem having for its res the assets of the estate within the jurisdiction where presented as distinguished from the entire estate, or the theory of the United States Supreme Court, that an action to establish a claim is in personam against the executor or administrator in the jurisdiction in which brought, which can be made payable only out of the assets of the estate in that jurisdiction. It is to be borne in mind that the original indebtedness is not presented here. The claim is based upon the judgment, and the right to present the original indebtedness is not before us. This distinction is drawn because the issues made by the pleadings, the defenses interposed to the claim, and the evidence introduced might be construed to have also submitted to the trial court defenses admissible only upon the theory that it was the original indebtedness which was under consideration. These, however, were presented on the issue that the claim was illegally allowed in Minnesota.

If this matter were considered by us upon the theory that is advanced by respondent to sustain the judgment, to wit: That by reason of the provisions of section 1356, Code Civ. Proc., a privity exists between the executor in Minnesota and the administrator in California, the plaintiff has failed to establish his right to recover against the assets in the latter state. If there be privity it must be in the enforcement of the provisions of the will; by these the payment of debts is charged upon the personal property first, and only when this is found insufficient to pay the debts is resort to be had to the real estate, and by our Code the property of a testator is to be applied to the payment of his debts in the order in which his will directs, if there be sufficient property of the kind indicated to pay his debts. Civ. Code, § 1359. There is neither averment nor finding that the personal property in the domicile has been exhausted, nor that any personal property exists in or has been removed to California. On the contrary, it is found that all the estate in California is real estate. Cherry v. Speight, 28 Tex. 517; Hill v. Tucker, 13 How. 458, 14 L. Ed. 223.

The other points made on the appeal as to the admissibility of the evidence relating to the knowledge of plaintiff of the bankruptcy proceeding, the mortgage on the Minnesota property, and the sufficiency of the showing of want of knowledge of the probate proceeding in California to stay the bar of the statute of limitations, and of the affidavit attached to the claim, need not be considered. We cannot, however unnecessary it may be to the decision, refrain from saying that an affidavit, "that said claim is due and unpaid, and there are no offsets against the same, and no credits thereon," is not merely defective, but entirely lacks some of the most important elements of the statutory requirement that it shall state, "that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant." Code Civ. Proc. § 1494.

Judgment and order reversed.

We concur: ALLEN, P. J.; SHAW, J.

12 Cal. App. 143

GRANGERS' UNION v. ASHE et al.

(Civ. 673.)

(Court of Appeal, First District, California. Dec. 9, 1909.)

1. VENUE (§ 66*) — CHANGE — AFFIDAVIT OF MERITS.

An affidavit of merits for a change of venue, reciting that deponent had fully and fairly stated the case to his counsel, "and after such statement I am advised and verily believe that I have a good defense on the merits to this action," did not show that deponent was advised by his counsel that he had a good defense, and was therefore defective.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 113; Dec. Dig. § 66.*]

2. APPEAL AND ERROR (§ 177*) — QUESTIONS NOT RAISED AT TRIAL.

Where an affidavit of merits on an application for change of venue was drawn on the theory that the deponent had employed counsel, and had stated the facts to him, and there was no intimation below that deponent was himself an attorney, or that he relied on his own judgment, his affidavit, otherwise defective for failure to show that he had been advised by his counsel that he had a good defense, could not be sustained on appeal, on the theory that deponent, being an attorney, did not need to rely on the advice of other counsel.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 177.*]

3. VENUE (§ 58*)—CHANGE OF VENUE—AFFIDAVIT.

Where, in an action against a firm, it appeared from the verified complaint that there were other defendants members of the firm when the action was commenced than those referred to by deponent in an application for a change of venue, who were alleged to reside in the city of San Francisco, so that it did not appear that all of the defendants were nonresidents of the county in which the action was brought, the application was properly denied.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 88–90; Dec. Dig. § 58.*]

4. APPEAL AND ERROR (§ 912*)—ORDERS—PRESUMPTIONS OF REGULARITY.

All presumptions are in favor of the regularity of a trial court's order denying an application for change of venue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3689; Dec. Dig. § 912.*]

Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by the Grangers' Union against R. Porter Ashe and others. From an order denying the motion of defendant Gaston M. Ashe for a change of the place of trial, he appeals. Affirmed.

John T. Thornton and Leo C. Lennon, for appellant. Briggs & Hudner, for respondent.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

COOPER, P. J. The order made by the trial court, denying appellant's motion for a change of the place of trial, may be justified. The motion was made by Gaston M. Ashe, who states in his affidavit of merits that he has fully and fairly stated the case to John T. Thornton, Esq., his counsel, "and after such statement I am advised, and verily believe, that I have a good defense on the merits to this action." The affidavit does not show that appellant was advised by his counsel that he had a good defense, and it is therefore and for that reason defective. Jensen v. Dorr, 9 Cal. App. 18, 98 Pac. 45.

Nor can the affidavit be held sufficient in this court on the theory that appellant is himself an attorney at law, and therefore not under the necessity of relying upon the advice of other counsel. No such theory was intimated in the court below. The affidavit was drawn entirely upon the theory that appellant had employed counsel, and that he had stated the facts to such counsel. Not having intimated in the court below that he was an attorney at law, nor that as such attorney he made the affidavit relying upon his own judgment, he will not now be allowed to ask this court to take judicial notice of the fact that he is such attorney, for the purpose of reversing an order otherwise properly made by the trial court.

It may be further said that the complaint shows that John Doe, whose true name is unknown to the plaintiff, was one of the partners doing business under the firm name of Ruinart Stock Farm. The affidavit does not state that there are no others than R. Porter Ashe and Gaston M. Ashe who are members of said partnership, nor that said John Doe is a fictitious defendant, nor that the defendants all resided in the city and county of San Francisco at the time of the commencement of the action. In fact it appears from the verified complaint that there were other defendants members of the said copartnership at the time said action was commenced. All presumptions are in favor of the regularity of the order made by the trial court.

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

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12 Cal. App. 141

PEOPLE v. LEWIS. (Cr. 203.)

(Court of Appeal, First District, California. Dec. 9, 1909.)

CRIMINAL LAW (§ 729*)—MISCONDUCT OF PROSECUTING ATTORNEY—CORRECTION BY COURT—EFFECT.

On a trial of a husband for assault with intent to murder his wife, living apart from him, the misconduct of the district attorney in stating in his argument that the wife refused to live with the husband because of his conviction of a felony, where there was no evidence that the wife lived apart from her husband on that ground, was not reversible error, where on objection the statement was withdrawn, and the court, at the district attorney's request, directed the jury to consider the husband's conviction of felony only in weighing his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. § 729.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

J. C. Lewis was convicted of assault with intent to murder, and he appeals. Affirmed.

Geo. Ingraham, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was charged by information with the crime of assault with intent to commit murder, the information also setting up a prior conviction. To the latter charge he pleaded guilty, but went to trial on the other, and was convicted. From the judgment, and from an order denying his motion for a new trial, he prosecutes this appeal.

The principal point urged by the defendant for a reversal of the judgment is misconduct on the part of the prosecuting officer. The assault for which the defendant was being tried was committed on his wife, who was living apart from him; and it appears from the record that just prior to the assault the defendant called on her and besought her to live with him again, but she refused to do so. The defendant offered himself as a witness at the trial, and upon his cross-examination admitted that he had been convicted of a felony. In the course of his argument to the jury the assistant district attorney stated that the defendant's wife had refused to live with him because he had been convicted of a felony. There was no evidence in the case that she had refused to live with him upon this ground, and upon objection by the defendant the prosecuting officer, in the presence of the jury, was immediately so informed by the court. The district attorney withdrew this statement, and requested the court to direct the jury to disregard it, whereupon the court instructed the jury in substance that the only use they could make of the testimony given by the defendant that he had been convicted of a felony was in weighing the credibility of his testimony; that the assertion of the district attorney that the defendant's wife had refused to live with him because of his conviction of a felony was without any evidence to support it, and that therefore it was to be wholly disregarded by the jury.

There are a number of cases in this state (many of which are cited by the defendant in his brief) to the effect that it is error sufficient to reverse a judgment for the prosecuting officer against objection to state facts pertinent to the issue, but not in evidence, or to argue on the assumption that such facts are in evidence when they are not.

While there was no evidence in this case that the wife's refusal to live with the defendant was because of his conviction of a felony, yet it is plain, we think, in view of the circumstances above adverted to and the triviality of the entire matter, that the statement was not so serious as to come within the doctrine of those cases.

In the oral argument before this court counsel for defendant contended that the trial court erred in its rulings on the admission of certain evidence. We have carefully examined these rulings, and also the sufficiency of the evidence to support the verdict, and find these points to have less merit than the point first considered.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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12 Cal. App. 148

PEOPLE v. OSBORN. (Cr. 123.)

(Court of Appeal, Second District, California. Dec. 10, 1909. Rehearing Denied by Supreme Court Feb. 7, 1910.)

1. CRIMINAL LAW (§ 1035*)—APPEAL—OBJECTION AND EXCEPTION—NECESSITY.

A conviction cannot be reversed on appeal because of alleged misconduct of the trial judge, in the absence of a specific objection and exception taken thereto in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2644; Dec. Dig. § 1035.*]

2. FALSE PRETENSES (§ 49*)—EVIDENCE.

Evidence *held* to warrant a conviction of obtaining money by false pretenses.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

3. FALSE PRETENSES (§ 38*) — STATUTES — AMOUNT RECEIVED—"GRAND LARCENY."

Pen. Code, § 487, defines "grand larceny" to include the taking of property of another exceeding $50 in value, and section 532 declares that every person who knowingly, and by false or fraudulent pretense, defrauds another of money, etc., is punishable in the same manner and to the same extent as for larceny of the money or property so obtained. *Held* that, where defendant was accused of obtaining by false pretenses a loan of $1,000, the state was not bound to show that defendant received the full amount alleged, but proof that she received an amount in excess of $50 was sufficient to sustain a conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. § 38.*

For other definitions, see Words and Phrases, vol. 4, pp. 3149-3150.]

4. FALSE PRETENSES (§ 43*)—EVIDENCE.

Where it was claimed that defendant procured a loan from prosecutor by false pretenses, on condition that she should procure insurance on a house, which she pretended to mortgage as security, evidence that defendant procured witness to introduce her to an insurance agent, saying that she wanted to procure insurance on a house, that defendant was present when the policy was issued, and that it was subsequently delivered to prosecutor in performance of the condition was admissible.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 43.*]

5. CRIMINAL LAW (§ 782*)—TRIAL—INSTRUCTIONS.

An instruction that the jury should not consider the court's opinion as to accused's guilt or innocence, if the jury had obtained a suspicion as to what the court's opinion was from the court's rulings, etc., was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1882; Dec. Dig. § 782.*]

6. FALSE PRETENSES (§ 44*)—EVIDENCE.

Where, in a prosecution for false pretenses in obtaining a loan by falsely representing defendant's ownership of certain real estate, which she offered as security, there was no evidence that she had any claim or interest in the property when the representations were made, or for a period of years before that, evidence that at some time prior to 1905 she claimed to own some interest in the property was properly excluded.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 58; Dec. Dig. § 44.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

K. B. Osborn was convicted of false pretenses, and she appeals. Affirmed on rehearing. Former opinion withdrawn.

C. W. Pendleton and Henry W. Nisbet, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appellant was tried by a jury, and found guilty of obtaining money under false pretenses. A motion for a new trial was denied, from which order and the judgment of conviction appellant appeals. This court in a former opinion filed reversed the judgment and order denying a new trial upon the ground of misconduct upon the part of the trial judge amounting to an irregularity in the proceedings. Upon the application for a rehearing our attention is called for the first time to the fact that no exception was reserved at the time to the comment by the court upon the questions of fact forming the basis for such claim of irregularity. There is an exception appearing in the record in connection with the incident involved in the question of misconduct; but it appears that this exception was taken to the ruling of the court upon the admissibility of certain evidence, and not to the language of the court used in connection with the ruling. The trial court is always entitled to know the true character of the objection and the reasons, if any, existing in the minds of the attorneys why and for what the objection is urged, to the end that the court may intelligently consider the effect of what has been said by the court, and thus be afforded an opportunity to correct any irregularity, either by instruction or otherwise. In the absence of a specific objection and exception based upon misconduct, an appellate court is not authorized to pass upon the merits of the controversy. People v. Abbott, 101 Cal. 645, 36 Pac. 129; People v. Ah Fook, 64 Cal. 382, 1

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pac. 347; People v. Trask, 7 Cal. App. 104, 93 Pac. 891.

What is said in connection with the one specification above referred to applies with equal force to the other matters specified as error and based upon alleged misconduct and irregularity. The record discloses that many things were said, and suggestions made by the court, during the progress of the trial, which might have been omitted. But appellant is not in a position, having reserved no exception thereto at the time, to ask a consideration of the effect of such alleged misconduct.

Eliminating, then, from consideration all questions of misconduct not excepted to at the time, we find upon an examination of the record evidence tending to show the following facts: Appellant represented to one Larkin that she was the owner of a certain house and lot bearing number 1217 West Forty-Fifth street, Los Angeles, and took Larkin to view said premises, and stated to him that the title to same was standing in the name of one Watts as trustee for her, and that she desired to procure from Larkin a loan of $1,000 upon said property. As a matter of fact, the house shown by defendant to Larkin was situated on lot 142, Normandie avenue tract, and was not owned by defendant, and she had no interest therein, and no title was held thereto by Watts or any other person for her use or benefit. Larkin, believing her representations to be true, agreed to make the loan of $1,000 if appellant would procure a policy of insurance upon the dwelling as part of the security. It is shown that this property so shown to Larkin was worth at least $2,000, and that Larkin, relying upon the representations of appellant, delivered his check to an abstract company, with instruction to deliver the same to defendant whenever the trustee, Watts, should execute and deliver as security for the loan a deed of trust for the house and lot and, in addition, a policy of insurance covering the cottage. The instruction to the abstract company was in writing, but there is evidence tending to show that when the same was signed by Larkin such instruction contained no designation as to the lot number. It does appear, however, that without Larkin's knowledge some one inserted in the instruction a description of the property as lot No. 35, Noramndie avenue tract. About the time of the transaction appellant had entered into a contract to purchase, for $600, an unimproved lot situate a block or so distant from No. 1217 West Forty-Fifth Street, the same being lot 35, Normandie avenue tract, upon which contract of purchase she paid $10, and no more, and represented to the seller that she was buying it for Watts. Appellant, after making arrangements with Larkin for the loan, caused a deed of trust to be executed in the name of Watts for lot 35, Normandie avenue tract, being the vacant lot, and caused to be issued and delivered to Larkin a policy of insurance upon the cottage known as 1217 West Forty-Fifth street. Larkin, believing that the description in the deed of trust executed to him covered the property shown to him as 1217 West Forty-Fifth street, accepted the same as security for his loan, and the abstract company applied the $1,000 represented by Larkin's check to the payment of the $590 due from appellant on account of the purchase of lot 35, and some other minor expenses, and gave appellant a check for the balance, $383.70, which check was payable to Watts, and, bearing the indorsement of Watts and appellant, was subsequently paid by the bank upon which it was drawn.

That every representation made by appellant in relation to the property was false, and known by her to be false, and the same were made by her to Larkin for the purpose of defrauding him, is established beyond question. In fact there was no evidence offered at the trial on the part of defendant tending to rebut any evidence offered in support of the allegations of the information. The theory upon which the defense appears to have been conducted was that defendant, at the time of committing the acts complained of, was insane. The verdict of the jury was adverse to appellant upon this contention, and the evidence fully warranted its conclusion in that regard.

A great number of errors are assigned in appellant's brief, the major portion of which are directed to claimed error on account of the action of the trial court in refusing certain instructions, notably among which was the refusal upon the part of the court to charge the jury, in effect, that a conviction could not be had unless the full sum of $1,000, alleged to have been obtained, was in fact actually received by defendant. We see no error in refusing this charge. That she did receive $590 of the money, or, at least, the full benefit thereof, in the purchase of lot 35, is unquestioned, and there are strong circumstances tending to show that she received all of the remainder of the money, or the benefit thereof. Aside from this, it is not incumbent upon the state to show that the full amount alleged to have been received was in fact actually obtained by reason of the false representations. Proof of receiving an amount in excess of $50 would be sufficient to sustain a verdict of guilty under the information in this case. Sections 487, 532, Pen. Code. We have examined carefully the instructions refused, and feel satisfied that, in so far as they are applicable or proper, the same were embodied in the instructions actually given by the court upon its own motion.

Error is claimed by reason of the admission in evidence of the policy of insurance covering the cottage. It is in evidence that defendant procured a witness to introduce her to an insurance agent, saying at the time that she wanted to procure insurance on a house; evidence that she was present when the policy was issued, and that this policy was subsequently delivered to Larkin, the complaining witness. This, in connection with her agreement with Larkin to procure a policy, was sufficient to connect her with the transaction, and were facts and circumstances sufficient to warrant the court in admitting in evidence the policy of insurance so issued and delivered.

We think there was no impropriety in giving the following instruction: "Rulings have been made by the court in your presence, and questions have been asked of witnesses by the court. From these things, or from anything that has occurred in the trial, you are not to infer what the opinion of the court may be as to the guilt or innocence of the accused. With the court's opinion you have nothing whatever to do, and if you have even any suspicion of what the court may think in the matter, you have no right to consider it any more than you would have a right to consider the opinion of anybody else. The question of the guilt or innocence of the defendant is for you alone, regardless of what anybody else may think about it."

We see no prejudicial error in the action of the court denying to defendant the right to show that at some time prior to 1905 the defendant claimed to own some interest in the house situated on lot 142, and which had been moved thereon from some other lot. There is nothing in any of the evidence which could have the effect to show any facts from which it could be inferred that defendant had any claim or interest in the property at the time the representations were made, nor, in fact, for a period of years preceding.

Many other errors are assigned, but, in our opinion, they are without merit, and, considering the record all together, that there is no prejudicial error appearing therein warranting a judgment of reversal.

The judgment and order are therefore affirmed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 145

Ex parte HAYDEN. (Cr. 151.)

(Court of Appeal, Second District, California. Dec. 9, 1909.)

1. CRIMINAL LAW (§ 13*) — "CONFIDENCE OPERATOR."

Pen. Code, § 647, subd. 4, declares every person known to be a "confidence operator," either by his own confession, or by his having been convicted of such offense, and having no visible or lawful means of support when found loitering around any steamboat landing, railroad depot, or broker's office, etc., to be a vagrant. *Held*, that the state's police power was sufficiently broad to warrant legislation looking toward the suppression of "confidence operators," which term implies as its fixed meaning one engaged in swindling operations, in which advantage is taken of confidence reposed by the victim in the swindler.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 2, p. 1421.]

2. CONSTITUTIONAL LAW (§ 206*) — "VAGRANTS"—DEFINITION—PRIVILEGES AND IMMUNITIES OF CITIZENS.

Pen. Code, § 647, subd. 4, defining "vagrants" to include confidence operators having no visible means of support when found loitering around certain public places, was not unconstitutional as abridging the privileges or immunities of citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625–648; Dec. Dig. § 206.*

For other definitions, see Words and Phrases, vol. 8, pp. 7267–7269.]

3. VAGRANCY (§ 1*) — EVIDENCE — "CONFESSION."

Pen. Code, § 647, subd. 4, provides that every person known to be a confidence operator, either by his own confession, or having been convicted of such offense, and having no visible means of support when found loitering around certain public places, shall be deemed a vagrant. *Held*, that the word "confession" as so used had reference to an admission or declaration as to the party's status as distinguished from his confession of guilt of a particular crime, and was not the equivalent of a "statement" or "declaration," and hence the section does not justify a conviction, or declare the offense established by the confession of the party, but only provides that his admission of the truth of one of the elements, of the offense, to wit, his calling, is sufficient to establish such element.

[Ed. Note.—For other cases, see Vagrancy, Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 2, pp. 1417–1419; vol. 8, p. 7610.]

4. CRIMINAL LAW (§ 273*)—PLEA OF GUILTY—CORPUS DELICTI.

In a prosecution for vagrancy, defendant's plea of guilty not only established the character of his calling, but all the elements of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 631; Dec. Dig. § 273.*]

Habeas corpus on petition of Thomas L. Hayden. Writ denied. Prisoner remanded.

Hugh J. Crawford, for petitioner. J. D. Fredericks, Dist. Atty., and Arthur L. Veitch, Deputy Dist. Atty., for respondent.

PER CURIAM. The petitioner was arrested upon a complaint charging him with the crime of vagrancy, in that, being known to be a confidence operator by his own confession, and having no visible or lawful means of support, he was found willfully and unlawfully loitering about and around a broker's office. He entered a plea of guilty, and was accordingly sentenced to imprisonment, from which by this writ he seeks relief. The affidavit of complaint charges the offense in the language of the statute. Section 647, Pen. Code.

It is claimed upon the part of petitioner that being a confidence operator is not made an offense under our Penal Code, and therefore a confession in relation thereto cannot be made an offense. The term "confidence operator" has a settled and fixed meaning in our language, and implies that the one to whom it applies is one engaged in swindling operations in which advantage is taken of confidence reposed by the victim in the swindler. That such persons are a menace to the safety of the public must be unquestioned, and that the police power is broad enough to warrant legislation looking toward their suppression should be conceded. It is certainly within the legislative power to provide that one having no visible means of support, and who admits that he is a swindler, and is found lounging about places of public assemblage, thereby becomes a vagrant. We see nothing in the enactment of the section of the Penal Code referred to in any wise abridging privileges or immunities of citizens, nor doing or seeking to do aught than to protect well-disposed and orderly citizens from the depredations of the idle and vicious.

It is further insisted that the statute makes the confession the offense, and not the act of the party, and that the record discloses a judgment pronounced without proof of the corpus delicti otherwise than by the confession of the accused. We do not interpret the section in the manner above stated. It undertakes to and does define vagrancy and the various acts or omissions forming its constituent elements. It is the confidence operator against whom the subdivision of the section is directed. The term "confession" is restricted to acknowledgment of guilt, and is not the equivalent of "statement" or "declaration." People v. Strong, 30 Cal. 156. The section referred to does not justify the conviction, or declare the offense to be established, by the confession of the party, but does declare that his admission of the truth of one of the elements entering into the offense, to wit, his calling, is sufficient to establish that element. Thus, where there is an "admission of a fact, or a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, it may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other acts or circumstances to be established." State v. Porter, 32 Or. 135, 49 Pac. 964. It is manifest that the word "confession" as used in the section has reference to an admission or declaration as to the party's status as distinguished from a confession of his guilt of a particular crime. When presented for trial the subject-matter of the inquiry is as to his calling, his idle loitering, the absence of visible means of support. If the illegitimate character of his calling is established, either by proof of former conviction or by his own admission, that element is established. The plea of guilty entered by him comprehends more than the mere fact that he has admitted the character of his calling, and goes to the extent of a plea of guilty to all of the elements entering into the offense. We do not desire to be understood as saying that one may be convicted upon his confession alone without other proof of the corpus delicti. The plea of guilty in this case removes from consideration such question.

Writ denied, and prisoner remanded.

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12 Cal. App. 153

HAMBERGER v. POLICE COURT OF CITY OF FRESNO et al. (Civ. 663.)

(Court of Appeal, First District, California. Dec. 13, 1909. Rehearing Denied by Supreme Court Feb. 10, 1910.)

1. PROHIBITION (§ 3*)—GROUNDS—ABSENCE OF OTHER REMEDY.

Prohibition will not issue to an inferior tribunal or officer acting in excess of jurisdiction, unless the aggrieved party be without a plain, speedy, and adequate remedy at law, under the express provisions of Code Civ. Proc. § 1103.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

2. PROHIBITION (§ 3*)—EXISTENCE OF OTHER REMEDY.

An appeal lies to the superior court both upon questions of law and fact from a judgment of a police court in a civil action under the express provisions of Code Civ. Proc. § 974. Section 975 provides an expeditious method of settling the statement if the appeal be upon questions of law alone, and upon such appeal the superior court may review all orders affecting the judgment appealed from. *Held* that, where a judgment sought in a police court was a money judgment for goods sold, an appeal from an adverse judgment is a remedy in the ordinary course of law plain, speedy, and adequate, and prohibition will not lie.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Prohibition by A. Hamberger against the Police Court of the City of Fresno and another. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court; Beatty, C. J., dissenting.

Carter & Carter and Earl A. Bagby, for appellant. Ernest Klette, for respondents.

HALL, J. Plaintiff brought this proceeding in the superior court of the county of Fresno for the purpose of securing a writ to issue out of said court, prohibiting the police court of the city of Fresno and the judge thereof from proceeding with the trial of an action then pending in said police court, upon an account against plaintiff herein for $121.65 for goods sold to said plaintiff. Defendants filed a general demurrer to plaintiff's complaint, and the court sustained the same, and entered judgment denying plaintiff's application for a writ of prohibition. From the judgment plaintiff has appealed, and the only question presented by the appeal is as to the correctness of the ruling of the court sustaining the demurrer.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The ruling of the court was clearly correct. The writ of prohibition will not issue to an inferior tribunal or officer, acting without or in excess of the jurisdiction of such tribunal or officer, unless the aggrieved party be without a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103; Levy v. Wilson, 69 Cal. 105, 10 Pac. 272; Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143; Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310; Strouse v. Police Court, 85 Cal. 49, 24 Pac. 747; Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604; McDonald v. Agnew, 122 Cal. 448, 55 Pac. 125; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; Valentine v. Police Court, 141 Cal. 616, 75 Pac. 336; McAdoo v. Sayre, 145 Cal. 344, 78 Pac. 874; Carr v. Superior Court, 147 Cal. 227, 81 Pac. 515; McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020.

An appeal lies to the superior court, both upon questions of law and fact, from any judgment rendered by a police court in a civil action. Code Civ. Proc. §§ 974, 975. If the appeal be upon questions of law alone, an expeditious method of settling the statement is provided (Code Civ. Proc. § 975), and upon such appeal the superior court may review all orders affecting the judgment appealed from. In the case at bar the judgment sought against appellant in the police court was an ordinary money judgment for goods sold. That an appeal from such a judgment is a remedy in the ordinary course of law, plain, speedy, and adequate cannot be doubted. Holbrook, etc., v. Superior Court, 106 Cal. 589, 39 Pac. 936; Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143; Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310; Strouse v. Police Court, 85 Cal. 49, 24 Pac. 747; Broder v. Superior Court, 103 Cal. 124, 37 Pac. 191; Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; Valentine v. Police Court, 141 Cal. 616, 75 Pac. 336; McAdoo v. Sayre, 145 Cal. 344, 78 Pac. 874; McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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12 Cal. App. 175

YOUNGER v. SPRECKELS. (Civ. 687.)

(Court of Appeal, First District, California. Dec. 15, 1909. Rehearing Denied by Supreme Court Feb. 10, 1910.)

1. VENUE (§ 68*)—CHANGE OF PLACE OF TRIAL—RESIDENCE OF DEFENDANT.

Affidavits on application for change of venue to the county of the residence of defendant which averred that defendant was at the commencement of the action, and had been for many years prior thereto, a resident of such county, and that he had during such times been registered as a voter therein, and had never resided or been registered as a voter at any other place for the past 45 years, were sufficient to require a change of venue, notwithstanding an opposition affidavit averring that defendant was residing in the dwelling house on his ranch in the county at the time the action was commenced.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 121; Dec. Dig. § 68.*]

2. VENUE (§ 28*)—"RESIDENCE."

"Residence" within the statute providing for the place of trial depends on intention as well as fact, and is the place where one remains when not called elsewhere on business, pleasure, or for other temporary purposes, and the place of residence within the statute is the fixed home of a party as understood by himself and his neighbors and friends.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 42; Dec. Dig. § 28.*

For other definitions, see Words and Phrases, vol. 7, pp. 6151–6161; vol. 8, p. 7788.]

3. VENUE (§ 28*)—RESIDENCE.

The mere inhabitancy of a summer home at certain seasons or at certain times does not make the person inhabiting the house a resident of the county in which the house is situated, for though one may abide at times in a place for pleasure, health, or repose, it does not become his domicile unless it is his intention to remain there.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 42; Dec. Dig. § 28.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Jeannie H. Younger, as executrix of Charles B. Younger, deceased, against Claus Spreckels. From an order denying the motion of defendant to change the place of trial on the ground of his residence, he appeals. Reversed.

Charles S. Wheeler, for appellant. Charles B. Younger, for respondent.

COOPER, P. J. In this case the trial court denied the defendant's motion for a change of the place of trial upon the ground that the place of residence of the defendant at the time of the commencement of the action was the county of Santa Cruz and not the city and county of San Francisco.

In our opinion the court erred in its conclusion. The affidavits filed by defendant and in his behalf stated positively that the defendant at the time the action was commenced was, and for many years prior thereto had been, a resident of the city and county of San Francisco, and that he has always during said times been registered as a voter in said city and county of San Francisco, and has never resided or been registered as a voter at any other place for the past 45 years. The only affidavit in opposition to the above is that of plaintiff's attorney, which states that for more than 20 years defendant has been the owner and in possession of a piece of real property situate in Santa Cruz county known as the "Aptos ranch"; that there is upon said ranch a dwelling house which, when occupied, is occupied by defendant and his family as a residence. "That said Spreckels remained and resided in and occupied said dwelling house on said ranch at the time of the commencement of this action, and at the time he was served with summons herein he was served with such summons at said dwelling house. That said defendant, at the time of making his affidavit of residence herein, made such affidavit while domiciled in said residence as aforesaid. * * * That for many years last past said Spreckels has been in the habit of frequently returning to said dwelling house in said county of Santa Cruz in seasons of repose." The above affidavit on behalf of plaintiff does not show, nor does it state, that defendant was not a resident of the city and county of San Francisco at the time the action was commenced. Neither does it state that he was a resident of the county of Santa Cruz. The purport of the affidavit is that the defendant was residing in the dwelling house on the ranch at the time the action was commenced. This is entirely consistent with the affidavit of defendant that among other properties he owns the Aptos ranch, and "that he has at various times sojourned on the same as a summer resort, but at no other times and for no other purposes."

Within the contemplation and meaning of the statute a person can have but one bona fide residence. Residence depends upon intention as well as fact; and in its ordinary acceptation it is the place where one remains when not called elsewhere on business, pleasure or for other temporary purpose. The mere inhabitancy of a summer home or country house at certain seasons of the year or at certain times would not make the party inhabiting said house a resident of the county in which such house is situated. The material question is the animo manendi. Although one may abide at times in a place for pleasure or health or repose it does not become his domicile unless it be his intention to remain there. The place of residence within the meaning of the statute is the fixed home of a party as understood by himself and his neighbors and friends. The affidavits show that the house of the defendant was in San Francisco.

Respondent's contention that the subsequent affidavit of merits filed by defendant was not properly filed and cannot be considered cannot be supported by the record. The certificate of the judge to the bill of exceptions shows that "defendant's further affidavit on motion for change of the place of trial, and further affidavit of merits, and the affidavits of Frank Harrold, W. W. Montague, and James D. Phelan, are copies of papers used on the hearing in this court of the motion of said defendant for a change of the place of trial of said action, and that said bill of exceptions contains all the papers used on the hearing of said motion in this court." Not only this, but the opinion of the trial judge, which appears in the record, denying the motion, shows that he placed his denial upon the ground that in his opinion there was sufficient evidence to show that defendant was a resident of the county of Santa Cruz within the meaning of the statute at the time the action was commenced.

The order is reversed.

We concur: KERRIGAN, J.; HALL, J.

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12 Cal. App. 163

JACOBS v. ALL PERSONS, ETC. (JACOBS et al., Appellants). (Civ. 700.)

(Court of Appeal, First District, California. Dec. 13, 1909. Rehearing Denied by Supreme Court Feb. 10, 1910.)

1. DEEDS (§ 99*)—FORM AND CONTENTS—REFERENCE TO OTHER INSTRUMENTS.

A deed may refer to another instrument, sufficiently identified, with the same effect as if the document referred to was set forth in full in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 261–265; Dec. Dig. § 99.*]

2. DEEDS (§ 99*)—CONSTRUCTION—REFERENCE TO OTHER INSTRUMENTS.

Where a deed conveyed land to grantor's wife for her life, and at her death to pass to certain designated children subject to the restrictions recited in certain separate deeds, to each executed by the grantor and wife, the separate deeds never having been delivered to the grantees named therein, and by their terms not to take effect until their parents' deaths, were parts of the main deed under which the grantor's wife took title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig §§ 261–265; Dec. Dig. § 99.*]

3. DEEDS (§ 90*)—CONSTRUCTION—CONSTRUCTION AS A WHOLE.

A deed will be construed so as to effectuate the manifest intention of the parties, the entire deed being read, and effect being given, if possible, to the habendum clause, as well as to the granting clause; the purpose of the habendum clause being to limit, enlarge, and make clear the estate granted by the premises.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 236; Dec. Dig. § 90.*]

4. DEEDS (§ 129*) — CONSTRUCTION — ESTATES CONVEYED—LIFE ESTATE.

A deed conveyed certain lands to the grantor's wife, and to her heirs and assigns forever, to have and to hold to her during her life, and upon her death to go to children of her and the grantor as her successors in interest, subject to the restrictions in certain separate deeds made to them by the grantor and his wife. *Held*, that the grantor's wife took a life estate only.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 416–435; Dec. Dig. § 129.*]

5. DEEDS (§ 124*) — CONSTRUCTION — "HEIRS" IN GRANTING CLAUSE.

The use of the word "heirs" in the granting clause of a deed is not necessary to the conveyance of a fee, and adds nothing to the legal effect of a grant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 346; Dec. Dig. § 124.*]

6. LIFE ESTATES (§ 8*)—NATURE OF POSSESSION AS TO REMAINDERMEN OR REVERSIONERS—ADVERSE POSSESSION.

The possession of a life tenant is not adverse to the interest of the remaindermen or reversioner.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24–28; Dec. Dig. § 8.*]

7. HUSBAND AND WIFE (§ 265*)—COMMUNITY PROPERTY—GIFT BY HUSBAND.

A husband, without the written consent of his wife, may make a gift in remainder of any portion of the community property not intended as a fraud upon the wife, if the property was acquired before the amendment of 1891 (St. 1891, c. 220) to Civ. Code, § 172, prohibiting a husband from making a gift of community property without the wife's written consent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 917; Dec. Dig. § 265.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Rachel Jacobs against All Persons Interested, including Louis Jacobs and others. Judgment for plaintiffs, and defendant Jacobs and others appeal. Reversed and remanded.

Mastick & Partridge, for appellants. Tum Suden & Tum Suden, for respondent.

HALL, J. Plaintiff brought this action under the McEnerney act (St. 1906 [Extra Sess.] c. 59), so called, to quiet her title to a certain piece of real estate situate at the corner of Broderick and Sutter streets, in the city and county of San Francisco. Plaintiff alleged and claimed that she was the owner of the premises in suit in fee. The appellants appeared in the action, and, while admitting plaintiff to be the owner of the premises for and during her natural life, denied that she was the owner thereof in fee, and set up a claim of title in remainder in each of them to an undivided interest in said premises. In their several answers defendants set up their chain of title, in which they allege that on and prior to the 31st day of December, 1900, one Jacob Jacobs was the owner in fee simple of the premises in suit, and on said day made a deed of said property, by which he conveyed a life estate therein to plaintiff, and remainder therein, after the expiration of said life estate, to his three sons, Gustav Jacobs, Albert Jacobs, and Leopold Jacobs, from whom appellants in turn deraigned such title as they claim. The court found that on and prior to the 31st day of December, 1900, one Jacob Jacobs was the owner in fee simple of the premises in suit, and that he on that day, by a deed of grant, conveyed the same and the whole thereof to the plaintiff in fee simple, and that ever since said day she has been and now is the owner and entitled to the possession thereof in fee simple. Judgment was entered accordingly for plaintiff, and the three defendants who appeared, within 60 days after the rendition and entry thereof, appealed. Appellants attack the sufficiency of the evidence to support the finding upon which the judgment is predicated.

It seems to be conceded by both parties that on and prior to December 31, 1900, the property in suit was community property of Jacob Jacobs, who acquired it while the husband of plaintiff. On that day he executed the deed referred to in the findings, and subsequently, and before the beginning of this action, died. By the terms of the deed Jacob Jacobs, in consideration of love and affection, did "give, grant, alien and confirm unto the said party of the second part and to *her* heirs and assigns forever" certain described lands, including the premises in suit. "To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, *her* heirs and assigns forever, *in manner following, viz: To the said party of the second part during the remainder of her natural life, and upon and at the time of her death the title to all of said property shall pass to and be vested in Annie Newman, Leah Levy, Jennie Levy, Phoebe Jacobs, Gustav Jacobs, Albert Jacobs and Leopold Jacobs as her successors in interest in manner and subject to the restrictions as in their certain separate deeds to each made and executed by myself and the said party of the second part herein to them and to each of them.*" This deed was upon a printed form; the portion in italics being written. It was delivered to plaintiff. The deeds referred to in the deed to plaintiff were dated and signed by plaintiff and her husband, but were never delivered to the grantees named therein, but were always retained by plaintiff without delivery to any one. There are three of these deeds, each by its terms not to take effect until the death of both of the parents of the grantees therein, and each conveying a different portion of the premises described in the deed to plaintiff. (The seven "remaindermen" in the deed to plaintiff are children of plaintiff and Jacob Jacobs, now deceased.) In one of the undelivered deeds the three sons are named as grantees; in another two of the daughters are the grantees, and in the third the two other daughters are the grantees. The defendants Louis Jacobs and Alexander Jacobs are also children of plaintiff and Jacob Jacobs, now deceased, and all the appellants deraign whatever interest they have in the premises in suit from the three sons named as "remaindermen" in the deed to plaintiff.

The contention of respondent is that by the premises or granting clause of the deed to plaintiff a fee was conveyed to her; that the provision of the habendum clause, purporting to limit the estate granted to her to a life estate, is subsequent thereto and in conflict therewith, and is therefore of no effect; that the premises or granting clause must prevail over any inconsistent provision in the habendum clause. This view evidently was adopted by the trial court. Appellants' contention is that the entire deed must be read and construed together to arrive at the intention of the grantor; that so reading and construing the deed, it is clear that the grantor only intended to convey to the grantee, his wife, a life estate and no more.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Before taking up the discussion of the effect of the deed to plaintiff it is well to dispose of some matters discussed in the briefs as to the effect of the deeds signed by plaintiff and her husband. As to these deeds it is clear to us that they never became effectual as independent grants to transfer anything to the grantees named therein for want of delivery. Nevertheless they are parts of the deed under which plaintiff claims, and may be read as a part of such deed. A deed may refer to another document sufficiently identified with the same effect as if the document referred to was set forth in full in the deed. Burnett v. Piercy, 149 Cal. 179, 86 Pac. 603; Estate of Willey, 128 Cal. 1, 60 Pac. 471; Jackson v. Ireland, 3 Wend. (N. Y.) 99. In Burnett v. Piercy, supra, a trust deed referred to a deed then prepared to be executed by the trustee. The court said: "By this trust clause the deed to be executed by Crockett was referred to, and all its conditions and limitations were thereby incorporated into, and made parts of, the terms of the trust upon which Crockett held the land." In Jackson v. Ireland, supra, a deed conveyed land to the grantees to have and to hold "in the manner mentioned in the said last will and testament of Thomas Ireland, deceased." It was held that the estate granted by the deed must be determined by the terms of the will thus referred to. While we do not deem it very important to the determination of the case, it is clear to us that the three deeds referred to in the main deed must be considered as a part thereof. We now take up the matter as to what estate was conveyed to plaintiff by the deed from Jacob Jacobs.

It is very truly said in Eldridge v. See Yup Co., 17 Cal. 45, that: "Much curious learning is to be found in the books as to the effect of deeds, and many subtle and unsubstantial distinctions, and technical and arbitrary rules laid down touching their construction and operation." It is, however, the tendency of the courts in the later decisions to adopt such construction as will effectuate the manifest intention of the parties. The entire deed must be read to get at the intention of the grantor. Effect, if possible, must be given to the habendum clause, as well as to the granting clause. Effect must be given to both consistent with the evident purpose and intent of the grantor. The very purpose and object of the habendum clause is to limit, enlarge, and make clear the estate granted by the premises. "Whether a life estate or an estate in fee is conveyed must be determined by considering the deed as a whole." 2 Devlin on Deeds, § 858. In the deed under consideration the words in the habendum clause limiting the estate granted to plaintiff were written, and thus evidently selected with a special view to effectuate the purpose of the grantor. On the other hand, the words in the premises relied on by plaintiff are the printed words (with only the necessary blanks to be filled to indicate the sex and number of the grantees) usually found in the forms for gift deeds. The limitation to a life estate in the plaintiff is clear and distinct in the habendum clause. "A clear and distinct limitation in a grant is not controlled by other words less clear and distinct." Civ. Code, § 1067. Reading the deed in question as a whole, we cannot doubt that the grantor intended thereby to convey to his wife, the grantee, a life estate only, and that the deed should be given this effect and no more.

To construe this deed as conveying a fee simple to plaintiff in the face of the clear and distinct limitation to a life estate contained in the habendum clause would be to defeat the manifest intention of the grantor by the application of "subtle and unsubstantial distinctions, and technical and arbitrary rules." This should not be done. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

A deed very similar to the one now under consideration was before the court in Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. The grant was to the grantee "and to his heirs," while the habendum limited the estate to the grantee "for and during his natural life, and to the issue and heirs of the body of the said party of the second part." Notwithstanding the grant was to the grantee "and to his heirs," the court found no difficulty in giving full effect to the limitation to a life estate in the habendum clause. True, in the Barnett Case the words "and assigns forever" were struck out of the printed form, while they were not in this, but such words add nothing to the effect of the other words not struck from the granting clause. Indeed, as is clearly pointed out in the Barnett Case, the use of the word "heirs" in the granting clause of a deed is not necessary to the conveyance of a fee. Under the statutes of this state the use of the word "heirs" is quite unnecessary to the grant of a fee. Its use adds nothing to the legal effect of a grant to a named grantee. The rules to be followed in construing a deed are very clearly laid down in Barnett v. Barnett, supra. What was there said is entirely pertinent to the facts of this case. The court in part said: "The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument, the habendum as well as the premises, are to be considered; and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause. * * * 'It is in such case to be considered as an addendum or proviso to the conveyancing clause, which by a well-settled rule of construction must control the conveyancing clause or premises, even to the extent of destroying the effect of the same.' Bodine v. Arthur, 91 Ky. 53 [14 S. W. 904] 34 Am. St. Rep. 162." To the same effect is Burnett v. Piercy, 149 Cal. 179, 86 Pac. 603. In this case John C. Piercy and his wife, Mary, conveyed in trust to Crockett to convey, by deeds already prepared to be executed by Crockett. By this deed Crockett conveyed certain property to "Mary Piercy, her heirs and assigns." It is manifest that by this granting clause an estate in fee as clearly appeared to be conveyed as such estate appears to be conveyed in the case at bar, yet the court had no difficulty in construing subsequent provisions in the deed as limiting the estate conveyed to a life estate. These limitations were not nearly so express as in the case at bar. To the same effect is Pavkovich v. S. P. R. R. Co., 150 Cal. 39, 87 Pac. 1097, where the court said: "The doctrine that where the habendum, or other subsequent clause is repugnant to the premises, the premises must prevail applies only where the two are irreconcilable. And it does not apply where it appears from the whole conveyance, or from the language of the subsequent clause, that the grantor intended thereby to qualify the granting clause, or where the grantee will receive an estate of value even if the granting clause be modified as may be necessary to give effect to all parts of the deed."

In other jurisdictions we find that the courts have not hesitated to give controlling effect to the habendum clause in deeds similar to the one in the case at bar. In Henderson v. Mack, 82 Ky. 379, the granting clause was to the grantee, "his heirs and assigns," and the habendum was: "To have and to hold the same, with all the appurtenances thereof, to the second party, his heirs and assigns forever, with covenant of general warranty, during his natural life, and after his death to go to and belong absolutely to Belle Mack, she paying the unpaid purchase money as aforesaid." It was held that the grantee, the party of the second part, took a life estate with remainder in fee to Belle Mack. In all essential particulars, indeed, the case just cited was identical with the deed in the case at bar, even to repeating in the habendum clause "to the second party, his heirs and assigns, forever." In Carson v. McCaslin, 60 Ind. 335, the granting clause was to "Hervey McCaslin, and his heirs and assigns forever," and the habendum was, "To be held by the said Hervey McCaslin for and during his natural life," with contingent remainder to his wife if she survive him. She did survive him, and it was held that Hervey McCaslin took a life estate only, with remainder to his wife. In Caldwell v. Hammons, 40 Ga. 342, the grant (in consideration of marriage) was to Martha Gray, "and to her heirs and assigns," of a described tract of land, "to hold the same during her lifetime, and then to revert to my heirs, both of her and my former wife." The grantor died without issue of Martha, but leaving issue by his former wife. In an action for waste against the grantee, brought by the heirs at law of the grantor, it was held that Martha Gray took a life estate only. This case was decided under the Georgia Code of 1861, § 2656, which is as follows: "If two clauses in a deed be utterly inconsistent, the former must prevail, but the intention of the parties from the whole instrument should, if possible, be ascertained and carried into effect." This section of the Georgia Code is but an epitome of the Code law of this state, including section 1070, Civ. Code, and the correlated sections dealing with the interpretation of contracts, which are made applicable to the interpretation of grants by section 1066, Civ. Code.

It is clear that plaintiff did not take a fee simple by the deed from her husband, but a life estate only, and that under the evidence she is not the owner of the whole of the property in suit in fee simple. Neither did plaintiff acquire any title by adverse possession. The possession of a life tenant is not adverse to the interest of the remaindermen or reversioner. 1 Am. & Eng. Ency. of Law, 807. For the reasons above set forth the finding to the effect that Jacob Jacobs conveyed the premises described in the complaint to Rachel Jacobs, the plaintiff, and that she has been ever since, and now is, the owner thereof in fee simple, is not sustained by the evidence.

We have discussed the case without regard to the possible effect of section 172, Civ. Code, as amended in 1891 (St. 1891, c. 220), upon the right of a husband, without the written consent of his wife, to make a gift in remainder of any portion of the community property, for though it does not expressly appear from the record that the property in suit was acquired by the husband prior to such amendment, counsel upon both sides seem to have treated the case as though such were the fact. The right of a husband to make a gift of such community property not intended as a fraud upon his wife is established by Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170.

The judgment is reversed, and the cause remanded for further proceedings.

We concur: COOPER, P. J.; KERRIGAN, J.

12 Cal. App. 189

SMITH v. SUPREME LODGE A. O. U. W.

(Civ. 709.)

(Court of Appeal, First District, California. Dec. 16, 1909.)

1. JUDGMENT (§ 17*)—PROCESS TO SUPPORT—PUBLICATION OF SUMMONS—ATTACHMENT.

Where defendant, a nonresident, was served with summons by publication and mailing, and no writ of attachment issued, a judgment taken by default was void for want of jurisdiction in the court over the person of defendant, since the court had no jurisdiction to proceed until it had brought under its jurisdiction property belonging to defendant within the state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25, 26–33; Dec. Dig. § 17.*]

2. JUDGMENT (§ 135*) — MOTION TO VACATE JUDGMENT.

Where a default judgment had been rendered against a nonresident served with summons by publication and without writ of attachment, a motion to vacate the judgment was the proper remedy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 246, 247; Dec. Dig. § 135.*]

3. JUDGMENT (§ 164*)—OPENING DEFAULT—RELIEF AWARDED—QUASHING SERVICE.

The court, on vacating a personal judgment by default, based on service by publication and mailing, without attachment of property, properly refused to set aside and quash the service of summons, since, the service of summons and the issuance and levy of attachment being independent proceedings, plaintiff may supplement his process by attachment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 324; Dec. Dig. § 164.*]

4. ATTACHMENT (§ 143*) — NONRESIDENT DEFENDANTS — ALLOWANCE AFTER VACATED JUDGMENT.

Under Code Civ. Proc. § 537, which provides that a plaintiff may attach property of the defendant as security for any judgment recovered when the defendant is a nonresident, etc., after a judgment had been vacated and set aside because no attachment had issued, and the court was without jurisdiction, the plaintiff could still procure the issuance and levy of a writ of attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 395; Dec. Dig. § 143.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Mary Jane Smith against the Supreme Lodge Ancient Order of United Workmen. From an order denying a motion to set aside and vacate the judgment and to vacate and quash the service of summons, defendant appeals. Reversed, with directions to vacate and set aside the judgment, and affirmed as to the order denying the motion to quash the service of summons.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

D. S. Hirshberg, for appellant. Wilson T. Hume, for respondent.

HALL, J. Plaintiff brought this action to recover the sum of $2,000, upon the death of her husband, Michael H. Smith, in accordance with the terms of a certificate issued to said Michael, by defendant, through a subordinate lodge located at Gold Hill, in the state of Nevada. The only service of summons was by publication and mailing. The affidavit for the order showed defendant to be a foreign corporation, with its principal place of business in the state of Pennsylvania, and without any managing or business agent, cashier, or secretary within the state of California, and without any appointed agent or person upon whom service of summons could be had within said state. There was no writ of attachment issued, and of course no seizure or attachment of any property of defendant. Plaintiff, however, took judgment by default on the 27th day of July, 1908, against defendant for the sum of $2,000. Thereafter, on the 16th day of October, 1908, defendant, appearing only for the purpose of its motion, gave notice of its intention to move the court to set aside and vacate the judgment, and to vacate and quash the service of summons. This motion was denied, and thereupon defendant appealed from such order. It was proven without conflict upon the hearing of the motion that defendant was not doing business in the state of California, and had not done any for 20 years last past. The contention of appellant is that, in the absence of any attachment or seizure of property of defendant within this state, the court obtained no jurisdiction in a purely personal action to render a personal judgment against a defendant not within the state, by service of summons by publication and mailing a copy to defendant addressed to its residence in another state.

This contention is sound. That a judgment so obtained in such a case is void for want of jurisdiction in the court over the person of defendant is the doctrine laid down in the much-cited and leading case of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. Notwithstanding the publication of summons, jurisdiction to proceed is not obtained until the court has brought under its jurisdiction, by attachment or other proper procedure, property belonging to the defendant within the state. This is the rule established not only in Pennoyer v. Neff, supra, but also in several cases decided in this state. Belcher v. Chambers, 53 Cal. 635; Anderson v. Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Eureka, etc., Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393; Johnson v. Miner, 144 Cal. 785, 78 Pac. 240; First National Bank, etc., v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 Pac. 289.

The issuance and levy of the writ of attachment is an essential step to be taken before jurisdiction is acquired to render any judgment at all. And when jurisdiction is thus acquired the judgment can only be enforced against property previously attached. See cases above cited. That a motion to vacate the judgment is the proper remedy is established by De la Montanya v. De la Montanya, supra. The court should have granted defendant's motion to the extent of vacating and setting aside the judgment.

The action of the court, however, was right in refusing to set aside and quash the service of summons. The service of summons and the issuance and levy of an attachment are both requisite to confer jurisdiction, but "the proceeding for the publication of summons is distinct and separate from the proceeding in attachment. The judgment against a nonresident is dependent upon both these proceedings, but neither of the proceedings is dependent upon the other." Johnson v. Miner, 144 Cal. 785, 78 Pac. 240.

The judgment being vacated and set aside, the plaintiff, if so advised, may yet procure the issuance and levy of a writ of attachment (Code Civ. Proc. § 537), provided property can be found upon which to make such levy.

The order appealed from is reversed, and the court directed to enter an order vacating and setting aside the default of defendant and the judgment entered thereon, but denying its motion to quash the service of summons.

We concur: COOPER, P. J.; KERRIGAN, J.

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12 Cal. App. 173

PEOPLE v. LEAVENS. (Cr. 198.)

(Court of Appeal, First District, California. Dec. 15, 1909.)

1. False Pretenses (§ 8*)—Elements of Offense—Evidence.

To justify a conviction of obtaining money by false pretenses by the sale of fraudulent certificates of stock represented by accused to be owned by him, the prosecution must prove that accused obtained the money on the representation that he was the owner of the stock which he sold, and that such representation was false.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 13; Dec. Dig. § 8.*]

2. Criminal Law (§ 511*)—Accomplice—Evidence—Sufficiency.

On a trial for obtaining money by false pretenses by the sale of fraudulent certificates of stock which accused represented that he owned, the bookkeeper of the corporation testified that he and accused conspired to procure the issuance of the fraudulent certificates, and that accused should sell them and divide the proceeds; that the certificates were issued in the name of a third person; that accused indorsed the third person's name on the back of the certificates; and that there was no consideration paid for the issue of the certificates. The buyer of the certificates and his clerk testified that accused obtained the money from the buyer by representing himself to be the owner of the stock, and gave a fictitious name, which he signed to the certificates, etc. *Held*, that the testimony of the bookkeeper, who was an accomplice, was sufficiently corroborated to justify a conviction within Pen. Code, § 1111, providing that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence tending to connect accused with the commission of the offense.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

3. CRIMINAL LAW (§ 508*)—TESTIMONY OF ACCOMPLICE.

The actual commission of an offense may be established by the evidence of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1111; Dec. Dig. § 508.*]

4. CRIMINAL LAW (§ 511*)—TESTIMONY OF ACCOMPLICE—CORROBORATION.

Under Pen. Code, § 1111, providing that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence tending to connect accused with the commission of the offense, evidence outside of that of the accomplice need not be sufficient to establish the guilt of accused, but it must in some way tend to implicate and connect him with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

5. CRIMINAL LAW (§§ 543, 1153*)—APPEAL—ADMISSION OF DEPOSITIONS TAKEN AT PRELIMINARY EXAMINATION — DISCRETION OF COURT.

In admitting in evidence on the trial the deposition of a witness taken at the preliminary examination, on the ground that the witness could not be found within the state, much is left to the discretion of the trial court, based on the facts, and its ruling will not be disturbed unless the discretion has been abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 3061-3066; Dec. Dig. §§ 543, 1153.*]

6. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where there was sufficient evidence of the nonresidence of a witness, whose deposition was taken at the preliminary examination, to justify the court in admitting the deposition in evidence on the trial, regardless of telegrams sent to the witness and his answer thereto, the error in admitting the telegrams, because hearsay, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

7. FALSE PRETENSES (§ 38*)—INFORMATION—EVIDENCE—VARIANCE.

There is no variance between the allegation in an information for false pretenses that accused procured money from prosecutor and the proof that he procured money by means of a check which prosecutor drew.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. § 38.*]

8. FALSE PRETENSES (§ 38*)—INFORMATION—EVIDENCE—SUFFICIENCY.

Where the information for false pretenses charged that the money procured by accused was the property of two persons, and that accused intended to defraud both, evidence that the money was the property of one of the two, and that the intent was to defraud him, was sufficient.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. § 38.*]

9. FALSE PRETENSES (§ 39*) — FRAUDULENT INTENT—EVIDENCE.

A fraudulent intent in false pretenses may be presumed from the proof of the fraudulent acts or pretenses made by accused with knowledge of their falsity.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 54; Dec. Dig. § 39.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

M. B. Leavens was convicted of false pretenses, and he appeals. Affirmed.

D. S. Truman, for appellant. Attorney General Webb, for the People.

COOPER, P. J. The defendant was charged in the information with the crime of obtaining $1,442.75 in lawful money of the United States from one Norwood on the 6th day of February, 1909, knowingly, designedly, and by falsely and fraudulently representing to said Norwood that he, the defendant, was then and there the owner of $5,000 of the capital stock of the Sandstorm Mining Company, a corporation organized under the laws of the state of South Dakota and doing business in the state of Nevada. The jury returned a verdict of guilty as charged, whereupon judgment was entered to the effect that defendant be imprisoned in the state prison at San Quentin for the term of 18 months. He made a motion for a new trial, which was denied, and this appeal is from the judgment and the order.

It is not claimed that there is an insufficiency of evidence in the record to sustain the verdict, but it is contended—and is the main contention here—that there is not sufficient evidence outside of the evidence of one Chaney, an accomplice, to justify the verdict. The evidence of Chaney is to the effect that in February, 1908, he was the bookkeeper of the corporation, and resided in the town of Goldfield, in the state of Nevada, where the corporation was doing business, to wit, mining, and that the defendant also lived in the said town; that he and defendant entered into an agreement, or conspiracy, whereby he, as such clerk or bookkeeper, was to take up canceled certificates of stock of said corporation to the amount of $5,000, and issue new certificates in lieu thereof, and by certain false statements to procure the signatures of the president and of the secretary of the corporation to said fraudulent certificates, and then affix the seal of the corporation thereto; that defendant should then take these said fraudulent certificates to San Francisco and sell the same, the proceeds to be divided equally between the two; that the witness did procure the issuance of said certificates for 5,000 shares of said stock, and procured the names of the president and of the secretary thereto, and when so issued affixed the seal of the corporation in the proper place; that at the suggestion of the defendant the stock was issued in the name of J. C. Culver, and that defendant indorsed the name of J. C. Culver on the back of the certificates; that witness did not know any one by the name of J. C. Culver; that there was no consideration paid for said certificates, and that they were issued without the knowledge or consent of the board of directors, the president, or any officer of the corporation. The said certificates were then delivered to defendant, and he immediately left for San Francisco.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It appears from the evidence of Norwood, who was a stockbroker doing business in San Francisco, and of Simpson, his clerk, in effect that about February 6, 1908, the defendant came into the office of Norwood, and desired to sell the stock, introducing himself under the fictitious name of Stewart; that Norwood asked defendant how he came by the stock, and defendant replied as follows: "He said he had a 5,000-share certificate that he had bought when the stock was low, and had sent it up to a friend of his, a Mr. Culver, to have it cut up into 1,000-share pieces so that he could sell it more easily. Mr. Culver for some reason had put it in his own name, and indorsed it and sent it down to him. * * * I asked him if he knew this was Mr. Culver's signature, and he said he did. I asked him if he was ready to witness it, and he said he was, and he signed it in my presence and the presence of Mr. Simpson 'A. F. Stewart.' * * * I asked him if he knew Mr. Culver's signature and would witness it, and he said he did and would witness it, and thereupon signed the five certificates. * * * Defendant wrote the signature 'A. F. Stewart,' which appears on the back of the check in my presence, and at the time I gave him the check the words 'sig. O. K.' were placed there in my presence by my clerk, Mr. Simpson. This was done at Mr. Leavens' request. He said he was unacquainted, and wanted to know how he could get his money for the check." The witness further testified that he gave the defendant a check for $1,442.75 on the Bank of British North America, where his bank account was kept; that this check was made payable to "A. F. Stewart," and indorsed by defendant "A. F. Stewart," and was paid by the bank and charged to the account of Norwood; that he believed and relied on the representations of defendant that he was the owner of the stock; that his name was A. F. Stewart, and, acting upon such belief, he paid the defendant for the stock; that he subsequently bought other stock which was genuine, and delivered such genuine stock to his customer in lieu of the stock purchased of defendant.

The record fails to show why Norwood purchased other stock, or by what means he knew or discovered that defendant was not the real owner of the 5,000 shares which he had purchased from defendant. In fact there is no evidence that defendant was not the owner of the 5,000 shares at the time he sold them to Norwood, except the evidence of Chaney, the accomplice, as hereinbefore stated. It seems that the district attorney or prosecuting officer might easily have procured other testimony if it existed to show that the stock was not issued by the authority of the corporation, or that it was fraudulent; but we must take the record as we find it, and determine whether or not the evidence other than the evidence of the accomplice tends to connect the defendant with the commission of the offense charged.

Our Code (Pen. Code, § 1111) provides: "A conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The crime charged here is obtaining money by false pretenses. It was necessary for the prosecution to prove that defendant obtained the money, and not only that he obtained the money, but that he obtained it upon the representation that he was the owner of the stock which he sold to Norwood, and that such representation as to his ownership was false. The evidence of Norwood and of his clerk Simpson clearly shows that defendant obtained the money from Norwood; that he obtained it by representing himself to be the owner of the stock. He further represented and stated that his name was Stewart, and signed such name to each of the five certificates of stock. He had the stock in his possession purporting to be indorsed by J. C. Culver. The accomplice Chaney in his testimony said that he delivered the stock to defendant, and that defendant indorsed the name of Culver on the certificates. It was part of the plan and a part of the conspiracy that defendant should come to San Francisco and dispose of the stock. Now it is evident from the very inception of the general plan that money was to be obtained from some one by a false representation. It began in Goldfield, Nev., by Chaney willfully procuring the certificates from the corporation, with the consent and acquiescence of the defendant. The name of Culver was used at the suggestion of defendant. The defendant indorsed the name of Culver on the back of the certificates. He came to San Francisco as a part of the plan to dispose of the stock. The crime was commenced in Nevada, and every step from the first conversation between defendant and the accomplice up to the final act of obtaining the money was tainted with fraud. Every act, no matter whether performed by Chaney or by defendant, was in furtherance of the common design and in aid of the common purpose. The fact that defendant had the stock in his possession tended to connect him with the crime. The fact that he wrote the name of Stewart instead of his true name tended to connect him with the crime. Honest men do not introduce themselves under an alias and sign fictitious names to muniments of title to property. There is not a word to contradict the evidence of Chaney as to why the certificates of stock were purloined. The transactions which followed, as narrated by Norwood and his clerk, tend to connect the defendant with the commission of the offense. The actual commission of an offense may be established by the evidence of the accomplice, but the law, in order to protect innocent men from being convicted, provides that the evidence of the accomplice alone shall not be sufficient to justify a conviction, but that there must be other independent evidence which "tends to connect the defendant with the commission of the offense." The evidence outside of that of the accomplice need not be sufficient to establish the guilt of the defendant, but it must in some way tend to implicate the defendant and connect him with the transaction and with the crime. This is sufficient. People v. Ames, 39 Cal. 404; People v. Kunz, 73 Cal. 313, 14 Pac. 836; People v. Barker, 114 Cal. 617, 46 Pac. 601; People v. Bunkers, 2 Cal. App. 197, 84 Pac. 364, 370.

It is next claimed that the court erred in admitting in evidence the deposition of Chaney taken at the preliminary examination, for the reason that it was not made to appear that he could not with due diligence be found within the state and produced at the trial. The evidence shows without conflict that Chaney was not a resident of the state; that he was not present at the trial; that he could not be found or had not been found at his former address in Oakland. In such case much is left to the discretion of the trial court, based upon all the facts and circumstances, and it is only in case of an abuse of such discretion that this court would be justified in reversing a criminal case where the judgment was otherwise correct. People v. Witty, 138 Cal. 576, 72 Pac. 177; Renton v. Monnier, 77 Cal. 450, 19 Pac. 820; People v. Melendrez, 4 Cal. App. 399, 88 Pac. 372. Conceding that the telegram sent to Chaney at Kansas City, Mo., and his answer thereto were hearsay, and not admissible as preliminary to the introduction of the deposition, the error was harmless. There was sufficient evidence as to the residence of Chaney without the state, and the fact of his not being present, to justify the court's action in admitting the deposition regardless of the telegram.

There is no variance between the allegations of the information and the proof. The allegation is that the defendant procured money from Norwood, and the proof is that he did procure money, but it was procured by the means or use of a check or written request which Norwood made upon the bank for the payment of the money. There may be a difference between getting money directly by handing the coin over in hand and giving a request in writing to a third party who complies with the request and hands it over, but the effect is the same, and the distinction is highly technical. An appeal that depends upon such question for reversal is devoid of merit. The defendant obtained the money, and obtained it from Norwood, no matter what means were used in finally conveying the money from Norwood to the defendant. People v. Whalen, 154 Cal. 472, 98 Pac. 194.

Nor is there any merit in the contention that the evidence does not show that the money obtained was the property of the Sandstorm Mining Company. The information states that the money was the property of Norwood and of the Sandstorm Mining Company, and that the intent was to cheat and defraud both; but it was sufficient to prove that the money was the property of one of the parties named, to wit, of Norwood, and that the intent was to cheat and defraud Norwood. People v. Hines, 5 Cal. App. 122, 89 Pac. 858; People v. Gibbs, 98 Cal. 664, 33 Pac. 630.

It is claimed that the court erred in refusing the defendant's requested instruction numbered 1, which reads as follows: "The jury is instructed that in this case, as in case of all other crimes, the burden of proving every element of the crime beyond a reasonable doubt is on the state, and that a fraudulent intent is not to be presumed by you on the part of the defendant in this case if you should find that this defendant did make to H. H. Norwood false pretenses as alleged in the information here, and even if you should find that at the time the defendant knew such pretense or pretenses to be false and untrue." The instruction is to the effect that a fraudulent intent cannot be presumed or inferred upon proof of fraudulent acts or pretenses, the party making such pretenses knowing them to be untrue. If a fraudulent intent cannot be presumed or inferred from such proof, it is difficult to understand how it can be proved. The intent was to be presumed from the facts, and it would be difficult to understand how the intent could be proven in any other way except by proving the facts which would raise a reasonable inference as to the intent.

Other instructions are complained of, but the objections to them are equally devoid of merit. The defendant appears to have had a fair trial, and the instructions of the court as given were full and clear, and covered all the material issues in the case.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

12 Cal. App. 186

THORPE v. NORTH MONETA GARDEN LANDS WATER CO. et al. (Civ. 716.)

(Court of Appeal, Second District, California. Dec. 15, 1909.)

1. Appeal and Error (§ 78*)—Final Judgment—Denial of Application of Intervention.

An order denying an application of intervention is final as to the intervener, and justifies an appeal without waiting for judgment between the other parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 464; Dec. Dig. § 78.*]

2. Appeal and Error (§ 151*)—Party Aggrieved.

One denied the right to intervene in an action is not aggrieved by the judgment in the action, and his appeal therefrom will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 947; Dec. Dig. § 151.*]

3. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

It is the province of the trial judge to determine the weight of conflicting evidence, and his findings thereon will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

4. Appeal and Error (§ 1048*) — Harmless Error—Cross-Examination.

The exclusion of questions objectionable as not constituting proper cross-examination is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. § 1048.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Spencer G. Thorpe against the North Moneta Garden Lands Water Company, in which John G. Orth applied for leave to file a complaint in intervention. From a judgment for plaintiff against defendant, defendant and John G. Orth appeal. Appeal of John G. Orth dismissed, and judgment affirmed.

H. T. Gordon and Harris & Swanwick, for appellants. Herbert J. Goudge and C. L. Chandler, for respondent.

SHAW, J. Plaintiff as indorsee thereof brought suit to recover from defendant upon a promissory note described in the complaint and alleged to have been made and delivered by defendant to one W. J. Williams. By a second count it was alleged that on August 22, 1906, defendant was indebted to W. J. Williams in the sum of $4,073.85 for money loaned to defendant, which defendant agreed to pay on or before one year thereafter, with interest at 7 per cent. per annum until paid, compounded half yearly, which indebtedness, it was alleged, had been assigned to plaintiff. Defendant filed its answer, denying all the allegations of the complaint, except the alleged incorporation of defendant and an intermediate indorser of said note. At the trial the issues thus joined were found in favor of plaintiff and judgment was rendered against defendant, from which, and an order denying defendant's motion for a new trial, defendant appeals.

The record also contains what purports to be an appeal by John G. Orth from this judgment so rendered against defendant. Orth's purported appeal is based upon the ground that, prior to the trial, he applied to the court for an order making him and said Williams, to whom the note was made, parties to the action, and permitting Orth to file a complaint in intervention. At the hearing of the motion the court made an order denying the application; "and Orth," says his counsel, "prosecutes this appeal from the judgment for the purpose of reviewing the action of the court in denying his right to intervene." So far as disclosed by the record, Orth is a stranger to the action, and his rights are in no wise affected by the judgment against the defendant. The order denying his application was, in effect, a final judgment as to him and his right to be heard at all. Upon the making of the order he was entitled to an immediate appeal therefrom, free and unhampered by the subsequent proceedings in the action or final judgment rendered against the defendant. Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616; People v. Pfeiffer, 59 Cal. 90; Donner v. Palmer, 45 Cal. 180; State v. Parish Judge, 27 La. Ann. 184. We are fully aware that a contrary view was held in the case of Wenborn v. Boston, 23 Cal. 321, but, as said by Mr. Justice Shaw in the first case above cited, that decision must be regarded as overruled by these later cases. Orth is not a party aggrieved by the judgment against defendant, and his purported appeal therefrom is dismissed.

The appellant North Moneta Garden Lands Water Company contends for a reversal upon the ground that the finding of the court to the effect that defendant made and delivered the promissory note to Williams, as alleged in the complaint, the consideration thereof, as found by the court, being an indebtedness of the corporation due to said Williams in the sum of $4,073.85 for money advanced and loaned to defendant by Williams, is unsupported by the evidence. There is no merit whatever in this point. The evidence in support of the finding is clear and positive. The most that can be said is that there is a substantial conflict of evidence upon the issue. Where such conflict exists, it is, as has been so often stated, the peculiar province of the trial judge to determine the weight and credibility to be accorded to such conflicting testimony. "It is not for an appellate court to intimate as to the truth or falsity of any of the evidence." Anglo-Californian Bank v. Cerf, 147 Cal. 396, 81 Pac. 1081. Hence the extended argument of counsel for appellant, wherein they attack the evidence offered on behalf of plaintiff in an endeavor to show that it should be discredited, is an idle, though laborious, effort.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We perceive no error in the rulings of the court in excluding certain questions asked witness Williams on cross-examination. These questions relate to transactions in the corporate stock of defendant had between Williams and Orth. Appellant fails to point out wherein the evidence sought to be elicited thereby could, under any theory of the case, be relevant or material. Moreover, they were objectionable as not constituting proper cross-examination.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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CRITTENDEN et al. v. SAN FRANCISCO SAVINGS UNION et al. (L. A. 2,329.)

(Supreme Court of California. Jan. 22, 1910.)

1. Costs (§ 244*)—Costs on Appeal—Modification of Judgment — Necessity of Award.

Under Supreme Court rule 23 (144 Cal. xlix, 78 Pac. xi), providing that, "in all cases in which the judgment or order appealed from is reversed or modified and the order of reversal or modification contains no directions as to the costs of the appeal, the clerk will enter * * * a judgment that appellant recover the costs of appeal," appellant who succeeds in having the judgment modified is entitled to costs of the appeal, though the order of the court fails to so state.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 941; Dec. Dig. § 244.*]

2. Costs (§ 244*)—Costs on Appeal—Effect of Failure to Mention Costs.

Where under such rule two judgments were involved in the appeal, and only one is modified, and the order is silent as to costs, appellant is entitled to costs only as to the judgment modified.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 941; Dec. Dig. § 244.*]

3. Costs (§ 244*) — Costs on Appeal — Construction of Award.

Though the subject-matter of the action was transferred by appellant after appeal taken and brief filed and he appeared no more in the case, it cannot be said that the word "appellant" in the judgment of remittitur in relation to costs referred to the transferee rather than to the original appellant.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 945; Dec. Dig. § 244.*]

4. Costs (§ 83*)—Persons Entitled to Costs —Transfer of Interest.

Where the transferee of the subject-matter pending a suit permits it to be prosecuted in the name of the original parties, such parties are entitled to the costs of the suit, in the absence of a contract between such parties to the contrary.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 342; Dec. Dig. § 83.*]

In Bank. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by James L. Crittenden and another against the San Francisco Savings Union and others. From an order striking from the files memoranda of costs, plaintiffs appeal. Reversed, with directions.

Richards & Carrier and James L. Crittenden, for appellants. Canfield & Starbuck, for respondents.

SHAW, J. In the action of Kate M. Bell and James L. Crittenden v. San Francisco Savings Union et al., the defendant, San Francisco Savings Union, upon a cross-complaint, obtained judgment for the foreclosure and sale of the land which was the subject of the suit for the purpose of paying a large sum of money to the San Francisco Savings Union out of the proceeds thereof. Teresa Bell moved for a new trial. So also did Crittenden and the oil company. These motions were denied. Crittenden and the oil company appealed from the judgment. Teresa Bell also appealed from parts of the judgment, and both of said appeals were presented in one transcript numbered L. A. 1,913, filed in this court on May 17, 1906. Crittenden and the oil company also appealed from the order denying their motion for a new trial, and so also did Teresa Bell, the two appeals last mentioned being embodied in one transcript numbered L. A. 1,927, filed in this court on June 18, 1906. In this court these appeals were all submitted together and the opinion disposing of them is reported in the 153d volume of California Reports at pages 64 to 77, 94 Pac. 225.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The conclusion of that opinion is as follows: "The order denying both motions for a new trial is affirmed. The cause is remanded to the lower court, with directions to modify the judgment by deducting from the amount directed to be paid to the San Francisco Savings Union the sum of $16,679.85, and, as so modified, the judgment will stand affirmed." Nothing was said in the opinion, or in the order of modification, concerning the costs of appeal. The appeals from the judgment, embraced in case No. 1,913, was therefore governed by rule 23 of this court providing that: "In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal." 144 Cal. xlix, 78 Pac. xi. In the attempt to obey this rule the clerk entered upon the record and inserted in the remittitur in each case, 1,927 as well as 1,913, a judgment that the appellant recover costs of appeal. This, of course, is to be construed as including the plural and to give costs to all the appellants. In accordance with these two judgments of the Supreme Court, the two appellants filed in the court below two memoranda of costs on appeal under section 1034, Code Civ. Proc., one for $256.85 as the costs in case No. 1,913, the other for $1,168.30 as the costs in case No. 1,927. The court on the respondents' motion struck both of said memoranda from the files, and from this order the present appeal is taken.

The orders denying a new trial were the only orders presented for review on the appeals embraced in case No. 1,927, being the appeals from the order denying the motions for a new trial. That order having been affirmed, the appellants were not entitled to the costs of those appeals. The appeals from the judgment were embraced in No. 1,913 and under the rule aforesaid, upon the modification of the judgment, the appellants were entitled to the costs upon that appeal. Teresa Bell filed no memorandum of costs in either case, and her rights and the particulars of her appeal are not involved. The appeal of Crittenden and the oil company from the judgment was taken more than 60 days after the rendition of the judgment, and hence they could present for review upon that appeal the judgment roll alone.

Under these circumstances, the clerk had no authority or power to enter the judgment in favor of the appellant for costs in case No. 1,927. No order having been made by this court, except that manifested by the aforesaid rule, his power was limited by the rule which authorized him to enter the judgment for costs only in case No. 1,913, the appeals from the judgment alone. If this clerical error had been called to the attention of the court, the unauthorized judgment would doubtless have been vacated. Now that it is called to our attention an order to that effect will be made. The order, striking from the files the memoranda of costs on appeal No. 1,927 from the order denying a new trial, while erroneous upon the record as it stood at that time, was not a legal injury to the appellants, for the judgment then appearing to have been given in that case was itself unauthorized. This error alone would be insufficient to justify a reversal of the order. The appellants were, however, entitled to the costs of appeal from the judgment and it was error to strike that memorandum of the costs in case No. 1,913, from the files.

The respondent upon the hearing in the court below filed an affidavit showing that, after the taking of the appeals and filing of the transcript in No. 1,913, all the interest of Crittenden and the oil company in the lands involved in the action were sold in pursuance of the judgment appealed from to Teresa Bell as administratrix of the estate of Thomas Bell, deceased, and that a deed was made to her in pursuance of said sale on April 8, 1907. At the latter date the appellants' brief had been filed but the appeal had not been called for hearing in the Supreme Court. The appellants, Crittenden and the oil company, filed no reply brief, and did not appear in this court at the time of the hearing. Upon this it is contended by the respondent here that those appellants have no right to recover the costs in case No. 1,913. The argument is that, as they had no interest in the property at the time the appeals were argued or at the time the opinion was filed, the word "appellants" in the opinion and in the judgment and remittitur must be construed as applying only to the person or persons who at that time were interested in and were prosecuting the appeals; that is, to Teresa Bell alone. They further say a transfer by a party to an action of his interest in the subject-matter thereof carries to and vests in the transferror all interest in the costs theretofore incurred, and hence that these appellants have no right to such costs.

We do not think the manner in which the appeals were presented and the time at which the sale of the interest took place would justify the construction of the word "appellant" contended for by the respondents. As to the other point, it does not appear that there was any substitution of parties, and there is nothing to show that the right to those costs was transferred to Teresa Bell, or that these appellants abandoned the appeal. They may have been content to submit it upon their opening brief. Where a transferee pending a suit permits it to be prosecuted in the name of the original parties, there is no rule of law that prevents those parties from recovering costs of suit. That is a matter of contract between the two with which the adverse party has no concern. Furthermore, the judgment of this court as to the costs in 1,913 is still in force, and it is binding upon the superior court and upon the parties to the action.

This conclusion, of course, does not prevent the respondents, upon the going down of the remittitur upon this appeal, from further contesting the items of costs by showing, if they can, either that they were not incurred or that the items are too large.

For the reasons given, the order is reversed, with directions to the court below to strike from the files the memorandum of costs on the appeal in case No. 1,927 from the order denying a new trial, and for further proceedings, if any are instituted, to retax the costs of the other appeal. The appellants herein shall recover the costs of this appeal.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

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157 Cal. 206

In re HARTMAN'S ESTATE. (Sac. 1,733.)

(Supreme Court of California. Jan. 24, 1910. Rehearing Denied Feb. 23, 1910.)

1. DESCENT AND DISTRIBUTION (§ 71*)—EVIDENCE OF RELATIONSHIP—SUFFICIENCY.

Evidence *held* sufficient to identify one B. as the niece of decedent.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

2. MARRIAGE (§ 50*)—EVIDENCE.

Under Code Civ. Proc. § 1963, subds. 28, 30, 33, enumerating as disputable presumptions that things have happened according to the ordinary course of nature and the ordinary habits of life, that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage, and that the law has been obeyed, testimony that a man and woman lived together as husband and wife, that they always called one A. their child and their daughter, and that she called them father and mother, was sufficient prima facie evidence of the marriage and of the legitimacy of A.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79–89; Dec. Dig. § 50.*]

3. DESCENT AND DISTRIBUTION (§ 71*)—PROOF OF HEIRSHIP—EVIDENCE.

That two men called each other brother, that each spoke to the other by his first name, and that their conversation and conduct indicated relationship, and was consistent with the fact that they were brothers, sufficed to establish the fact of such relationship.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

4. EVIDENCE (§ 290*)—DECLARATIONS—QUESTIONS OF RELATIONSHIP.

Declarations of one P. to his daughter, made in the lifetime of W., that he had a brother W. in California, were properly admitted in evidence to prove the relationship; it appearing that they were made before any controversy over certain property arose, and that declarant was dead when they were offered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1149; Dec. Dig. § 290.*]

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

In the matter of the estate of William Hartman, deceased. From an order distributing the estate and from an order denying a new trial, the California Conference Association of the Seventh Day Adventists appeals. Affirmed.

E. E. Perlin, for appellant. O. B. Parkinson, for respondent. Aylett R. Cotton, for executor.

SHAW, J. The record presents two appeals, one from an order distributing the estate of William Hartman, deceased, and the other from an order denying a new trial of the matter.

By the provisions of his will the deceased left the sum of $2,000 to the Stockton Branch of the California Conference Association of the Seventh Day Adventists, and the entire residue of his estate to the said California Conference Association of the Seventh Day Adventists. The petition for distribution stated these facts, and asked distribution accordingly. The last-named body is an eleemosynary or charitable corporation, and it includes the so-called Stockton Branch, named as the recipient of the $2,000 legacy. Hartman executed said will more than 30 days before his death. He died on February 8, 1904. Annie Hartman Burns appeared and filed a counter-petition for distribution, alleging that she is the daughter of Peter Hartman, deceased, and that Peter was a brother of the testator, William Hartman; that she is an heir of the testator; that the gift of the entire estate to said charitable corporation is void, under section 1313 of the Civil Code, except as to one-third thereof, and asking that the two-thirds be distributed to her as the only heir. The corporation appeared and denied her relationship to the testator. The court found that she is a niece of the testator, as alleged, and his only heir at law. Distribution was made accordingly of two-thirds to her and one-third to said corporation, $2,000 thereof being for the use of the Stockton Branch. The corporation is the appellant.

The main question presented is the sufficiency of the evidence to support the finding that Annie Hartman Burns is a niece of the testator. We think there was evidence justifying that conclusion. A brief statement of the facts which the evidence tends to prove will show its sufficiency. William Hartman came to San Joaquin county prior to 1864 and continued to reside there until his death. So far as known, he never married and left no children. He was a native of Hanover, Germany, and was naturalized in 1866. In 1864 he boarded at a hotel in Stockton, Cal., kept by Jacob Byer, now of Lancaster, N. Y. He told Byer at that time that he came from Lancaster, but did not say whether it was in New York or Pennsylvania. In 1862 Peter Hartman lived at Lancaster, N. Y. He and one William Hartman were together there at that time, in presence of E. J. Silvernail. They called each other brother, and by their first names, William and Peter. William talked of going to California, and was trying to persuade Peter not to enlist in the army of the United States. Peter enlisted and in July, 1862, he and Silvernail's father, who had enlisted in the same company, were both injured by lightning, and were sent home to Buffalo on furlough. Silvernail and William Hartman met the two injured soldiers at Buffalo. Again Peter and William addressed each other as brothers and William helped Silvernail to take his father from the train. Many years afterwards Silvernail, in behalf of his father, who was applying for a pension, ascertained from an army comrade that William Hartman was in Stockton, Cal., and wrote to him to get his affidavit as to the injury of the elder Silvernail, reminding him of the occurrence at Buffalo in 1862, and stating to him that the elder Silvernail was an army comrade of Peter Hartman, his brother. The letter was addressed to William Hartman at Stockton, Cal. William answered the letter, saying that he well remembered helping to carry Silvernail, the elder, from the train at Buffalo in 1862. Again, about 1897, Silvernail sent another letter to William Hartman addressed to Stockton, Cal., and William wrote another letter to Silvernail and at that time made affidavit to the facts. This affidavit and the two letters were sent to the pension office at Washington and were not produced. Silvernail, on being shown a photographic copy of the signature of William Hartman to his will, testified that it was in the same handwriting as the signatures to said letters and affidavits. The elder Silvernail could not read, and the witness had read the letters and affidavits more than once. He described William Hartman as he remembered him, and his description was similar to that of the testator. No other William Hartman had even been known to reside in San Joaquin county. Annie Hartman Burns testified that she was the daughter of Peter Hartman and Mary Hartman, who were husband and wife; that she was born on January 22, 1868, at East Aurora; that her father died at Cowlesville, N. Y., in 1879; that her mother died in 1903; that she had no living brother, sister, or other relative to her knowledge; that her father had told her he had a brother named William Hartman who had gone to California at the time of the Civil War, and who lived there; that he had received letters from William Hartman; that he several times spoke of having a brother William, in California. East Aurora, Cowlesville, and Lancaster are towns in western New York a few miles apart.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was no contradictory evidence except a statement in William Hartman's will as follows: "I have no living relatives to inherit anything from my estate" (see Pearson v. Pearson, 46 Cal. 628), and the testimony of John C. Miller, his executor, that frequently the testator said he had no living relatives, and that the testator never had spoken to the witness about having had a brother. The evidence of the relationship of Annie Hartman Burns was clearly sufficient to identify her as the niece of the testator. It does not appear that Peter ever wrote William Hartman, and it might well be that William was not aware that Peter left a surviving daughter. At most, these declarations by the testator would only create a conflict in the evidence, which the court below decided in favor of the niece, a decision which concludes this court.

The testimony that Peter Hartman and Mary Hartman lived together as husband and wife, that they always called Annie their child and their daughter, and that she called them father and mother is sufficient prima facie evidence of their marriage and of her legitimacy. Code Civ. Proc. § 1963, subds. 28, 30, 33. So also the fact that William and Peter Hartman called each other brother, that each spoke to the other by his first name, and that their conversation and conduct indicated relationship, and was consistent with the fact that they were brothers, suffices to establish the fact of such relationship. The presumptions of legitimacy and from the identity of name supply the fact that they were legitimate children of the same father. Lee v. Murphy, 119 Cal. 368, 51 Pac. 549, 955; Garwood v. Garwood, 29 Cal. 520; Carleton v. Townsend, 28 Cal. 221. Evidence of eye witnesses to the marriage ceremony, and to the births, can seldom be obtained to prove relationship and legitimacy, in such cases, and for that reason and others the law accepts secondary evidence and indulges in presumptions, where better evidence is not produced.

The appellant is not interested in the question whether or not there are other collateral relatives. If Mrs. Burns is an heir, it cannot take more than one-third of the estate. If there are other kin, they alone have a right to attack the distribution of the two-thirds to her as sole heir. The declarations of Peter Hartman to his daughter, made in the lifetime of William Hartman, that he had a brother William in California, were properly admitted in evidence to prove the relationship. The appellant on this point cites the rule given in Taylor on Evidence and in some of the decisions on the question. Taylor states it as follows: "Before, however, a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof other than the declaration itself." 1 Taylor on Ev. 640. To this Mr. Wharton adds: "For it would be a petitio principii to say that the declarations are receivable because he is a member of the family, and he is a member of the family because his declarations are receivable." 1 Wharton, Ev. § 218. On the other hand, however, it seems absurd to require, as a foundation for the admission of the declaration, proof of the very fact which the declaration is offered to establish. The preliminary proof would render the main evidence unnecessary. There are statements in the cases which seem to recognize a rule thus rigid and absurd. Wise v. Wynn, 59 Miss. 588, 42 Am. Rep. 381; Anderson v. Smith, 2 Mackey (D. C.) 281; Blackburn v. Crawford, 70 U. S. 187, 18 L. Ed. 186. But for the most part the statements to this effect in the opinions mean no more than that the declarations of persons not of kin, either to the claimant or to the person from whom descent is claimed, cannot be admitted to prove kinship. See Rulofson v. Billings, 140 Cal. 459, 74 Pac. 35; Est. of James, 124 Cal. 661, 57 Pac. 578, 1008. In Estate of Heaton, 135 Cal. 387, 67 Pac. 321, the rule for which appellant contends was referred to only to say that it was not applicable to the case. The question was not involved nor decided. In the present case it was sufficiently shown that Peter Hartman was a member of the family within the meaning of the rule. Annie Hartman Burns, his daughter, is the claimant, and she testified to the relationship between herself and Peter Hartman. On this question the latest edition of Greenleaf on Evidence says: "It is sometimes said that where, for example, the question is whether A. is B.'s heir, the declarant must appear to be related to B., and not merely to A. This seems erroneous, however, since all relationship is mutual, and the question whether A. is related to B. or a member of B.'s 'family' is also and just as much a question whether B. is related to A. or a member of A.'s family, and on this point a person claiming to belong to A.'s family is competent to speak; the circumstance that the estate to be claimed is in A.'s or B.'s family being immaterial." 1 Greenl. on Ev. (16th Ed.) § 114c. Mr. Wigmore treats the question at greater length, as follows: "It follows in applying the foregoing principle that, where an alleged relationship between Doe and Roe is to be testified to, a relation of Doe may speak to it, because it concerns the relationships of Doe's family, while a relation of Roe may equally speak to it, because it concerns the relationships of Roe's family. Hence all that is required of the declarant is a connection with either one or the other, but not with both. This truth, however, has been obscured by what must be regarded as erroneous rulings. The question being whether Doe is related to Roe (for example, so as to share in Roe's inheritance), the argument has been that it would be idle to require merely that the declarant should be shown to be related to Doe alone, because then any family could connect itself with any other by its members' mere assertion of the relationship. But the proper way to approach the question seems to be a different one, and is as follows: Any member of Doe's line may declare as to the relationships (i. e., memberships) of that family, and any member of Roe's line may declare as to the relationships (i. e., memberships) of that family; and the qualifications of the declarant as such member must, of course, be shown beforehand, like the qualifications of any witness (ante, section 1486). Thus, before declarations of a supposed member of Doe's family can be admitted, the declarant's membership in Doe's family—for example, that he is Doe's son—must be shown. But that is the whole effect of this requirement. The further question, if any, is whether a declaration of Doe's son that Doe is related to Roe (for example, is Roe's cousin) is a declaration as to Doe's family at all—i. e., whether it is not for the case in hand solely a declaration about Roe's family relationships, as to which Doe's son is by hypothesis not yet shown to be a qualified declarant. Now the state or condition of relationship must always in effect, though not in form, be double or mutual; i. e., the fact that Doe is cousin to Roe is also the fact that Roe is related as cousin to Doe. Hence a statement of Doe's son that Doe is cousin to Roe, though in one form an assertion of Roe's relationships, is also equally a declaration that one of the relations of Doe (i. e. one of the members of Doe's family) is Roe, for example, that one of the grandsons of Doe's grandfather is Roe. It is therefore a declaration upon which Doe's son is qualified to speak. The doubt then can only be as to whether it should make any difference that in the case at hand it is Roe's descendants who are seeking Doe's estate, or Doe's who are seeking Roe's estate. This surely cannot affect the evidential value of the declarations; for that must depend on the circumstances at the time of making, and no one has ever contended that, apart from the lis mota and kindred limitations (ante, sections 1483, 1484), it makes any difference whether a parent belongs to a poor or obscure branch of the family or to a rich and notorious one. Moreover, it is usually at a later day only that it has become apparent which branch would have a pecuniary interest in connecting itself with the other. The difference, then, is a matter of the form of the statement only, and such assertions as the above must be treated as in substance declarations as to Doe's family relationships. Whether it is Doe's or Roe's family that now happens to be seeking the inheritance is immaterial." 2 Wigmore on Ev. § 1491.

The following cases are in accord with this doctrine: Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207; Fowler v. Simpson, 79 Tex. 614, 15 S. W. 682, 23 Am. St. Rep. 370; Louder v. Schluter, 78 Tex. 105, 14 S. W. 205, 207; De Leon v. McMurray, 5 Tex. Civ. App. 283, 23 S. W. 1038; Brown v. Lazarus, 5 Tex. Civ. App. 84, 25 S. W. 71. The confusion seems to have arisen from the idea that such declarations were competent as admissions against interest. They do not derive their evidential value or competency from that consideration. They are admitted from reasons of necessity because otherwise it would frequently be impossible to prove the kinship of members of a family after those who knew the facts are dead. Their evidential value comes not from their being admissions against the interest of the person making them, but, as Wigmore points out, from "the probability that the 'natural effusions' (to use Lord Eldon's often-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy." 2 Wigmore on Ev. § 1482. "The evidence is in its nature of an unsuspicious kind. It is generally brought from remote times, when no question was depending or even thought of, and when no purpose would apparently be answered." Rex v. Eriswell, 3 T. R. 720. Such declarations are safeguarded against the possibility of their being declarations in the interest of the party making them by the requirement that they must appear to have been made before any controversy over the property arose. To satisfy the rule that the best evidence must be produced and to show necessity, it is made a condition of their admission that the declarant is dead at the time they are offered, or out of the jurisdiction; and they are sometimes excluded when it appears that there are living persons whose testimony on the subject could be produced.

The orders appealed from are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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157 Cal. 240

SHAW v. SOUTHERN PAC. R. CO. et al.

(Sac. 1,737.)

(Supreme Court of California. Jan. 25, 1910.)

1. DAMAGES (§ 147*)—INJURIES—PLEADING.

In an action for personal injuries, damages from loss of profits in business are special, and the facts must be particularly alleged.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 147.*]

2. DAMAGES (§ 159*)—EVIDENCE—ADMISSIBILITY.

In an action for personal injuries, the complaint alleged that plaintiff had become unable to do any labor, and he testified that his business was that of loading railway cars, doing the work by contract and having several men in his service; that he was a good hand at the work and prior to his accident able to give his full time to it, and do all parts of it himself; and that he made a certain amount a month on his contracts, but that, after his injury, he was required to work on a salary; and that, if he had been able to perform labor as before, he could get a larger salary. *Held*, that it was proper to admit such testimony, the court having instructed that in fixing the damages the jury could take into consideration the inability of the plaintiff to perform labor, caused by the injuries received from the defendant's negligence, but that they could not award the plaintiff any damages to compensate him for the loss of his business, trade, or calling.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 429–453; Dec. Dig. § 159.*]

3. APPEAL AND ERROR (§ 1004*)—REVIEW—DAMAGES.

A judgment can be reversed for excessive damages only when it appears that the amount allowed is so plainly unjust and oppressive as to suggest passion, prejudice, or corruption on the part of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. H. Shaw against the Southern Pacific Railroad Company and another. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Power & McFadzean, for appellants. Lamberson & Lamberson and H. T. Miller, for respondent.

SHAW, J. This is an action for damages for bodily injuries to the plaintiff, alleged to have been caused by the negligence of the defendants. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The complaint alleges that by reason of the improper and negligent operation of its cars by the employés of the defendants, while the plaintiff was lawfully in one of its freight cars occupied in loading the same with boxes of grapes, the said boxes were caused to fall upon the plaintiff, "crushing, bruising, and wounding him," and that "by reason of said injuries plaintiff has become and is unable to do or perform any labor, and has become sick, bruised, sore and disabled, * * * and has suffered and is now suffering great bodily and physical pain, * * * and has been permanently crippled and will continue to suffer from said injuries during the remainder of his lifetime." The damages thus caused are alleged to be in the sum of $10,000.

Upon the trial the plaintiff testified that before the accident his physical condition was good, and that he was able to do the work that he was engaged in doing, and all parts of it. Over the objection of the defendants he was then permitted to testify that his business was that of loading railroad cars with fruit, doing the work by contract on a large scale and having from 10 to 25 men in his service; that he was a good hand at the work; that prior to the injury he was able to give his full time to the work and to do all parts of it himself and made from $150 to $300 a month on his contracts; that after the injury he did not make any money out of it because he was unable to superintend it correctly and do the work; that he was now working on a salary of from $80 to $100 a month; and that, if he was able to perform labor as before, he could get a larger salary. If this evidence had been allowed to go to the jury for the purpose of establishing, as the measure of the damages to the plaintiff, the loss of the profits he would have made if he had continued in the business in which he was engaged prior to the injury, it would have been outside of the issues. A loss of profits does not always result from such an injury. Damages from such loss of profits are special in their nature, and the facts must be particularly alleged in order to admit evidence thereof and justify a recovery therefor. Treadwell v. Whittier, 80 Cal. 579, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. The complaint does not allege a loss of profits. The allegation is merely that he was rendered unable to labor and was permanently crippled.

But the evidence was properly submitted to the consideration of the jury for a different purpose. In Treadwell v. Whittier, supra, the allegation was similar, although not so specific. It was there decided that it was proper to instruct the jury to consider the loss arising from the fact that the injury received rendered the plaintiff less capable of attending to his business than before, and that such loss was not special damage, but was provable and recoverable under general allegations of permanent disability. It is practically conceded in the case at bar that under such allegations it would be proper to prove the business or occupation in which the plaintiff had been previously engaged, and its nature, and that the injury rendered him less capable, or wholly incapable, of continuing such occupation or business. The authorities are in practical unanimity to that extent. The real point of the objection, therefore, is that while the jury may consider the work the plaintiff previously did and was able to do, or the business he was able to and did carry on, they may consider it only in a general way, and that, when they come to determine what his financial loss has been from the deprivation of his former bodily ability and vigor, they must rely on their common knowledge as to the value of such occupation or business to a man of his strength and capacity, and that they cannot have the aid which would come from proof of the amounts he had been accustomed to receive therefrom. Evidence of what a plaintiff had usually earned before his injury, either as wages or in business on his own account, would be the most accurate, satisfactory and valuable data from which to determine the value of the time and labor he has lost by being rendered unable to continue such occupation or business. For example, if he had previously made $5,000 a year by his personal efforts, and afterwards by reason of his injury could make no more than $1,000, his damage from the deprivation of bodily strength would be much greater than if he had previously been able to make only $2,000 a year. The rule contended for would drive the jury from the actual facts of the case to their own surmises and experience as a criterion for decision as to the value of his time and labor. The authorities sanction the more accurate method. In C. R. L. & P. Co. v. Posten, 59 Kan. 453, 53 Pac. 466, the court says: "In order that the jury may intelligently estimate the loss the plaintiff has sustained, it is necessary that they should be informed with reference to his business affairs, and while they may not, as compensation for the loss of his time, include speculative profits, or profits on invested capital, it is for them to say what loss has resulted to his business because of his being incapacitated from attending to it, and to award him as damages the value of his time and labor to himself in the transaction of his own business. This is the same compensation, and for precisely the same reasons, that a clerk or agent doing the same work for wages might recover for his loss." In I. & G. N. Ry. Co. v. Irvine, 64 Tex. 533, the court says: "If the hand of a carpenter or other mechanic be cut off by the negligence of another, it would surely be admissible, in an action to recover damages therefor, for him to state what his business was, what he was accustomed to make in its pursuit, and the effect which the hurt had upon his capacity to pursue that business." And it was said that the same rule applied where plaintiff was in mercantile business on his own account, in order "to show how far the hurt had disabled him to follow his ordinary occupation." In New J. Co. v. Nichols, 33 N. J. Law, 437, 97 Am. Dec. 722, upon this question the opinion declares that "evidence of the nature and extent of the plaintiff's business and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury to guide them in the exercise of that discretion which, to a certain extent, is always vested in the jury." In 1 Sedgwick on Damages, § 180, the rule is thus stated: "The most trustworthy basis of damages, in such a case is the amount which the injured party has earned in the past. This is, however, only evidence from which the jury will be enabled to say what the services of such a man as the plaintiff are worth, and the jury should distinctly understand that it is not to be taken as the necessary and legal measure of damages." It is the loss occasioned by the particular man who was injured that is to be ascertained, if possible, and not the loss which an average man would sustain from a similar injury. The standard of an average man is resorted to only where the specific evidence as to the actual loss to the particular man is wanting, and where experience teaches that there will be some loss from the injury. The following authorities are of similar effect to those above quoted: Smith v. C. & A. Ry. Co., 119 Mo. 253, 23 S. W. 784; Schmitz v. St. L., etc., Co., 119 Mo. 277, 24 S. W. 472, 23 L. R. A. 250; Bartley v. Trorlicht, 49 Mo. App. 219; Frobisher v. Fifth Ave. T. Co., 81 Hun, 544, 30 N. Y. Supp. 1102; Hamilton v. Great Falls, etc., Co., 17 Mont. 352, 42 Pac. 860, 43 Pac. 713; Luck v. Ripon, 52 Wis. 200, 8 N. W. 815; Bloomington v. Chamberlain, 104 Ill. 268; Chicago, etc., Co. v. Meech, 163 Ill. 314, 45 N. E. 290; Chicago, etc., Co. v. Anderson, 182 Ill. 298, 55 N. E. 366; Wade v. Le Roy, 20 How. 34, 15 L. Ed. 813; Chatsworth v. Rowe, 166 Ill. 116, 46 N. E. 763; North Chicago, etc., Co. v. Brown, 178 Ill. 191, 52 N. E. 864; Bailey v. Centerville, 108 Iowa, 20, 78 N. W. 831; Falangan v. Baltimore & O. R. Co., 83 Iowa, 643, 50 N. W. 60; Goodhart v. Penna. R. Co., 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705; Birkel v. Chandler, 26 Wash. 241, 66 Pac. 406; Ehrgott v. New York, 96 N. Y. 276, 48 Am. Rep. 622; Cent. P. v. Senn, 73 Ga. 709.

It is true that there are many decisions to the contrary, and some of the text-writers say that the contrary decisions are in the majority. But for the most part they are based upon the doctrine that under a general allegation of permanent disability to work evidence cannot be admitted to prove that his disability renders his devotion to his business less profitable to him after the injury than it was before. In this state the rule is, as established in Treadwell v. Whittier, supra, that the jury may under such general allegations consider the permanent loss from the fact that the injury renders the plaintiff less capable than before of doing the business in which he was previously engaged. If they can consider a loss of this character from partial disability, they can, of course, consider the loss from a disability which renders him wholly unable to carry on his former business and compels him to engage in a business less remunerative. And it would be absurd to say that the jury could consider such loss, and at the time refuse them the aid of any information as to the relative gains from the business formerly carried on and that subsequently conducted—the only facts that would show the actual value, to him, of his time and labor. If the latter were equally or more profitable, no doubt the defendant would claim, and would be conceded, the right to show that fact in mitigation of the damages. In the states where such proof cannot be made unless the loss of business is specially pleaded, the rule is uniform that, where it is pleaded, evidence of the wages received or gains from business, before and after the injury, is admissible. In this state, where such loss of business power may be considered without having been specially pleaded, it is obvious that the same rule should be applied and evidence of the wages or gains before and after the injury admitted.

The case of Lombardi v. California St. Ry., 124 Cal. 311, 57 Pac. 66, is not in conflict with these views. There the plaintiff had specially alleged the amount of the loss by reason of his inability to attend to his business as he formerly did, and that it consisted of a specified sum paid as wages to men working in his place. He offered evidence of special damages from loss of profits in the business which was carried on by himself and a partner in which considerable capital was invested, concerning which there were no allegations. It was held that this evidence was improperly admitted. The court says that the rule stated in Treadwell v. Whittier was not involved. In the case at bar the plaintiff had no capital invested, nor any partner, and did not plead a special loss of profits.

It is necessary in all such cases, special damage not being in issue, as stated by Mr. Sedgwick, supra, to direct the jury that no allowance as damages can be made for the specific loss of profits that may be disclosed by the evidence of the comparative gains before and after. This the court did in the present case. The jury was instructed that in fixing the amount of damages they could take into consideration the inability of the plaintiff to perform labor, caused by the injuries received from the defendant's negligence, but that they could not "award the plaintiff in this case any damages to compensate him for the loss of his business, trade, or calling." The evidence is received solely for the purpose of enabling the jury to more intelligently estimate the loss occasioned by his incapacity, and not as a basis for the allowance of the particular losses indicated. It is the usual and ordinary previous gains in his usual and ordinary business that is to be considered, and not exceptional or extraordinary profits from particular transactions. The instructions given as above put the matter to the jury in the proper light, and we must presume that it prevented them from allowing a loss of profits as damages, and that they considered the evidence objected to only to determine the plaintiff's damage from loss of earning power.

The appellants also contend that the damages are excessive, to such an extent as to call for the intervention of this court. The injury rendered the plaintiff unconscious for a few moments. There was a contraction of the lumbar muscles and a lateral and posterior curvature of the spine. The contraction turned four of the vertebræ a little to the right. He was confined indoors for two weeks because of the injury. He suffered from continuous strong pains in the back which kept him awake and forced him to take opiates at times to enable him to sleep. He did not attempt to do the work he had previously been able to do, until five months after the accident, and he then found that he could not do it for any length of time. He attempted it several times afterwards, with the same result, and up to the time of the trial, 17 months after the injury, he was unable to endure the muscular exertion necessary to successfully carry on his former business or occupation. At the time of the trial he was still suffering from the injury. There was at that time general weakness and almost a continuous pain in the back which became very severe after walking or being on his feet for two or three hours. He was compelled to engage in clerical work, involving only slight muscular exertion, and it was less remunerative than his former business of loading cars. It may be that the damages given are more than the plaintiff has actually sustained. This is a question primarily committed to the discretion of the trial court. The judge of that court is in a much better situation than are we to determine the question. It sometimes appears to us from the bare record that probably an excessive verdict has been allowed to stand. We are frequently asked to interfere in cases which would require us to exercise the broad discretion of the trial court in reviewing the verdict, instead of the circumscribed discretion possessed by the appellate courts. This we cannot do. We can reverse a judgment for excessive damages only when it appears that the amount allowed is so plainly unjust and oppressive as to suggest passion, prejudice, or corruption on the part of the jury. Hale v. San Bernardino Tr. Co. (Cal.) 106 Pac. 83, and cases cited. We do not think that the case demands our interference.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

157 Cal. 237

KERN VALLEY BANK v. KOEHN. (L. A. 2,285.)

(Supreme Court of California. Jan. 25, 1910.)

1. LIMITATION OF ACTIONS (§ 167*)—BAR OF DEBT AS AFFECTING SECURITY.

Under Civ. Code, § 2911, when the debt secured by a mortgage became barred by limitations, the mortgage lien was extinguished.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651–653; Dec. Dig. § 167.*]

2. LIMITATION OF ACTIONS (§ 164*)—BAR OF DEBT AND SECURITY—REVIVAL.

Civ. Code, § 2911, provides that a lien is extinguished when the debt secured thereby is barred by limitations. *Held* that, where a debt secured by mortgage became barred by limitations, the subsequent renewal of the note evidencing the debt did not revive the mortgage.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 619, 648; Dec. Dig. § 164.*]

3. LIMITATION OF ACTIONS (§ 197*) — EVIDENCE—SUFFICIENCY.

Evidence considered, and *held* insufficient to show that a mortgage lien was revived after the debt secured thereby was barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

4. ATTACHMENT (§ 128*)—VALIDITY—UNDERTAKING.

A writ of attachment is improperly issued and void unless supported by an undertaking conforming substantially to the requirements of the statute.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 351, 352; Dec. Dig. § 128.*]

5. ATTACHMENT (§ 132*) — UNDERTAKING — SUFFICIENCY.

An attachment undertaking was fatally defective where it failed to contain the stipulation required by Code Civ. Proc. § 539, as amended in 1907, that, if the attachment should be discharged on the ground that plaintiff was not entitled thereto under section 537, the plaintiff would pay all damages.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 365–370; Dec. Dig. § 132.*]

6. ATTACHMENT (§ 20*)—SUCCESSIVE ATTACHMENT.

A writ of attachment having been invalid, a levy thereunder did not bar or prevent a new proceeding in the same action.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 20.*]

7. APPEAL AND ERROR (§ 874*)—REVIEW—EXTENT.

An order denying a motion to vacate a writ of attachment could not be considered on appeal from an order refusing to dissolve a subsequent writ of attachment in the same action, where it did not appear that the order in question relative to the first writ had become final.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 874.*]

Department 1. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by the Kern Valley Bank against Charles Koehn. Appeal by defendant from an order refusing to dissolve an attachment. Affirmed.

For decision in Court of Appeal, see 10 Cal. App. 679, 103 Pac. 173.

J. W. P. Laird, Rowen Irwin, and E. L. Foster (Joseph H. Tam, of counsel), for appellant. George E. Whitaker, for respondent.

SHAW, J. This is an appeal from an order refusing to dissolve an attachment.

The writ of attachment attacked was issued on October 2, 1907, in pursuance of an affidavit and undertaking filed on the same day. The action was begun on July 17, 1907, to recover of defendant the amount of a note for $5,320, dated October 2, 1900, and maturing October 2, 1903.

The first ground of the motion to dissolve the attachment was that the debt sued on was secured by a lien and pledge of personal property. Affidavits and counter affidavits were filed upon the hearing. They were conflicting upon some points. We must necessarily accept the view most favorable to the plaintiff, being bound to that extent by the decision of the court below. The debt was originally created on May 2, 1898, and was evidenced by a note of that date which became due eight months after its date, which would be January 2, 1899. On August 5, 1898, defendant executed to plaintiff a contract purporting to be a grant, bargain, and sale of an undivided one-half interest in a quartz mill and appurtenances with the right to use the mill site, adjacent ground, and water to operate the same. This was given and accepted, not as an absolute conveyance, but as security for the payment of said note of May 2, 1898, in effect a mortgage. Plaintiff did not take possession of the mill under this mortgage. This note was not paid and the note sued on was given in renewal thereof. Although dated October 2, 1900, the latter note was not in fact executed until March 24, 1903. At that time the original debt and note falling due January 2, 1899, was barred by the statute of limitations. The conveyance of the quartz mill, although absolute in form, was, in effect, only a mortgage, and when the debt which it secured became barred the mortgage ceased to be effective and the lien which it had created was extinguished. Civ. Code, § 2911. The subsequent renewal of the note on March 24, 1903, created the debt anew, but it did not renew, revive, or continue the mortgage. Sanford v. Bergin (Cal.) 103 Pac. 336; Wells v. Harter, 56 Cal. 343; Southern Pacific Co. v. Prosser, 122 Cal. 417, 52 Pac. 836, 55 Pac. 145.

It is claimed that H. A. Blodgett, as president of plaintiff corporation, on March 23, 1903, executed to Koehn a written declaration that the conveyance of the quartz mill should stand as security for the note sued on. The affidavits on behalf of plaintiff, however, show that the note was executed on March 24th in the absence of Blodgett; that Blodgett had nothing to do with the renewal of the note; that it was done without any agreement to revive or renew the mortgage; that Blodgett had no authority to act for the plaintiff in the matter; and that he signed the declaration aforesaid at the request of Koehn, without authority and in reliance upon Koehn's statement that there had been an agreement to that effect between Koehn and plaintiff's cashier, who had attended to the matter of the renewal of the note on behalf of plaintiff, that said statement of Koehn was untrue and that he knew that Blodgett was not authorized to act for plaintiff. This sufficiently supports the decision of the lower court that there was no revival or renewal of the mortgage or lien. We have assumed, for the purposes of the argument only, that the lien could be renewed by the plaintiff and Koehn without giving possession to plaintiff and without the execution of any writing by Koehn.

The other ground urged in support of the motion to dissolve the attachment was that on July 17, 1907, and again on September 30, 1907, writs of attachment were issued in the action; that each of these writs had been levied upon property; that such levies remained in full force and effect and constituted liens upon property for the security of the debt sued on; that an attachment cannot be had for debts so secured; and that, therefore, the later attachment was invalid. We need not determine whether or not, after a valid attachment has been issued and levied upon property of the defendant, and while it remains in force, the plaintiff may file a new affidavit and undertaking and obtain another writ of attachment thereon in the same action. A writ of attachment is improperly issued and void, unless it is supported by an undertaking conforming substantially to the requirements of the statute. Hisler v. Carr, 34 Cal. 646; Gow v. Marshall, 90 Cal. 567, 27 Pac. 422; Tibbett v. Tom Sue, 122 Cal. 207, 54 Pac. 741; 3 Ency. of Plead. & Prac. 30. In each of the previous attachment proceedings the undertaking was fatally defective, in that it failed to contain the stipulation required by section 539 of the Code of Civil Procedure, as amended in 1907, "that, if the attachment should be discharged on the ground that plaintiff was not entitled thereto under section five hundred and thirty seven," the plaintiff will pay all damages, etc. The former writs being invalid, the levies thereon did not create valid liens upon the property, did not constitute lawful security for the debt sued on, nor operate to bar or prevent a new proceeding upon a valid undertaking in the same action.

It is said that a motion to vacate the writ of July 17, 1907, has been denied, and that the order denying it has become final. The record before us does not show that the order has become final, nor does it disclose any other grounds for the motion than the existence of the supposed mortgage lien which we here hold had been extinguished. Under these circumstances, the former order cannot be considered in the decision of the present appeal. Naftzger v. Gregg, 99 Cal. 88, 33 Pac. 757, 37 Am. St. Rep. 23; In re Blythe, 99 Cal. 476, 34 Pac. 108.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

157 Cal. 289

HOUGHTON v. KERN VALLEY BANK et al.
(L. A. 2,402.)

(Supreme Court of California. Feb. 7, 1910.)

1. TAXATION (§ 421*)—ASSESSMENT—VALIDITY.

An assessment roll offered in evidence in a case involving a tax title showed entries as follows: Under the heading, "Description of Property," appeared the words, "In the town of B., lot 1, 2, 3," and under the heading, "Block," the figures "132." *Held* that, no map showing the location of any lot or block being introduced, the assessment was prima facie invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 729; Dec. Dig. § 421.*]

2. TAXATION (§ 810*)—ASSESSMENT—VALIDITY—EVIDENCE.

If an assessment of lots is prima facie insufficient by reason of a defective description, it may be shown in support of a tax title based thereon that there was of record at the time of the assessment a map, by aid of which the description would serve to fully identify and locate them.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1607; Dec. Dig. § 810.*]

3. LANDLORD AND TENANT (§ 63*)—ATTORNMENT—ESTOPPEL TO DENY TITLE.

In view of Civ. Code, § 1948, providing that the attornment of a tenant to a stranger is void unless it is made with the landlord's consent, or in consequence of the judgment of a court of competent jurisdiction, evidence that where after a tax sale of leased property, while the tax title was claimed by a third person, lessor consented to lessee's payment of rent to such claimant, and deducted such payment from the amount due under the original lease, it amounted to an attornment to such claimant with lessor's consent, terminating the relation on which it was sought to base an estoppel to deny lessor's title.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 176; Dec. Dig. § 63.*]

4. TAXATION (§ 788*)—TAX DEEDS—RECITALS—CONCLUSIVENESS.

In view of Pol. Code, § 3898, making a tax deed to the purchaser from the state prima facie evidence of all the facts recited therein, and requiring it to recite "facts necessary to authorize such sale and conveyance," a recital in a deed, as one of such facts, that the amount bid was not less than the amount required by section 3897, must prevail, in absence of any showing to the contrary.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1555; Dec. Dig. § 788.*]

5. TAXATION (§ 671*)—SALE OF LAND—LOTS OR PARCELS.

The question as to the lots or parcels in which land is to be sold is controlled as a general rule by the assessment list.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1354; Dec. Dig. § 671.*]

6. TAXATION (§ 341*)—ASSESSMENT—SEPARATE LOTS.

Where separate lots in a block are contiguous and are owned by a single individual, they may be properly assessed as one parcel.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 574; Dec. Dig. § 341.*]

7. TAXATION (§ 671*)—SALE OF LOTS—SINGLE PARCEL.

If separate contiguous lots in a block, owned by a single individual, are assessed properly as one parcel, sale of them in bulk is, in effect, a sale of a single parcel.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1354; Dec. Dig. § 671.*]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by R. E. Houghton against the Kern Valley Bank and others, wherein Ng Hon Kim intervened. From a portion of the decree in favor of intervener, and from an order denying a new trial, plaintiff and defendants appeal. Reversed.

Octave G. Du Py, Rowen Irwin, C. Brower, J. W. P. Laird, Olney & Olney, W. S. Allen, Fred E. Borton, Emmet H. Wilson, and G. C. De Garmo, for appellants. Nancy Ella Houghton, in pro. per. Chas. N. Sears, for respondent and intervener.

SLOSS, J. This action was brought to obtain a partition of a number of lots situate in the city of Bakersfield, Kern county. Pending the action Ng Hon Kim filed a complaint in intervention, whereby he claimed, as against all the original parties, the title to a portion of the property described in the complaint, to wit, lots 1, 2, and 3, in block 132, in the Baker homestead tract. The plaintiff and the various defendants answered the complaint in intervention, denying the intervener's claim of title. The court found that said intervener was the owner of the lots claimed by him, and gave him a decree quieting his title thereto as against the plaintiff and the defendants. A partition of the remainder of the land described in the complaint was ordered. The plaintiff and the defendants appeal from that portion of the decree in favor of the intervener, and also from an order denying their motion for a new trial.

The intervener's asserted title was based on a deed from the state following a sale for failure to pay taxes. The proceedings leading up to the making of this deed are fully set out in the record, and the only question that need here be determined is whether the evidence sustains the findings of the court that the intervener acquired title by virtue of the tax proceedings.

Various objections to the validity of the assessment and the steps taken to collect the same are presented by the appellants.

It is urged that the assessment itself is invalid for want of a sufficient description of the property. The assessment roll or book was offered in evidence, and showed entries as follows: Under the heading, "Description of Property," appears the words, "In the town of Bakersfield, lot 1, 2, 3," and under the heading, "Block," the figures "132." Upon the trial the intervener offered no evidence to show whether this represented a general system of numbering in force in the city of Bakersfield, or was according to a subdivision of some tract offered for sale by private owners. The complaint describes the property as "In the Baker homestead tract, according to the map of said tract filed in the office of the county recorder of the county of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Kern, state of California, on the 3rd day of April, 1889," and the complaint in intervention adopts the description of the complaint. No map showing the location of any lots or blocks was introduced in evidence. Under the decisions of this court there seems to be no escape from the conclusion that the assessment is prima facie invalid.

In Miller v. Williams, 135 Cal. 183, 67 Pac. 788, the description was "Lots 13, 14, 15, 16, 17 and 18 in Blk F, Leibrandt Tract. Lots 18 and 20, Block C, Kaye and Union Tract." This was held to be insufficient. The case just cited has sometimes been regarded as going to the length of declaring absolutely void an assessment based upon a description of this character. But in subsequent cases it has been explained that the effect of Miller v. Williams is not so sweeping. In Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, it was held that an assessment as follows: "Lot four, block one hundred seventy-eight, 14.42 acres, Rancho Rincon del Diablo"—might constitute a sufficient description of the land if made certain by the introduction of a map showing the lots and blocks delineated thereon as described in the assessment. Similar was the holding in Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, where the assessment was upheld when aided by the introduction of the recorded map of the tract designating with certainty the property referred to in the assessment. Finally, in Fox v. Townsend, 152 Cal. 51, 91 Pac. 1004, 1007, the court had before it a situation like the one which confronts us here, and substantially similar to that in Miller v. Williams. The assessment there relied on described the property as follows: "In Los Angeles County. In Electric Ry. Homestead Assn. Tr. Lot 17 Block 20." The record did not show the introduction of any map in evidence, or that there was any map of any kind in existence at any time during the tax proceedings. The description was held to be insufficient; the court stating its position as follows: "In Miller v. Williams, an action to quiet title, it was held that such a description in an assessment is not sufficient prima facie to identify the portion assessed. In that case, as in this, there was no attempt to supplement the assessment description by evidence showing that it did sufficiently identify the land. The theory of the decision apparently is that a description of this kind is of such a nature as to indicate that the property can ordinarily be located only by reference to some map or plat, and, no such map or plat being referred to as being in existence, the description is prima facie insufficient. There is no presumption, in the absence of such a reference, that there is such a map in existence." And, further: "The later cases of Best v. Wohlford, 144 Cal. 733 [78 Pac. 293], and Baird v. Monroe, 150 Cal. 560 [89 Pac. 352], accepting the rule of Miller v. Williams, as correct, establish the doctrine that, while such description is prima facie insufficient, it may be in fact sufficient to identify the property, and that whether or not it is so sufficient is a question of fact to be determined by the trial court upon such evidence as may be presented on that issue. The party relying on an assessment containing such a description may therefore supplement his case by showing that the description in the assessment was in fact sufficient to identify the land."

Upon the authority of these cases, it must therefore be held that there was before the court no evidence sufficient to justify it in holding that the intervener had acquired title by virtue of valid tax proceedings. The proceedings in question were based upon an assessment which, standing alone, was prima facie insufficient. Upon a new trial it will, of course, be competent for the intervener to offer evidence for the purpose of showing that the description was sufficient. To this end he may show, if it be the fact, that there was of record at the time of the assessment a map by the aid of which the description of the lots in question would serve to fully and completely identify and locate them.

A new trial will be necessary by reason of what we have stated. As a guide for further proceedings we shall give attention to such other points made by appellants as may arise again.

It appeared that the record title to the land stood in the name of one Celsus Brower, who held as trustee for the plaintiff and the various defendants. Brower had executed a lease of the property to the intervener, who had taken possession thereunder, and had accepted grants from the purchasers under the tax sales before the expiration of the term of the lease with its extensions. It is urged that said intervener was, as tenant of Brower, estopped to deny the title of the latter. We need not enter into the question whether the doctrine precluding a tenant from questioning his landlord's title prevents reliance upon a tax title acquired under a sale made after the execution of the lease. 24 Cyc. 955; Teich v. Arms, 5 Cal. App. 475, 90 Pac. 962. There was here evidence sufficient to justify the court in finding that after the tax sale, and while the tax title was claimed by one Morrison, Brower had consented to the intervener's payment of rent to Morrison, and had deducted such payment from the amount due under the intervener's original lease. This amounted to an attornment to Morrison with the consent of the landlord. Civ. Code, § 1948; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; 24 Cyc. 956. Such attornment terminated the relation of landlord and tenant—the relation which forms the sole basis of the alleged estoppel.

It is urged that the trial court erred in admitting in evidence tax receipts showing the payment by the intervener of taxes upon the land in controversy. We do not see the materiality of this evidence (Keane v. Cannovan, 21 Cal. 291, 303, 82 Am. Dec. 738), but the record does not disclose any exception to the rulings complained of.

The point, raised for the first time in the reply brief, that the land was sold to the state for more than the amount of taxes and the costs actually due, is not supported by the record. The argument is based upon the assumption that the land sold covered (in addition to the property in controversy) only certain land in the town of Tehachapi and lots in the Drury addition. It appears, however, from the tax collector's deed to the state that the sale included four lots in the Lowell addition, and, taking these into account, it appears that the amount of taxes and costs was correctly computed and stated in the deed. The same answer may be made to the point that the tax collector, in receiving and accepting a bid upon the sale by the state, did not include taxes for the years 1900, 1901, and 1902. Section 3897 of the Political Code provides that no bid shall be received or accepted at such sale for less than the amount of all taxes levied upon such property and interest, costs, penalties, and expenses up to the date of such sale. There is, however, no evidence in the record that any taxes were assessed or levied upon the land in question for the years 1900, 1901, and 1902. The deed to the purchaser from the state is prima facie evidence of all the facts recited therein (Pol. Code, § 3898), and is required to recite "the facts necessary to authorize such sale and conveyance." The deed in question recited as one of such facts that the amount bid was not less than the amount required by section 3897 of the Political Code. In the absence of any showing to the contrary, this recital must prevail.

The remaining point is that the authorization from the State Controller to the tax collector required the land to be sold in separate lots or parcels, whereas it was in fact sold as a whole. It appears, however, that the land sold, while described as lots 1, 2, and 3, was really assessed as a whole. "The question as to the lots or parcels in which the land is to be sold is controlled, as a general rule, by the assessment list." 27 Am. & Eng. Ency. of Law (2d Ed.) 834. Where separate lots in a block are contiguous, and are owned by a single individual, they may properly be assessed as one parcel. People v. Morse, 43 Cal. 534; Cooper v. Miller, 113 Cal. 238, 45 Pac. 325. If so assessed, there seems to be no good reason for holding that a sale of them in bulk is not, in effect, a sale of a single parcel. There may, no doubt, be conditions under which a joint assessment of separate lots would be improper, as, for example, where the lots are not contiguous, or improvements on one are charged against all (Terrill v. Groves, 18 Cal. 149), but no such conditions appear here. The mere fact that the sale included several lots, sold apparently, in gross, does not, under the rule declared in Cooper v. Miller, supra, establish that the several lots did not together form a single parcel.

The portion of the judgment appealed from, and the order denying appellants' motion for a new trial, are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

157 Cal. 256

MILLER v. BAY CITIES WATER CO. et al.

(S. F. 4,814.)

(Supreme Court of California. Feb. 4, 1910.)

1. WATERS AND WATER COURSES (§ 100*)—UNDERGROUND CHANNEL—RIGHTS OF LANDOWNER.

The right of a person owning land on a channel of underground water is not measured by whether the water is under pressure or not, but by whether the water comes to him in a natural defined flow, so as to constitute a part or parcel of his lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 109; Dec. Dig. § 100.*]

2. WATERS AND WATER COURSES (§ 107*)—DIVERSION—EVIDENCE—FINDINGS.

In a suit to restrain the misappropriation of water from an underground channel, evidence *held* to sustain a finding, as to the geological formation, that complainant's land overlay an underground gravel stratum saturated with water feeding his artesian well, and that defendants threatened and intended to take and divert, and unless restrained, would take and divert, all the waters of a river, both surface and subsurface, which supplied such gravel stratum, to complainant's injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

3. WATERS AND WATER COURSES (§ 100*)—UNDERGROUND WATER-BEARING STRATUM—RIGHTS OF OWNER.

The owner of land having an underground water-bearing stratum supplied by the flood waters of a stream has a primary right to the full flow of the stream at flood in order to bring his stratum up to its water-bearing capacity, though not to the extent that they may replenish his water-bearing stratum, as against the right of an appropriator to divert any part of the waters for commercial use beyond the watershed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 109; Dec. Dig. § 100.*]

4. WATERS AND WATER COURSES (§ 107*)—WATERS OF STREAM—APPROPRIATION—UNDERGROUND WATER-BEARING STRATUM.

Where the accustomed flow of a stream is more than necessary to supply an underground water-bearing stratum supplying complainant's land with water for irrigation, the burden is on an appropriator, claiming the right to appropriate the surplus flood waters of the stream for use beyond the watershed, to show that such flood waters were in fact wasted or lost waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

5. TRIAL (§ 391*)—FINDINGS—EVIDENCE.

No finding is required on an averment as to which there is no proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 914; Dec. Dig. § 391.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. WATERS AND WATER COURSES (§ 107*)—WATERS OF STREAM—DIVERSION—FINDINGS.

Complainant alleged that defendants were threatening and intending to divert and carry away "the waters of Coyote river" beyond their own lands, and prevent the same from ever returning to the river or flowing through the gravel within the gorge and supplying a gravel stratum under complainant's land, into which complainant's well was sunk, thereby depriving complainant of waters to irrigate his land, and irreparably damaging the same. *Held*, that such allegation stated in effect that defendants intended to divert all the waters of the stream, and, the court having found the same to be true, such finding sufficiently found the quantity of storm waters which defendants intended to take, under a claim that they were entitled to appropriate and use, beyond the watershed, the flood waters of the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

7. WATERS AND WATER COURSES (§ 107*)—FLOOD WATERS—DIVERSION—FINDINGS.

The owner of land underlain by a water-bearing gravel formation fed from an adjoining stream being entitled to have the flood waters of the stream supply by their flow, force, and volume the artesian stratum in which his well is sunk, a finding that, if a "large portion" of such flood waters is diverted by defendants as intended, the gravel stratum will be deprived of water to complainant's irreparable injury is sufficient to sustain a judgment enjoining defendant's appropriation, independent of any finding as to the exact quantity measured in second feet or gallons necessary to cause such result.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

8. WATERS AND WATER COURSES (§ 101*)—PERCOLATING WATERS—RIGHTS OF LANDOWNER.

The common-law rule applicable to percolating waters, which gave a landowner all that lay beneath it, with a right to interrupt and take away waters passing to his neighbor's well, has been modified in California by the application of the doctrine sic utere tuo, which gives to each landowner only the right to a reasonable supply for irrigation and other ordinary uses upon his land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 110, 111; Dec. Dig. § 101.*]

9. WATERS AND WATER COURSES (§ 105*)—PERCOLATING WATERS—DIVERSION—SALE.

The rights of owners of land overlying a water-bearing artesian stratum to withdraw and use the waters are correlative, so that one may not divert such waters for sale elsewhere to the injury of others.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 113; Dec. Dig. § 105.*]

10. WATERS AND WATER COURSES (§ 101*)—RIPARIAN RIGHTS—DIVERSION OF WATERS OF STREAM—PERCOLATING WATER.

One riparian owner is not entitled to divert the waters of a stream for use at a distant point for commercial purposes, so as to prevent another riparian owner, to whom the waters would otherwise be available, from using them on his lands, and this rule is equally applicable as between owners of land overlying a common substratum of percolating water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 110, 111; Dec. Dig. § 101.*]

11. WATERS AND WATER COURSES (§ 101*)—APPROPRIATION—INJURY TO ARTESIAN WELL ONLY.

An appropriator of the waters of a stream may not carry them beyond the watershed for commercial purposes, to the injury of the owners of land overlying an artesian stratum, which is so connected with the stream as to derive its supply of water by percolation therefrom.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 110, 111; Dec. Dig. § 101.*]

12. WATERS AND WATER COURSES (§ 107*)—DIVERSION—UNDERGROUND STRATUM—INJUNCTION.

An owner of land overlying an underground saturated stratum, receiving its supply from a stream or saturated plane, is entitled to enjoin the diversion of the waters of the stream or saturated plane, or other well-defined supply, for use elsewhere than on lands to which, as waters of the stream, they are riparian, or which, as waters of an underground stratum, they may be reasonably and usefully applied to the overlying land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

13. WATERS AND WATER COURSES (§ 79*)—DIVERSION—"FLOOD OR STORM WATERS."

While an appropriator may divert for use to any point beyond the watershed any portion of the waters of a stream which can serve no useful purpose, either to the riparian owner or in supplying an underground stratum, or which are in excess of the quantity necessary for that purpose, waters of a stream are not necessarily "flood or storm" waters because the flow is increased by unusual rains beyond normal, so long as the water is confined to the general channel of the stream, nor so long as the waters perform an indispensable service in pressing into the gravel beds or trough the waters which go to supply the various artesian strata, from which the overlying landowners obtain water by means of wells.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 70, 71; Dec. Dig. § 79.*]

14. WATERS AND WATER COURSES (§ 107*)—DIVERSION—DEFENSES.

Where complainant sued for an injunction to restrain a diversion of the waters of a stream as soon as it reasonably appeared that the proposed diversion, by the pump and appliances of defendant as installed and operated, would affect complainant's water supply to his artesian stratum, complainant was not subject to the charge that he had stood by and permitted the development of water to be made to successful operation having reasonable cause to believe that it would affect his supply.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

15. APPEAL AND ERROR (§ 173*)—REVIEW—REVERSAL—THEORY OF CAUSE.

Where, in a suit to restrain the diversion of water from a stream, defendants denied complainant's right to any relief against defendants' diversion of the waters of the stream, either surface or subsurface, and insisted that complainant, not being a riparian proprietor, had no right to prevent the diversion of the waters, whether surface, subsurface, or percolating, and that, as far as the storm waters of the stream were concerned, they had a right to divert above the lower gorge of the river all the waters that flowed down to the outlet, irrespective of any benefit they afforded in filling the gravels below the lower gorge and supplying the artesian stratum of plaintiff, which had its intake therein, defendants, on their contentions being refused, were not entitled to the reversal of a decree because the trial court did not adopt an artificial plan not suggested by the pleadings, and on which no proof was made, permitting defendants to store waters of the watershed in reservoirs above the lower gorge, and requiring them in each season to permit a certain quantity of water to pass the upper gorge in such quantities as to allow it to sink into the gravels below the lower gorge and supply complainant's underground stratum.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1120; Dec. Dig. § 173.*]

In Bank. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Charles Miller against the Bay Cities Water Company and others. Decree for complainant, and defendants appeal. Affirmed.

Garret W. McEnerney and Walter Rothchild (John Garber, of counsel), for appellants. S. F. Lieb and John E. Richards, for respondent.

LORIGAN, J. Plaintiff, the owner of a tract of land in Santa Clara county upon which was planted an orchard of 21 acres of deciduous trees, brought this action against the defendant, a California corporation organized for the purpose of furnishing water to cities and their inhabitants, and against certain of its officers, to enjoin the diversion by them of any waters of the Coyote river in said county, either those waters flowing on the surface of the bed of said river, or flowing or percolating underneath it, or from diverting any of said waters to any extent. As the basis of his right to an injunction it was alleged in the complaint, among other things, that beneath the land of plaintiff, and under a stratum of impervious clay, there is a stratum of gravel, always full of water under pressure, which water was constantly supplied to said stratum from the sinking and subsurface flow of the Coyote river; that from a well sunk in the said water-bearing stratum plaintiff had for years annually irrigated his orchard, which was of great value; that if defendants were permitted to divert the waters of the Coyote river as they threatened to do, above or at a certain gorge known as the lower gorge of the river, the gravel stratum of plaintiff and his well would be deprived of water from which to irrigate his orchard, and the orchard would be irreparably damaged and soon become of little or no value. The answer denied all the material allegations of the complaint, and particularly denied the existence of any gravel stratum under the land of plaintiff connected with or supplied from the waters of the Coyote river, and further denied that defendants intended to divert any surface or subsurface waters of the river, or any waters, at or above said lower gorge, except a large portion of the waters of the river which sunk at that point and became impounded and stored in the gravels deposited therein, and did not flow at all, and except, further, that they intended to divert "a portion of the storm or flood waters which for a short period in every year rush in great volume and with great velocity down the channel of said river to the bay of San Francisco, and are wasted and lost therein." Plaintiff had a decree as prayed for, and defendants appeal therefrom, and also from an order denying their motion for a new trial.

Upon the issues presented under the pleadings the trial court found the following facts: That underneath the surface of the land of plaintiff, known as the Miller ranch which is about four miles northerly from what is known as the lower gorge of the Coyote river, and underneath a stratum of impervious clay, there is a stratum of coarse, loose gravel seven feet thick, being from 83 feet to 90 feet below such surface, which is always full of water, under pressure, the same being constantly supplied to said stratum of gravel from the sinking and subsurface flow of the waters of the Coyote river, as hereinafter stated. Said stratum of gravel extends from plaintiff's lands southerly, and approaches the surface of the ground and connects with, and is a part of, the gravel bed of the Coyote river, just below and in said lower gorge of said river. The plaintiff for years past has had a well on said land extending down into said stratum of gravel, through which he has pumped the water therefrom upon his land, and irrigated his orchard, and, if unable to do so, his orchard and land will be irreparably injured. The Coyote river rises to the eastward of the Santa Clara valley, in that portion of the Coast Range Mountains known as the Mt. Hamilton range. It is formed by the union of a number of smaller streams which rise and have their confluence south of Mt. Hamilton, and thence issues in the single stream of the Coyote river into the Santa Clara valley, through a narrow gorge, known as the upper gorge, about 20 miles south of the city of San Jose, and thence flows northerly along the eastern edge of the Santa Clara valley about 8 miles to the point where the valley narrows to what is known as the lower gorge, which lies about 12 miles south of the city of San Jose. The channel of the river passes through this lower gorge, and extends thence northward about 20 miles to the San Francisco Bay. The Coyote river has a watershed in that portion of the Mt. Hamilton range wherein it rises, of over 200 square miles, and supplies by far the greater portion of the underground or artesian waters of all that part of the Santa Clara valley which lies northerly of the lower gorge, and all the rain falling upon the watershed drains into the Coyote river before it enters the Santa Clara valley at the upper gorge. During a few days in times of freshets or high waters, much of the waters of said river runs in its bed from the upper gorge to the bay of San Francisco; but during some seasons freshets or high waters occur only to a limited extent, and in other seasons they do not occur at all; and at all times, whether they do or do not occur, a large portion of the waters of the river, and during the rainless months, substantially all thereof, sinks into said gravel stratum during its course to at least as far northerly as the city of San Jose, and flows or percolates through the said gravel stratum, and other gravel strata connected therewith, from and just below said lower gorge to at least as far northerly as the bay of San Francisco. Said waters keep said gravel stratum, and said other gravel strata connected therewith, full of water and under pressure, and the same rise up in plaintiff's said well from 55 to 63 feet above said stratum, the variation depending mainly upon the time of the year, and also upon the flow of water in the river, and said waters rise up in all the other wells which have been bored down to the said gravel strata connecting therewith. Between San Jose and the bay of San Francisco, such pressure causes the water in said gravel stratum, and the gravel strata connecting therewith, to actually overflow from the wells connected therewith in large quantities, making what is usually designated "flowing artesian wells." The largest of said flowing artesian wells are those nearest the bay of San Francisco, the waters in said gravel stratum and gravel strata connecting therewith, which furnish water for said last-named wells, being at a lower level below the level of said gorge, and under greater pressure from said waters so sinking in said stratum at said gorge, than are the waters in said gravel stratum and strata at points further south from said bay of San Francisco. At the lower gorge Santa Clara valley is only about 400 yards wide, and consists almost entirely of the gravel bed of the Coyote river, and said gravel bed of said river there extends through the lower gorge between the hills at that point, and extends down to the bed rock, lying from 35 to 165 feet below the surface of the gravel through such gorge, and on the surface of the gravel bed of said river, or underneath through the gravel bed thereof, all the waters of said river and of said watershed flow and percolate in a northerly direction, and all of said waters flowed or percolated through said gravel bed, underneath the surface thereof, at the date of commencing this action.

It is further found that at the time this action was commenced—January 9, 1904—defendant had sunk a shaft in the gravel bed of the Coyote river at the lower gorge, and was then installing powerful machinery and pumps, and intended therewith and by other means to divert substantially all of the surface and subsurface water of the river, amounting to some 20,000,000 gallons per day or more, prevent these waters from passing over said lower gorge northward, and carry them by pipes and other means from said point of diversion to other points, and sell the same as an article of merchandise, thus preventing them from returning to the river and supplying water to the gravel stratum in the land of plaintiff, which stratum, if they were so diverted by defendants would be without sufficient water to enable plaintiff to irrigate his orchard or land; that defendant corporation also intended to divert during a portion of each year a large portion of the surface waters of the Coyote river at points on the river before and after it emerged from the Mt. Hamilton range at the upper gorge, and above said lower gorge, and divert the same to other points for sale, and prevent any portion of the water from returning to the river or gravel bed thereof, and, generally, that the defendant corporation, unless restrained, threatened to divert and carry the waters of the river beyond their own lands for sale as merchandise, prevent them from returning to the river or gravel bed, with the result that any or all of these threatened and intended diversions would prevent these waters from flowing or percolating into the gravel stratum northerly of the lower gorge, and prevent plaintiff from having any water in his well with which to irrigate his orchard, and so cause irreparable damage to the same. Continuing, it is found that no material part of the waters underneath the land of plaintiff are supplied from any source other than the waters which fall upon the watershed of the Coyote river. The point where said river emerges at the upper gorge from said range of mountains into the side of the Santa Clara valley is about eight miles southeast from said lower gorge, and is over 100 feet higher than the lower gorge. Between these two points is that portion of said valley which is designated by the defendants in their answer as being known as the "Coyote Valley." This Coyote valley has therein very large strata of gravel, extending and descending continuously from the bed of the river at the upper gorge to the gravel in the river at the lower gorge. At the lower gorge the gravel extends from surface to bed rock, which, at its deepest point, is 165 feet deep. Through these gravels at the lower gorge flow about 20,000,000 gallons per day, a little more in the wet part of the year and a little less in the dry part of the year. The flow is supplied mainly from the said gravels of said Coyote valley; and those gravels are in turn constantly, but chiefly in the wet part of the year, supplied by the waters of said river after it emerges into said valley at the upper gorge. The waters of these very large strata of gravel in said Coyote valley slowly flow northward to said lower gorge, and through the same, and on down toward the bay, through said underground gravel strata, north of said lower gorge; and would soon, within two years at most, all flow through said gravels in said lower gorge, if they should receive no further supply from said river. No water is stored or impounded in the said gravels in said Coyote valley; but, though said gravels impede the flow of the water therein, it flows constantly and continuously through them and through the gravels in said lower gorge, and thence through said gravel strata north of said gorge. The defendant threatened and intended to build a dam across said lower gorge, with the bottom resting on bed rock, and extending to the surface of the gravel. This dam, if built, would effectually prevent any of the waters heretofore flowing through said gravels of said gorge from thereafter flowing or passing through the same. If defendants pump and extract no more water out of the gravels of said gorge than their present shafts, tunnels, pumps, and appliances now permit, still, if such amount of water as could now thereby be pumped, were pumped, the plane of the waters in the gravels below said gorge would be thereby lowered to such an extent that the same would be entirely below the bottom of said gravel stratum in plaintiff's lands, and plaintiff's said well would be thereby entirely deprived of water. Soon after heavy rains upon the watershed of the river, portions of the storm or flood waters of the river flow in its channel to the bay, for short periods of a few hours to a few days—the lengths of the periods being dependent upon the heaviness of the rainfall. Large portions of the storm waters flowing in the channel of the river sink into the gravel strata in and along the bed and banks of the channel. The volume of the storm waters flowing in the channel decreases, from a point near the upper gorge, to a point near the northern limits of San Jose, and from the latter point to the bay, the volume of the waters increases in case of very heavy rains, or of frequent heavy rains during any winter. A larger volume of storm waters sinks in the gravel strata in and along that part of the channel at or near the lower gorge, of the length of about two miles, than in the gravel strata in and along any other part of the channel. The waters, sinking into such gravel strata, flow and percolate into the several gravel strata underlying the surface of the Santa Clara valley, and among others the stratum penetrated by the plaintiff's well. The storm waters coming from a very heavy rain, or from frequent heavy rains during the winter, largely increase the flow and percolation of water into the gravel strata underlying the valley, and thereby the water in such strata and the pressure of the water therein are increased, and the water in the wells, including the plaintiff's well, rises, and wells are caused to flow, and flowing wells to increase their flow. Such increase of water, of its pressure, of its rise in and flow from the wells is proportionate to the volume of storm waters flowing in the channel of the river.

In addition the court found that from the evidence presented in the case it could not "determine with certainty what portion of the storm waters issuing from the upper gorge during any rainy season, or during any rain storm, sinks into the gravel strata underlying the valley; but more than one-third of the storm waters flowing during the last six years did so sink. Should those storm waters be prevented from flowing in the channel of the river below the upper gorge, and be diverted to places not within the valley, the gravel strata underlying the valley would be deprived of their usual supply of water, and within a short time—not more than two years—the wells penetrating those strata would not yield enough water for profitable or successful irrigation, and would not yield more water than the surface wells."

The decree entered perpetually enjoined the defendant corporation and its officers from arresting or obstructing at or above the lower gorge (except for the reasonable use thereof on the lands of the said corporation in the exercise of its riparian rights) any of the water of the Coyote river which, excepting for said arresting or diverting, would flow on the surface of the bed of said river through said gorge, or would flow or percolate through said gorge underneath the surface thereof.

On this appeal practically every finding of the court is challenged as not sustained by the evidence; it is also insisted that the court failed to find on certain material issues, and that the decree as made is erroneous for various reasons. The transcript on appeal consists of some 1,600 pages. The various briefs of counsel on both sides have exhaustively discussed the evidence applicable in support of, or against, the findings made, and by their excerpts therefrom, or by ready reference to it in their briefs, have facilitated our examination of it. The limits of a judicial opinion, however, will in many cases preclude a consideration in detail of findings where they are very many, and are all questioned, and particularly is this true when, as in this case, a careful examination of all the evidence satisfies us that the findings as made find ample support in it, and a discussion of it could only end in demonstrating that fact. We will, however, refer to the evidence supporting them in a general way; and, when we come to consider the attack made on the particular findings of the court as to the threats, intent, and conduct of the defendant respecting the diversion of the waters of the Coyote river, we will discuss the evidence applying to them more in detail.

There can be no doubt but that it was as clearly proven under the evidence as such matters can be proven that there are underlying a vast territory in the Santa Clara valley—some 20 miles square—numerous channels created by the Coyote river through its action in ages past when, in the building up and forming of the valley, its waters rushed in enormous quantities from the mountains, changing from one side of the valley to the other, and constantly varying its course in its flow through the lower gorge northward towards the bay of San Francisco. These old channels now lie beneath the surface of the valley at varying depths; channels beside channels, and channels crossing and interconnecting with each other, through each of which the Coyote river once flowed in its open course, but which are now underground channels filled with loose and coarse gravel, through which waters still flow, supplied to them through percolations from the Coyote river, with which these old gravel channels have always been connected, and that the particular underground channel or gravel stratum from which the well of plaintiff is supplied constitutes one of these old channels, which is likewise connected with and supplied from the waters of Coyote river. The intake of all these old channels, including that from which the plaintiff derives his water, is in the enormous bed of gravel extending several miles northerly below the lower gorge. For at least one mile below the lower gorge this deposit consists of pure gravel from surface to bed rock. Into this vast gravel bed during the winter and spring, when the storm waters gather between the upper and lower gorge and discharge themselves through the latter, there sink into these gravels immense quantities of water, in amount limited only by the extent of the rainfall, but in any season of flood extending largely into hundreds of millions of gallons per day, the evidence showing, when tests were made, that these intakes amounted in some seasons to from 300,000,000 to 500,000,000 gallons a day during a single storm. It is quite clear that these quantities of waters sink into the gravels and fill up the various branch channels underlying the valley, which connect with these gravels by the pressure of the storm waters passing over them, and the supply of these underground channels is obtained in no other way; and it is equally clear that the intake into these gravel beds and the gravel strata along the flow of the river generally is in proportion to the height and breadth of the storm waters passing over them, and the consequent pressure they exert to increase the percolation of the waters in the vast gravel bed and gravel strata. That the waters which lie in these old branch channels are supplied by the percolation of waters into the gravel beds and strata from the storm waters of the Coyote river is beyond question from the evidence, as it equally appears that the flow of these storm waters during the recurring heavy rains is absolutely necessary to sustain the supply of water thereto which would otherwise and in a few years be exhausted. That these underground gravel strata are connected with the river in these gravel beds at the lower gorge, and that their waters are thus supplied to these branch underground channels therefrom, and that the findings of the court to that effect are true appears not only from the evidence of the geological expert—Dr. Branner, whose qualification to testify on the subject was conceded, and who testified to that effect—but also from tests made in wells, and the testimony of well borers and well owners owning lands over these gravel strata and others speaking on the subject. Of course this supply from the rainfall and storm waters is augmented by the 20,000,000 gallons which year in and year out daily percolate over the gorge, and which is designated as the normal flow of the river, but it is quite evident that this quantity, of itself, and save for the immense quantities which are supplied by the annual storm waters, would not sufficiently meet the needs of those hundreds of property owners whose land is situated above the various old branch channels, all having their intake into the gravel beds at the lower gorge, and who draw water for their irrigation from wells sunk in these various water-bearing gravel strata. While it is true that this controversy concerns only the plaintiff and defendants, and must be disposed of by a consideration of their respective rights, yet, as bearing upon the correctness of the findings of the court as to the source of supply of these waters of plaintiff, we have a right to take into consideration the evidence which shows that these various water channels underlying square miles of territory in the Santa Clara valley all have their intake and ramify from the vast gravel beds extending for miles northerly from the lower gorge, that in instances they connect with each other, and that all are affected by the flow of the flood waters in proportion to their volume over the vast gravel beds which serve as an intake for them and supply the various underground branch streams over which these lands are situated. The test which was made, as well as the evidence of these various well owners, showing that the water in the hundreds of wells in the district in which lands overlie these various channels decreases in depth in the summer time while the irrigation season is active and increases in volume with the winter rains and flood waters, and increases in proportion as these floods are frequent and heavy or less frequent or light, and that this was the effect in all wells, including those situated on the channel in which Miller's well was situated, was sufficient of itself to warrant the finding of the court as to the sources from which the waters in the strata underneath Miller's land were supplied.

While it is insisted that the finding that Miller's well was in a stratum of gravel under pressure is not supported by the evidence, yet no good purpose can be subserved by discussing this point. The evidence shows that as a fact the well was sunk in a stratum under pressure, as the court found, but whether it was or not can make no difference in Miller's legal rights. The right of a person owning land upon a channel of underground water is not measured by whether the water is under pressure or not, but by considering whether the waters come to him in a natural defined flow so as to constitute a part or parcel of his lands, a matter which will be considered as we discuss the law applicable to this matter. It is further insisted that the Miller gravel stratum is supplied from other sources than the Coyote stream, and that the finding of the court that Miller's supply came from no other source is not supported by the evidence. About the only evidence rising above conjecture which could support this theory is that such waters might be supplied from a watershed of some eight square miles below the gorge. No other stream save the Coyote enters the region in which Miller's underground stratum is located. And comparing this watershed of 8 square miles with the Coyote watershed of some 200 square miles which the evidence does show contributes its waters to supply the Miller stratum and the other underground channels, this would appear to be too trivial to consider as a source of substantial supply. Dr. Branner, the geological expert heretofore referred to, testified that the water supply in Miller's channel all came from the gorge. This would seem to settle the question; but in any event it is a matter of no real consequence, as the evidence shows that plaintiff, in common with hundreds of others having wells sunk into the same strata, and who are being supplied from the same source (each being entitled to take only a reasonable amount), needs all the water which does come to this gravel channel from whatever source. Defendants cannot deprive him of any portion which gets to his gravel stratum simply because some of the necessary quantity may come from another source than the Coyote river. As all is needed from whatever source it comes, and comes by natural flow to the stratum, plaintiff is entitled, as against defendant, to it all.

We shall proceed now to a consideration of the claim of appellants that the findings of the court as to the threats, intentions, and conduct of defendants relative to the diversion of the waters of the Coyote river are not sustained by the evidence, and to the further claim of a failure to find on what are asserted to have been material issues, because these matters must be disposed of before any consideration of the legal propositions involved in the controversy can be had.

The court found that the defendants threatened and intended to take and divert, and, unless restrained by the court, would take and divert, all the waters of the Coyote river, both surface and subsurface, passing through said lower gorge, and which supplied water to the gravel stratum in which plaintiff had his well, and from which he extracted his waters for irrigation, and specified in its findings the means by which the appellants were attempting to accomplish this result. We see no room for questioning the sufficiency of these findings. The appellants had filed a notice of appropriation at the point of intended diversion on the banks of the Coyote river between the upper and lower gorges, claiming the appropriation of "the water of said Coyote river then flowing and to flow therein to the extent of 10,000 inches measured under a 4-inch pressure," to be diverted through "a canal * * * 120 feet wide upon the bottom and 8 feet deep below banks, or such other dimensions as may be necessary to carry such waters to reservoir sites." In terms this appropriation did not cover flood waters of the river, and, as applied to the waters therein occasioned by ordinary rains, would cover all of those waters, and would take all the waters which, after such rains, passed through the lower gorge and into the gravel beds below it. Subsequently another notice was filed appropriating "500,000 inches measured under a 4-inch pressure." This applied in terms to the flood waters, and, as the records show, would, except in one instance, have far exceeded the amount of any flood waters which flowed in the river. This appropriation of such a vast amount was evidently intended, as counsel for appellants state in their brief, to cover the "peak" rate of flow, and necessarily the peak rate of flow would embrace the entire flow of any flood waters. In fact, the appellants are now here insisting that they have a right to take and appropriate the flood waters of the river. So much for the surface waters. As far as the subsurface waters of the Coyote valley are concerned, it is conceded by appellants that they amount approximately to some 20,000,000 gallons per day. Yet that appellants intend to abstract all these waters, and at the commencement of this action were taking means to do so, is quite apparent. They had contracted for pumps to be operated in the gorge, of a combined lifting capacity of 20,000,000 gallons of water a day for the first 90 feet in the gorge; they had sunk a caisson or shaft at the lower gorge, with tunnels extending towards its bank on either side, and had installed two pumps with a demonstrated capacity, at the least, of raising 10,000,000 gallons a day. They had also bored three strings of wells across the lower gorge to bed rock as "trial dam site lines," with the obvious purpose of constructing a submerged dam from bed rock to the surface of the gravel at the lower gorge, and thus prevent the flow of any of this 20,000,000 gallons of water to the gravels through the lower gorge.

Beyond all this, however, and as applying to both surface and subsurface waters, in two letters of the appellants to the board of supervisors of the city and county of San

Francisco they offered to deliver 68,000,000 gallons of water per day from the Coyote river at the lower gorge under gravity pressure, and to bring the supply up to 70,000,000 gallons per day, if necessary. All this they asserted their ability to do by reason of alleged ownership and control of the entire watershed of the Coyote river of 300 square miles with adequate and desirable reservoir sites, the retaining capacity of these several reservoirs amounting to from 50,000,000,000 to 60,000,000,000 gallons, not including an underground reservoir or cone (as they claimed) capable of withstanding a daily draft of 20 or more millions of pure filtered water to be augmented, if necessary, by discharging into it waters from the watershed and reservoirs. All these waters were to be concentrated in the lower gorge, and by means of power generated by the fall of waters impounded in the mountain reservoirs were to be brought to a sufficient elevation at the lower gorge, so that by gravity pressure they could be brought to the southern limits of the city and county of San Francisco.

Taking all of these facts into consideration, there is no room for question but that the court was sufficiently warranted in finding that the intention of defendants was to divert, unless restrained by the court, all the waters of the Coyote river, both surface and subsurface, and, as far as their acts disclose, that they intended to do so by the means and methods the court found were being employed or contemplated. This disposes of the attack on the findings made by the court as far as we deem it necessary to particularly consider them.

Now, as to the claim that the court failed to find upon material issues raised by the answer of defendants, namely, that they did not intend to divert any portion of the surface waters of the Coyote river, "except or other than a portion of the storm or flood waters, which, for a very short period in every year, rushed in great volumes and with great velocity down the channel of said river to the bay of San Francisco and are wasted and lost therein." It is not clear from this averment what is meant by "storm" or "flood" waters "wasted and lost in the bay." It is not a clear allegation that they were anywhere lost and wasted in the river, which, of course, is where the appellants intended to divert them. But assuming that it was; that, in effect, it amounted to an averment that the waters which appellants intended, and which they claimed a right, to divert were the storm waters which were lost and wasted at the point of diversion because they could serve no useful purpose in their flow through the lower gorge to the bay of San Francisco—still there was no evidence introduced by the appellants to support this allegation. The owner of land having an underground water-bearing stratum supplied by the flood waters of a stream has a primary right to the full flow of such waters, in order to bring his stratum up to its water-bearing capacity. In torrential streams, such as the Coyote river, floods vary in extent with different seasons and in different years, and those of one season or one year may be insufficient to supply the underground stratum connected with the stream, while those of another season or year may be more than sufficient. While the owner of the underground stratum is only entitled to the flow of the flood waters to the extent that they may replenish his water-bearing stratum, still his right to the accustomed flood flow of the stream for that purpose is paramount to that of the right of an appropriator to divert any of the waters for use beyond the watershed. If the accustomed flow is more than necessary to supply the underground stratum, the burden of proof is upon the appropriator seeking to appropriate the surplus to show that there is a surplus. In the case at bar the burden of proof was upon the defendants, setting up a claim to an alleged portion or surplus of flood waters upon the ground that such waters were wasted or lost waters, to prove that fact. In the absence of such proof, a finding on the averment was not necessary. Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; Gregory v. Gregory, 102 Cal. 52, 32 Pac. 364.

Aside from this, however, if it was intended to allege that a portion of these storm waters were wasted and lost waters at the point of intended diversion, the court found that they were not in those findings which we have recited, to the effect that the storm waters after passing the lower gorge sunk into the vast gravel beds below it, and flowed into the several strata underlying the surface of the Santa Clara valley, and among others the stratum penetrated by the well of plaintiff, that the pressure of these storm waters largely increased the flow and percolation of water into the said underlying strata, and that "such increase of water, of its pressure, of its rise into and flow from the wells, is proportionate to the volume of the storm waters flowing in the channel of the river," and that if defendants should divert a portion of said waters at the gorge, or at other places above the gorge, plaintiff would be prevented from having enough water in said gravel stratum underneath his land to irrigate his orchard, or any considerable part thereof. These are clear findings that there was no "waste or loss" of the storm waters until, at least, they had served the essential and necessary purpose of supplying to plaintiff their force and volume in forcing such supply into the vast gravel beds in which the various underlying strata referred to had their intakes, and had flowed over these gravels on their way to the bay.

Nor can there be any ground of complaint that the court did not make any finding as to the exact amount of flood waters of the Coyote river which sunk and became part of the waters underlying the lands of plaintiff, or as to the exact amount of flood waters which did not sink, but passed over the gravel beds in which these underlying strata had their intakes and were wasted and lost in the bay of San Francisco. There was no issue as to any amount or exact proportion of these waters which sunk or did not sink; the defendants asserting simply a right to divert at or near the lower gorge a portion of the storm waters which rushed down the channel of the river to the bay, and, as they alleged, became lost and wasted therein. The complaint alleged that defendants were threatening and intending to divert and carry away "the waters of said Coyote river" beyond their own lands and prevent the same from ever returning to the river or flowing through the gravel within the gorge and supplying the gravel stratum in which plaintiff's well was sunk, thereby depriving him of waters to irrigate his land, and so irreparably damaging his land and orchard. This allegation that they were threatening and intending to take "the waters" of the river was, in effect, an allegation that they intended to divert all the waters thereof. The court on sufficient evidence, as we have already shown, found all these particular allegations of the complaint to be true, and was a full finding of the quantity of storm waters which the defendant intended to take, namely, all of them, even if it be assumed that an issue were made on the matter of quantity.

It is true that in another paragraph of the complaint it is alleged that the defendants "will divert a large portion of the surface waters of the Coyote river," accompanied by immediate further allegations that such diversion will prevent the flow of sufficient water to the well of plaintiff with which to irrigate his land. This allegation, as far as it alleged an intention on the part of defendants to divert a "large portion" of the surface waters of the river, was not denied by defendants. In fact, they asserted such a right. The court found that they so intended, and found that if they were permitted to do so, it would prevent the well of plaintiff from being supplied with sufficient water for the purposes of irrigation. The plaintiff undoubtedly had, as against the defendants, a paramount right to have the flood waters supply by their flow, force, and volume the artesian stratum in which his well was sunk; and, as the court found that if a "large portion" of these flood waters serving that purpose was diverted by defendants, the gravel stratum in which plaintiff's well is situated would be deprived of water to his irreparable injury, this finding was sufficient to sustain the judgment independent of any finding as to the exact quantity measured in second feet, or gallons, which went to make up this portion. The plaintiff being entitled to recover if deprived of his right to a full supply of his gravel stratum by the diversion of a "large portion" of flood waters, the exact quantity taken was immaterial, and the omission to find on an issue which in no event could affect the right of plaintiff to recover on the facts as found will not warrant a reversal of the judgment. Gregory v. Gregory, 102 Cal. 52, 36 Pac. 364.

Having disposed of (as far as we deem consideration necessary) the attack on the findings and the claim of alleged want of findings, and being satisfied that there is no merit in the points made relative thereto, we come now to a consideration of the legal principles involved on the appeal.

It is insisted by the appellants, first, that as the plaintiff is a nonriparian owner, he has no right to enjoin to any extent the diversion of the waters of the stream by an appropriator, on the ground that the stream contributes percolating waters to his nonriparian lands; and, secondly, even if he has, the court was not warranted in enjoining the defendants, as appropriators, from appropriating the flood waters of the Coyote river which they claim waste themselves in the bay, in order that another portion of the flood waters may continue to sink into the subsurface gravels and supply percolating waters to his nonriparian lands.

As an abstract proposition of law, applied to the concrete facts in this case, the contention of appellants is that, notwithstanding it is clearly established that the waters, surface and subsurface, which either flow or percolate through the channel of the Coyote river, at or above the lower gorge, pass through well-defined artesian gravel strata in the Santa Clara valley connected with the stream itself, and furnish a supply of water for irrigation to a territory to which its use is essential, still that territory can be deprived of this inestimable benefit by an appropriator seeking to divert all the waters of the river away from the stream as a commercial proposition, thus rendering the lands overlying the various artesian strata valueless, and that owners of these superimposed lands have no rights which are invaded, and hence no right to apply for an injunction to restrain such a diversion.

The principal stress of the argument of appellants against the right of plaintiff to restrain their diversion of the waters flowing through the lower gorge and percolating into the subterranean stratum under the land of plaintiff is based on the claim that plaintiff is not an owner of land riparian to the stream, who would be entitled to a flow of its waters, but is simply an owner of land situated above percolating waters supplied in part by percolation from the stream, who has no rights against an appropriator. This is, in effect, a contention that the rule at common law applicable to percolating waters, which gave an owner of land all that lay beneath it, with a right to interrupt and take away waters passing to his neighbors' wells—the doctrine of cujus est solum—governs the respective rights of plaintiff and defendants.

But whatever the extent to which that doctrine may have heretofore obtained in this state, at least ever since the decision in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, it has been modified by the application of the more reasonable doctrine of sic utere tuo as to percolating waters.

It would be a waste of time to particularly discuss the reasons which impelled the modification of the common-law doctrine of an absolute right in each landholder (and as an appropriator the appellants insist upon this right) to abstract all percolating waters under his land and dispose of them as he saw fit, without regard to what extent he might deplete these waters under the lands of his neighbors. The climatic conditions of this state, the great stretches of arid and semiarid lands, the uncertainty of the seasons and varying rainfall, the necessity of irrigation, and the vast superiority of underground waters as a steady and ready means of irrigation over the uncertainty of a similar supply from a surface stream which, in many instances, becomes dry at the very time when irrigation is necessary; the vast areas of land brought under cultivation and production by irrigation, and additional areas still to be improved by it; the enormous draft which this constant improvement and cultivation makes on a supply which is limited, and which will become inadequate for all as population increases and additional lands are to be brought under cultivation and improved by irrigation—these, and many other causes, impelled a departure from the old doctrine and a limitation of it, and the adoption of the just principle that a common and essential necessity—water—when supplied to well-defined strata from whatever source, should be preserved to lands overlying them for reasonable use upon them.

In Katz v. Walkinshaw, supra, in the opinion written by the late Justice Temple, and in that written by Justice Shaw upon a rehearing (granted for further argument), the necessity for the modification of the cujus est solum doctrine as inapplicable to the conditions in this state was fully discussed, announced, and applied. In that case the defendant had sunk wells in the same artesian belt underlying the lands of plaintiff, and in which his irrigation wells were sunk, and was diverting the water for sale to lands distant from the saturated belt from which the artesian waters were derived. Defendant asserted there, like appellants as appropriators do now, that as these were percolating waters, he had under the common-law rule to which we have just adverted, an absolute right to abstract them to any extent he saw fit, and to use them anywhere he pleased, notwithstanding it would result in depriving the well of plaintiff of any supply for irrigation. The common-law rule was rejected as inapplicable to the conditions in this state, and the rule of sic utere tuo announced, and, applying it, it was held that the rights of the parties in the suit to take these particular waters were correlative, and that the defendant could not divert them for sale elsewhere so as to prevent plaintiff from obtaining a reasonable supply for irrigation and other ordinary uses upon his land. The doctrine thus announced in this pioneer case has been subsequently followed, so that the rule is now settled beyond further question. See McClintock v. Hudson, 141 Cal. 281, 74 Pac. 849; Cohen v. La Canada, 142 Cal. 437, 76 Pac. 47; Montecito, etc., Co. v. Santa Barbara, 144 Cal. 584, 77 Pac. 1113; Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021; Burr v. Maclay, 154 Cal. 439, 98 Pac. 260; Hudson v. Dailey, 105 Pac. 748.

But, it is insisted by appellants that this rule only applies as to correlative rights of different persons owning lands overlying the same plane of percolating waters, and does not apply so as to entitle a nonriparian owner, although the stratum underlying his land is directly supplied by waters percolating from the stream to prevent the diversion of the waters of the stream by an appropriator. The precise question as to the respective rights of an appropriator of water to be used beyond the watershed, and of one claiming an uninterrupted flow of these waters to supply, by percolation, a water-bearing stratum underneath his land and connected with the stream, has not been heretofore presented. But there are general principles of law which have been applied as between other appropriators of the stream waters and claimants to the flow or to the percolating waters of the stream which are equally applicable as between the parties to this action. It is true in this case that the plaintiff is not a riparian owner, but neither does it appear, as far as their rights are here asserted, that appellants are. They are only asserting rights as appropriators under a claim that they have appropriated all the surplus waters of the Coyote river, and are entitled to certain impounded waters between the gorges. Be that as it may, however, as far as any waters of the river are concerned (there being no impounded waters), we do not perceive that the fact that the plaintiff is not a riparian owner can affect his rights as against the appellants. As between riparian owners, it is conceded, as the law declares, that one riparian owner is not entitled to divert the waters of a stream for use at some distant point for commercial purposes so as to prevent another riparian owner to whom they would otherwise be available from using them on his lands, and it is established by the authorities to which we have heretofore referred that, as between owners of land overlying a common substratum of percolating water, this cannot be done. This being so, we perceive no reason why the same rule should not be applied as between owners of land overlying a substratum of water directly connected with either the surface or subsurface flow of the stream, and deriving practically its exclusive supply from that source. The theory upon which the right of a riparian owner to be protected in the use of the waters of a stream to which his lands are riparian is that, nature having given these lands the benefit of the flow, and the natural advantage of its use on the lands, one riparian owner may not divert these waters to lands not riparian, to the injury of another riparian owner who can use them. The same principle has been applied, as we have seen, to the use of waters as between the owners of lands, overlying a common stratum of percolating waters. And we perceive no reason why the same principle should not be applied as between an appropriator of the waters of a stream to be taken beyond the watershed for commercial purposes and the owners of lands overlying an artesian stratum which is conclusively shown to be so connected with the stream as to derive its supply of water by percolation therefrom to this stratum. Why, in principle, should there be any distinction? With the common-law doctrine modified to meet the conditions in this state necessitating it, and modified so as to preserve to each owner of lands overlying a common stratum of percolating waters a right to a fair and reasonable use of these waters of which their lands have a natural advantage, no reason suggests itself why the same rule should not apply as between the appropriators of the waters of a stream for use elsewhere than on riparian lands and the owners of lands overlying a water-bearing channel, so directly connected with the stream as to be supplied by percolation from it. The conditions in all cases are analogous as far as the natural supply of waters is available for use upon the lands concerned, whether the lands be riparian to the stream or overlying a common subterranean stratum, or whether the underlying strata are connected and supplied directly from the flow of the stream itself. In either case there is a natural supply of water of which the lands by reason of their location, either as riparian or above a common subterranean stratum, or as lying over a water-bearing stratum supplied by percolation from the stream, have a natural advantage to the use of the waters. Lands are invariably purchased in view of the benefits which they may derive from being riparian to a stream or overlying well-supplied strata of water, the right to the flow or extraction of which is a part and parcel of the land, and there is no rational basis for any distinction between the classes as to the right to prevent a diversion of waters for use elsewhere, whether it be attempted by a riparian owner against another riparian owner, or by one owner of land over a common stratum of underlying water against another owner, or by an appropriator of the waters of a stream as against the owner of land overlying the water-bearing stratum directly supplied by percolation from the stream. As far as the owner of lands overlying a gravel stratum is concerned, it makes no difference in his rights, as against an appropriator of the water, from what source the supply comes which directly supplies his water-bearing stratum—whether from a stream or a saturated plane or other body of water which by natural flow or percolation, either surface or subterranean, clearly supplies his underground stratum. It would present an anomalous condition of the law were it the rule that, while a riparian owner may prevent an appropriator from diverting to his injury the waters of the stream for use beyond the watershed, and one owner of land overlying a common stratum of percolating water may restrain another owner similarly situated from making a like diversion, the owner of lands whose underlying stratum of water is directly and clearly supplied by percolation from the waters of the stream, and who will be greatly injured by a diversion, is not entitled to prevent it. There is no reason or any difference in the rule between the classes and none should exist. Such landowner has a right to restrain a diversion from the stream or saturated plane, or other well-defined supply, by an appropriator or any one else who seeks to divert such stream or other supplying waters from their natural percolating flow, for use elsewhere than upon lands to which, as waters of the stream, they are riparian, or which, as waters of an underground stratum, may reasonably and usefully be applied to the overlying land. Under this rule, as far as the artesian stratum of plaintiff, which is a well-defined one, and has its intake in the vast bed of gravel in the lower gorge, is supplied by the surface waters of the Coyote river passing over said gorge and percolating to the stratum, or is supplied by the subsurface waters in the Coyote valley between the upper and lower gorge (assuming for present purposes that these may not be considered as a part of the river), which pass over the lower gorge and percolate through the gravels below and into the artesian stratum of plaintiff, or as far as the stratum is supplied by percolation from both of these sources, the right of plaintiff to have the flow of these waters in his stratum uninterrupted is paramount to the right of defendants to divert them for use elsewhere, as the court found they intended to do, to the irreparable injury of plaintiff, and plaintiff was entitled to a decree enjoining such diversion.

But it is insisted by appellants that if the plaintiff has a right to enjoin the diversion of the waters of the stream which would otherwise percolate to and supply the artesian stratum underlying his land, the court was not warranted in enjoining the appellants from diverting the flood waters of the Coyote river, which it was claimed were wasted and lost in the bay of San Francisco. There can be no question but that an appropriator of water may divert for use, to any point beyond the watershed, any portion of the waters of a stream which can serve no useful purpose either to the riparian owners, or, in the instant case, any waters of the Coyote river which might serve no such purposes in supplying the underground stratum of plaintiff, or which are in excess of the quantity necessary for that purpose. Fifield v. Spring Valley Waterworks, 130 Cal. 552, 62 Pac. 1054.

But it is quite obvious that merely because waters are flood or storm waters of a stream —that is, on account of unusual rains the waters of a stream are increased beyond the normal flow—these flood or storm waters are not therefore surplus waters of the stream which serve no useful purpose, and are subject to appropriation. What are called the storm waters of the Coyote river are not waters which are precipitated over the lower gorge only in occasional seasons. They are generally of annual occurrence, and flow at great height and breadth over the deep, porous gravel beds below the lower gorge, although they last but a short time. They are confined to the general channel of the stream, as the banks of the Coyote river are of great height, in some places as high as 38 feet, and within the memory of man no overflow of the river until it gets to the low land near the bay has ever been known. But even if these storms are of short duration, and the waters are precipitated with great rapidity into the bay, they cannot be said, for that reason alone, to be waste waters, or subject to appropriation. They are only waste waters, and capable of appropriation as such, if they serve no useful purpose as storm waters. But in the case at bar there can be no question but that the flood waters perform, not only a useful, but an indispensable, service in pressing into the gravel beds or trough at the lower gorge, by their great breadth and enormous weight, a large portion of the waters which go to supply the various artesian strata, including that of plaintiff which have their intake therein. The extent to which these waters sink into these gravels below that gorge depends upon and is proportioned to the pressure exerted by the breadth and volume of the storm waters. The subsurface flow of 20,000,000 gallons per day does not keep up the supply, and that supply is augmented and is only partially kept up by the waters which are forced into the gravels at the lower gorge by the pressure of the flood waters. There are some years when there are no flood waters at all, and years when such floods as come are comparatively small, and there are also dry years occasioned through less than the ordinary rainfall. In every year when there are no floods, and in every dry year, the waters in these gravels suffer additional depletion on account of the extent of the drafts for irrigation, which are necessarily made upon them to meet the deficiency in the rainfall, and this depletion is only partly restored by the flood waters of subsequent years. The water plane in these gravels, and consequently in the various strata to which it is supplied, is, as the evidence shows, gradually lowering. Neither the gravels nor these underground strata have been completely filled since a season of unusual rains in the years 1861–62, when the flood waters brought them up to their full water-bearing capacity, and hence there was a surplus of flood waters which may be said to have served no useful purpose, and were wasted in the bay. Since then, on account of the increase of population and the improvement of the valley, the high state of cultivation to which lands have been and are being brought on account of their susceptibility to irrigation from these underground artesian strata and the consequent vast drafts made by the increasing number of wells sunk therein, the water plane, by continuous and extensive irrigation during the summer seasons, has been and is yearly gradually being lowered so that the flood waters, even to the extent to which they contribute of themselves to replenish the supply and under the pressure of their breadth and volume affect it, still do not bring these artesian strata up to near their full capacity. And the extent to which these artesian strata are now supplied, which is less than their full capacity, and which must be still further depleted as additional lands are brought into cultivation and irrigation from wells sunk into them, is, in addition to this daily supply of 20,000,000 gallons always flowing through the lower gorge, derived solely from the storm waters, and is supplied in proportion to their breadth and volume. It is quite obvious that, as the storm waters flowing over the gravels of the lower gorge do not, even under their enormous pressure, now bring the various artesian strata having their intake therein up to their full capacity, and in the nature of things must be further depleted as additional well drafts are made upon it, to permit them to be diverted at or near the lower gorge must inevitably deprive the various gravel strata, including that of plaintiff, of their usual water supply, and, as the court found, these strata within a few years would not yield enough water for profitable or successful irrigation, nor yield more water than the surface wells. As it appears, therefore, that all these flood waters, either by partially sinking into the gravels, or by their breadth and weight causing an increased sinking surface, are inadequate to fully supply the underground waters in these artesian strata, it is quite clear that it cannot be said that any portion of them are waste or lost waters which the appellants are entitled to divert from the stream above the lower gorge. All these waters are necessary, of themselves or by their force, to supply the underground waters, which they, even now, fail to do to the full capacity of the underlying strata, to which full capacity the plaintiff and others interested in them are entitled. Performing this necessary and indispensable service which could not be supplied without them, no part of them can be said to be waste waters until they have performed it, as far as they are capable of doing so, and have passed over the gravels on their way to the bay. This seems to be so plain as to require no further particular discussion. If at any time these flood waters, or any portion of them, can be characterized as waste waters in their flow from the upper gorge towards the bay, it certainly is not while they are in the river above the lower gorge where appellants desire to divert them. If they become waste waters, it is only after they have passed the gravels at the lower gorge, and have performed the necessary and useful purpose of supplying them, and the artesian strata connected with them, as far as they are capable of doing so, and from there are rushing towards the bay. We are not prepared to say that, even in their flow after passing the gravels in which the intake to these artesian strata lie, they serve no other useful purpose, but certainly these storm waters do not become waste until they have flowed over these gravel beds and are on their way to the bay. It is only there that it may be said that they can perform no further useful service, the only place where they first become waste waters, and where, without apparently invading the rights of anyone, they may be diverted. No reasonable objection could be made to the diversion of the waters by the appellants there because they are then, for all practical purposes, waste waters. But it is quite clear that this is the only point on the stream where it can be said, as far as plaintiff is concerned, that they are waste waters.

Coming now to a consideration of the objections of appellants to the decree.

It is insisted that the court should have secured the appellants in the right to divert the waters from the gravels of the lower gorge to the extent that their present shaft, pump, and appliances would permit. There can be no question but that the plaintiff brought this action for an injunction to restrain this particular diversion of the waters as soon as it reasonably appeared that the proposed diversion, by the pump and appliances of appellants as installed and operated, would affect the supply of water in his artesian stratum. So the appellants were not entitled to be secured in the operation of their plant and their diversion of water by that means on the ground that the plaintiff stood by and permitted the development of water to be made to successful operation, having reasonable cause to believe that it would affect his water supply (Katz v. Walkinshaw, supra); and, as the court found by evidence sustaining the fact that, if permitted to proceed with such pumping with the appliances as installed, the plane of water in the gravel below the lower gorge would be lowered to such an extent that it would be below the intake of the gravel stratum in the land of plaintiff, and his well thereby be entirely deprived of water, the court properly enjoined the further operation of said pump and appliances.

It is further insisted that the court should have framed a decree permitting the appellants to store waters of the watershed in reservoirs in the mountains above the lower gorge, and require them in each season to permit 5,500,000,000 gallons to pass the upper gorge in such quantities as would allow it to sink into the gravels below the lower gorge. This claim is made on the theory that this would exceed in amount that which is contributed to the gravels below the lower gorge by the sinking of the flood waters. The respondent questions the accuracy of this estimate and the feasibility of this plan, as well as the power of the court to so frame a decree respecting the matter as will give the court immediate and effectual control of the acts of the defendants so as to see that it is carried out, and to prevent injury to those relying upon the underground supply as nature gives it for the irrigation of their lands—an injury which would be the inevitable result of any delay or failure in turning in the amount specified. It is insisted, too, that the right of this plaintiff to the waters percolating through his land is a vested right, and that the right to have the flow of the flood waters contribute to this percolating supply is equally a vested right, which the court has no authority to permit to be disturbed or of which the plaintiff may be deprived except under condemnation proceedings and upon payment therefor. Other objections to such a decree are also urged, which it is unnecessary to state. Nor do we deem discussion or decision upon any of them necessary, because, in the state of the pleadings and proofs in the case, we do not think the court erred in failing to make a decree as suggested by appellants, even if under them the court had the right to do so. This case was not tried on the theory that the appellants were entitled to any such decree. There is nothing in the pleadings in the case remotely suggesting that the court should make such a decree, or that the appellants would be satisfied with it if it did; nor was any evidence presented in the case addressed to the making of any such decree. The trial court was neither advised under the pleadings, nor was suggestion made on the trial, that such a decree was proper. The claim of appellants was against the right of plaintiff to any relief or protection whatever against the diversion of the waters of the Coyote river, either surface or subsurface. They insisted in the trial court, and likewise insist here, that plaintiff, not being a riparian owner, had no right to prevent the diversion of the waters of the river, either the normal surface flow or the subsurface flow, or any percolating water, and that, as far as the storm waters were concerned, they had a right to divert, above the lower gorge, all the waters that flowed down to the bay of San Francisco, irrespective of any benefit they afforded in filling the gravels below the lower gorge and supplying the artesian stratum of plaintiff which had its intake therein. Asserting that plaintiff had no right to have these waters supply his artesian stratum under nature's plan they now ask that the decree of the trial court be reversed because that tribunal did not adopt an artificial plan, which was not suggested by the pleadings, to which no proof was particularly addressed, nor the trial court asked to make, and which is, for the first time in the case, suggested here, and then as a ground for reversal. Under the circumstances stated the appellants, if they had been entitled to such a decree under proper pleadings and proof, are in no position now to complain because it was not made by the trial court. As the appellants did not assert any right to impound the storm waters and release them in any given quantity to the gravels below the gorge so as to supply plaintiff's and the other artesian strata, but asserted that plaintiff had no right to any of these waters, but that appellants had a perfect right to divert and use them all, they cannot be heard to complain that the court did not embrace in its decree a plan which they had never asserted a specific right to, or asked to be made. Huffner v. Sawday, 153 Cal. 86, 93, 94 Pac. 424.

This disposes of the principal attack of appellants against the findings upon the claim of an alleged want of findings, and relative to their objections to the decree. Several other points are made, which, while we have examined them, we do not think of sufficient importance to command particular discussion.

We are satisfied that the findings as made are sustained by the evidence, and the decree supported by the findings, and the judgment and order appealed from are therefore affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J; HENSHAW, J.

SHAW, J. I concur in the judgment and in the opinion of Justice LORIGAN. I believe, however, that the claim of defendants to the so-called waste flood waters may well be decided on the merits. A well-established, but infrequently used, principle of the law of injunctions is peculiarly applicable to the case. Beach on Injunctions states it thus: "When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical or unsubstantial right." Volume 2, § 1067. High on Injunctions gives it in this form: "The court may properly be guided by the consideration of the relative convenience of the parties; and, if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared to the injury to the defendant, the relief may be denied, and the plaintiff left to the pursuit of his remedy at law." Volume 2 (4th Ed.) § 470. See, also, Peterson v. Santa Rosa, 119 Cal. 391, 51 Pac. 557; Jacob v. Day, 111 Cal. 571, 580, 44 Pac. 243, for applications of the principle.

This principle is stated in these authorities with reference to the refusal of an injunction. It is a flexible rule, however, and it will apply to either party, and to the granting or refusal of the injunction, according to the circumstances of the particular case. And in the varying conditions to be found in the different parts of this state this adaptability makes it of the greater value, if wisely administered. In many parts of the state, especially in the large interior valleys, practically all the flood waters are waste waters. They contribute little or nothing to the saturation of any subterranean gravel beds which are resorted to for a supply of water for useful purposes. They rush in great volume to the sea, carrying destruction in their path, and overflowing the low lands to the great damage of the owners, serving no useful purpose whatever. If they were stored in reservoirs, they might be made to serve a triple purpose. The extreme floods and consequent overflow and destruction would be prevented; the stored water could be used to irrigate large areas of valley land, now left unproductive for lack of water; if distributed upon the plains, for irrigation, a large portion of these waters would in due course of time find their way, by seepage and percolation, to the channels of the streams, giving an increased and more regular flow in the summer months, increasing the amount available for irrigation in the smaller streams, and bettering the navigation of the large rivers—all of which would add tremendously to the growth, prosperity, and wealth of the state, and to its ability to support the large population which its climate and productions attract. The question of the right to store such flood waters, and the terms upon which it can be obtained or exercised, is of the greatest importance to the future welfare of the state. In such parts of the state an injunction to prevent the storage of such flood waters might, perhaps, as a general thing, be properly denied.

But in the case at bar the conditions above described do not exist. The reverse is true. The Santa Clara valley presents conditions not paralleled elsewhere in the state, except it may be in the San Fernando valley, in which is found similar gravel beds, kept supplied by similar flood waters and rainfall, the use of which water is secured to the city of Los Angeles by its ancient pueblo right. In the Santa Clara valley a large community has settled upon the lands over the gravel beds in question, and, by the use of the waters stored therein, has made probably the richest and most productive region of equal size in the state. Plaintiff is but one of these, but he represents a large population engaged in like pursuits. The property of every one of them would be jeopardized by a diminution of the waters that go into this underground reservoir. The floods in which it can be asserted with any reasonable assurance that waste occurs are infrequent. They come at intervals of several years, and generally the waste water is small and practically indeterminable. The right to obtain such small quantities at such wide intervals for storage in open reservoirs, where evaporation would dissipate a large part during the time it would have to be stored to be made of real use, would be of little value, and probably of none at all. It is obvious from the whole case that the individual defendants never would have inaugurated their enterprise with nothing in view but the privilege of ascertaining, storing, and using these chance waste waters. It would be impracticable and unprofitable. The giving of a decree permitting the storage of such water as could be ascertained to be thus wasted, on the rare occasions when there is any waste, and the refusal of an injunction against such storage, would be of no substantial benefit to the defendants, and would have no practical effect, except to render the rights of a large number of persons more precarious, and their property less valuable, and possibly less productive. In view of all these circumstances I am of the opinion that the injunction was properly extended to include all the waters in controversy.

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12 Cal. App. 161

Ex parte MOORE. (Cr. 156.)

(Court of Appeal, Second District, California. Dec. 13, 1909.)

CRIMINAL LAW (§ 982*)—SUSPENDING SENTENCE — IMPRISONMENT UNDER ORIGINAL JUDGMENT.

The court suspending the sentence of imprisonment in jail imposed on one convicted of crime may thereafter order the issuance of a commitment, and direct the imprisonment of accused under the original judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

Application by Clara Moore for a writ of habeas corpus for her discharge under a commitment directing her imprisonment on a conviction of crime. Writ dismissed, and petitioner remanded.

S. A. D. Gray, for petitioner. H. B. Alexander, Deputy Dist. Atty., for respondent.

PER CURIAM. Application for writ of habeas corpus.

Petitioner was arrested upon a charge of vagrancy, and on the 18th day of March, 1909, entered a plea of guilty, and was sentenced by the court to serve 180 days in the city jail of Los Angeles. Sentence was suspended "to leave city." Thereafter, on October 19, 1909, the defendant was brought before the court charged with violating the terms of the suspended sentence. Thereupon the court ordered a commitment to issue, and directed the imprisonment of petitioner under the original judgment. This writ is prosecuted by petitioner to obtain her discharge under said last-named order of the court.

Upon the application for this writ the same was issued upon the theory presented to us that the petitioner had been paroled under the provisions of the act of March 13, 1909 (St. 1909, c. 232), and that, after the expiration of the term of the original sentence, the court had undertaken to revoke the order of probation and directed the execution of the original judgment. Upon the hearing, however, and an examination of the record, we find that no question connected with the probation law is involved, but, on the contrary, that the case presented is identical with that of Ex parte Collins, reported in 8 Cal. App. 367, 97 Pac. 188, upon the authority of which case, and for the reasons there assigned, the writ is ordered dismissed and prisoner remanded.

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12 Cal. App. 172

HOLLYWOOD UNION HIGH SCHOOL DIST. et al. v. KEYES, County Clerk. (Civ. 777.)

(Court of Appeal, Second District, California. Dec. 14, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BONDS—OFFER AND ISSUANCE—CONTRACT.

Under Pol. Code, § 1745, which authorizes the issuance of high school district bonds, the proposal and offer to issue bonds of certain kind and character and the purchase thereof is a contract in which the taxpayer and the purchaser are parties, and the minds of the parties must meet to make it valid.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 227; Dec. Dig. § 97.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BONDS—NOTICE OF ELECTION—PAYMENT OF INTEREST.

Under Pol. Code, § 1745, which authorizes the issuance of high school district bonds, and provides for the posting of notices of the election and what the notice shall contain, the omission to designate the times of payment of interest in the notice is fatal to the validity of the bonds.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

3. INTEREST (§ 23*)—PAYMENT OF INTEREST—WHEN NOT SPECIFIED — WHEN PAYABLE — MATURITY.

In contracts between individuals where the payment of interest is fixed at a per centum per annum, it is payable at the time of the maturity of the principal obligation.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 4; Dec. Dig. § 23.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BONDS—NOTICE OF ELECTION—INSUFFICIENCY OF.

Under Pol. Code, § 1745, providing for the posting of notices of elections for the issuance of high school district bonds, a provision in the notice that the interest was payable "per annum" was insufficient, and the failure to specify the time at which interest upon the bonds was payable could not be cured by any action of the supervisors in fixing the times of payment; and a county clerk was justified in refusing to attest such bonds.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

Mandamus by the Hollywood Union High School District and another against C. G. Keyes, county clerk and ex officio clerk of the board of supervisors of the county of Los Angeles. Writ denied.

Hartley Shaw, for petitioners. O'Melveny, Stevens & Millikin, for respondent.

PER CURIAM. The petition discloses that the trustees of the Hollywood Union High School District heretofore, acting under section 1745 of the Political Code as enacted in 1909 (St. 1909, pp. 488, 489, c. 311), gave notice to the taxpayers of the time and place for an election at which was to be determined the question of the issuance of bonds for purposes within the statute. This notice, it is conceded, contained all of the matters required by the section above stated, excepting that, in respect of interest, the notice provided that the bonds, which should be of the denomination of $1,000 each, "shall bear interest at the rate of 4½ per cent. per annum," whereas the statute provides that the notice shall designate "the rate of interest, not exceeding six per cent. per annum, payable annually or semiannually." It is the contention of respondent that the position of the county clerk, whose refusal to attest the bonds is the subject of this writ, is well taken, for the reason that the omission to designate the times of payment of interest in the notice is fatal to the validity of the bonds, and for that reason the clerk is justified in his refusal to attest the same.

It needs no argument to support the proposition that the proposal and offer to issue bonds of certain kind and character and the purchase thereof is a contract in which the taxpayer is one party and the bond purchaser the other, and, like every other contract, the minds of the parties must meet in order that it shall be valid. As the statute stood prior to 1909, the matter in relation to the fixing of the maturity of the interest was, by section 1670 of the Political Code, delegated to the board of supervisors as agents of the taxpayers, and the determination of the times of payment of interest by the board would bind the taxpayer. Section 1670 was repealed in 1909 (St. 1909, p. 473, c. 311), and the discretion theretofore reposed in the supervisors in this regard was, by the terms of section 1745, as enacted in that year, reserved to the people themselves, and this is indicated by the statement as to what the notice of election should contain heretofore quoted. This construction is in harmony with the present governmental policy tending to reserve to the people powers which have heretofore been delegated to representatives.

It is insisted by petitioner that these provisions of section 1745 with reference to the denomination of the bonds, and the time within which interest should be made payable, are but limitations upon the powers of the board, and are not to be considered as express declarations as to a material part of the notice. As we have before said, we are not in sympathy with this contention. We regard it as peculiarly significant that the express powers heretofore conferred upon the board of supervisors as the agents of the people should be by legislative act withdrawn from the agents, and the requirement in connection therewith should be found in the provisions relative to the notice of election; all of this indicating to our minds that it was the legislative intent that the people themselves, who bear the burden of taxation, should in the first instance express the character and extent of the obligation which they are imposing upon themselves, whether it apply to the denomination, rate of interest, or time of payment thereof.

Petitioner further insists that in the face of this construction the notice was nevertheless sufficient, for it provided that the rate of interest should be 4½ per cent. per annum, and in the form in which the bonds are proposed to be issued, and which form respondent refuses to attest, it is provided that the interest shall be payable annually. In other words, that the "per annum" in the notice justifies the use of the word "annually" by the supervisors. In contracts between individuals it is established that, where the payment of interest is fixed at a per centum per annum, the same is payable at the time of the maturity of the principal obligation. Koehring v. Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402; Tanner v. Dundee, etc., Co. (C. C.) 12 Fed. 646; Ramsdell v. Hulett, 50 Kan. 440, 31 Pac. 1092. This rule, being recognized as to contracts between individuals, is particularly applicable to contracts the evidences of which must be negotiated in the open market, and the market value of which is affected to some extent by the certainty or uncertainty of their terms; and it is obvious that a bond uncertain through an omission of express terms to indicate any material provision thereof would be affected as to the value thereof by such omission. The contrary effect as to the general provision of interest payable per annum was determined in Murphy v. San Luis Obispo (Sup.) 48 Pac. 974, but, in view of the rehearing granted in that case and the subsequent opinion in bank (119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444), we do not regard that case now as an authority on this question, and that the question is open for decision and, we think, should be determined in harmony with the cases above cited. We do not fully appreciate the force of some of the decisions to which our attention has been called, the effect of which is to determine that the time for the maturity of the interest materially affects the rate of interest. We cannot understand how this can be said where the rate is expressly fixed by the contract. It does, however, and must of necessity, affect the market value of the instrument, the subject of sale.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In our opinion, therefore, the omission to specify in the notice calling the election the times at which interest upon the bonds was payable cannot be cured by any action of the supervisors in fixing such times for the payment of interest, and that, as a consequence, the action of respondent in refusing to attest such bonds is justified.

Writ denied.

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12 Cal. App. 199

HUNEKE v. HUNEKE. (Civ. 714.)

(Court of Appeal, Second District, California. Dec. 16, 1909. Rehearing Denied by Supreme Court Feb. 14, 1910.)

1. Divorce (§ 249*)—Division of Property—Homestead.

Where, in a divorce proceeding, the court found that the homestead was community property, a decree that it should be divided equally between the parties at the expiration of a year from the entry of an interlocutory judgment granting the husband a divorce for extreme cruelty was the least interest therein that the court could assign him under Civ. Code, § 146, providing for the disposition of community property in divorce proceedings.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 712; Dec. Dig. § 249.*]

2. Divorce (§ 253*)—Trial—Property Interest—Determination—Time.

In the absence of an order continuing the hearing of a suit for divorce, in so far as it involved the property rights of the parties, the opportune time for the hearing and final determination of that question is at the time and place of the trial of the principal issue involved in the divorce proceeding, and not on the entry of a final decree one year after the date of the interlocutory judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 716; Dec. Dig. § 253.*]

3. Divorce (§ 201*)—Property Interests—Determination—Jurisdiction.

Under the express provisions of Civ. Code, § 147, the court having jurisdiction of a suit for divorce has jurisdiction to decree a partition and sale of the parties' community homestead.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 591, 592; Dec. Dig. § 201.*]

4. Divorce (§ 201*)—Property Rights—Determination—Jurisdiction—Estoppel.

Where, in a suit for divorce, both parties, in addition, raised issues concerning conflicting claims to certain real property, which were heard and determined without objection, they were estopped thereafter to question the jurisdiction of the court to make and enter a judgment affecting such property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 591, 592; Dec. Dig. § 201.*]

5. Divorce (§ 283*)—Judgment—Appeal—Time.

In so far as an action for divorce involved conflicting claims of the parties to real property, the court's judgment determining such issues became final as to all parties six months after the entry thereof, in the absence of appeal under Code Civ. Proc. § 939, requiring appeals to be taken from final judgments within that period.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 766; Dec. Dig. § 283.*]

6. Divorce (§ 181*)—Interlocutory Decree—Appeal—Time.

Under Civ. Code, § 131, providing for an appeal from an interlocutory divorce decree within six months, and for the entry of a final decree within one year from the date of the interlocutory decree, it was not the legislative intent to change the procedure and practice in actions for divorce, but to make the decree ineffective for one year as a deterrent from a new marriage.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 567; Dec. Dig. § 181.*]

7. Divorce (§ 254*)—Division of Property—Modification of Findings.

After a judgment affecting the property rights of the parties in an action for divorce had become final by failure to appeal within the time prescribed, the court had no jurisdiction to modify its findings or to grant a new trial.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 720; Dec. Dig. § 254.*]

8. Divorce (§ 283*)—Appeal—Right to Appeal—Time—Interlocutory Judgment.

Where an interlocutory judgment for divorce also determined the rights of the parties as to their community homestead, and this part of the judgment became final by a failure to appeal within six months, the fact that the final decree restated and reaffirmed the interlocutory decree conferred no right of appeal as to matters involved and finally determined by the interlocutory judgment, though by Civ. Code, § 131, execution was stayed on the final judgment as to the property until the entry of the final decree in divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 766; Dec. Dig. § 283.*]

9. Divorce (§ 283*)—Division of Property—Appeal — Time — Directions for Enforcement.

Where a divorce decree provided for a division of the parties' community homestead, and a sale thereof for that purpose, at the expiration of one year, such provision did not render the decree fixing and determining the property rights any the less final, under the rule that the finality of a decree is not affected by any direction therein contained in aid of its execution.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 766; Dec. Dig. § 283.*]

10. Divorce (§ 283*)—Time to Appeal—Final Judgment.

Civ. Code, § 131, provides for an appeal from an interlocutory divorce decree within six months, and Code Civ. Proc. § 939, provides for an appeal from a final judgment within the same period. An interlocutory divorce decree granted plaintiff a divorce which would become final at the expiration of one year, and at the same time directed a division of the community homestead, to be sold at the expiration of a year.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

No appeal was taken within six months, and at the end of a year final judgment was entered, reaffirming and restating the matters contained in the interlocutory judgment, and provided for the appointment of referees to make partition or to sell the property at public auction. *Held*, that the matter inserted in the final judgment, and not contained in the original, should be treated as an order for carrying the judgment into effect, and hence the appeal was ineffective.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 766; Dec. Dig. § 283.*]

11. APPEAL AND ERROR (§ 70*)—APPEALABLE ORDERS — PARTITION — ORDER APPOINTING REFEREES.

An order in divorce proceedings, appointing referees and directing partition or sale of real property, and directing that they report their action to the court for confirmation or modification, is interlocutory, and hence unappealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 377; Dec. Dig. § 70.*]

12. APPEAL AND ERROR (§ 70*)—APPEALABLE ORDERS — FINALITY — ORDER APPOINTING REFEREES.

The order appointing the referees did not vest in them power reserved to the court; the order providing for final confirmation of the referees' proceedings by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 377; Dec. Dig. § 70.*]

13. DIVORCE (§ 286*)—DIVISION OF PROPERTY—REVIEW—PRESUMPTIONS.

Where a court, in a divorce proceeding, had jurisdiction to order partition and sale of real estate belonging to the parties, its action in so doing must be sustained, in the absence of any showing of prejudicial error in connection therewith.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 769; Dec. Dig. § 286.*]

14. CONSTITUTIONAL LAW (§ 249*) — EQUAL PROTECTION OF LAW—DIVORCE LAW.

The California divorce law is not in violation of the fourteenth amendment of the federal Constitution, in that it denies equal protection of the laws, because the defendant is bound by the decree after the lapse of six months, while the plaintiff may dismiss the action at any time within a year after entry of interlocutory judgment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. § 249.*]

15. DIVORCE (§ 201*)—DIVISION OF PROPERTY—JURISDICTION—SOURCE.

The jurisdiction of the divorce courts in the division of the property of the parties rests on the right of a sovereign state to exercise control over all the property within its boundaries, and to determine the status or condition of its inhabitants or persons found within its borders, independent of any federal question.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 591, 592; Dec. Dig. § 201.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by John Huneke against Frances Huneke. Appeal from judgment and order denying defendant a new trial. Dismissed, and orders made in aid of execution affirmed.

John M. York and Waldo M. York, for appellant. Hutton & Williams, for respondent.

ALLEN, P. J. The action was one in divorce, based upon charges of extreme cruelty, and for a decree establishing the rights of the parties to a homestead alleged to constitute all of the property owned by the parties to the action. The answer of defendant denied the allegations of the complaint, denied that the property was a homestead, but, on the contrary, asserted the same to be the separate estate of the defendant. By cross-complaint defendant sought a decree of divorce and a decree adjudging the property described in the complaint and cross-complaint to be her separate estate. An issue was presented upon all the matters involved in the cross-complaint. The cause came on for trial September 17, 1906, and the court found in favor of plaintiff as to all the issues presented, and against defendant, and especially as against her claim of the separate character of the property involved. The court adjudged the property described to be community property, and that the same was impressed with a valid homestead, and by its interlocutory decree ordered that one year from the entry thereof a final decree of divorce should be entered in favor of plaintiff, and that the homestead should by such decree be awarded to the parties equally. This award to plaintiff was the least interest which, under section 146, Civ. Code, could be assigned to him; the divorce being granted plaintiff upon the ground of extreme cruelty. Eslinger v. Eslinger, 47 Cal. 64. And it was directed that a partition be made thereof, and one-half be set off to each in severalty, or, if the same could not be done advantageously, that the property be sold, and the proceeds be equally divided. Jurisdiction was reserved by the court to carry into effect the provisions of such interlocutory judgment. This interlocutory decree was entered September 26, 1906, and notice thereof given to defendant October 1, 1906. No further proceedings were had in connection with the case until August 23, 1907, when the defendant moved the court to strike from the findings of fact filed, and upon which the judgment was based, all portions thereof relating to the character of the property and the rights of the parties in respect thereof. This motion was denied on August 27, 1907, and on the 22d day of January, 1908, the court, under the objections of defendant, entered its final judgment dissolving the marital relation, and finally adjudging the rights of the parties as by the interlocutory decree determined, and further directing the appointment of three referees with directions to partition the premises, if the same could be done advantageously, allotting to each party one-half thereof, otherwise, to sell the premises at public action for cash, and report their proceedings to the court. It was ordered that the referees report in writing to the court their action under the order, the court to approve any partition reported or any sale made before the same should become effective, to which order and the judgment defendant excepted. Thereafter defendant moved the court to vacate the decision and judgment rendered in said action, and especially in so far as said judgment affects the property rights of the parties, and to grant a new trial, which motion was denied, and on June 12, 1908, the defendant noticed an appeal from the judgment entered on the 27th day of January, 1908, and from the order denying the motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The primary contention of appellant is that, under the statutes of this state, the court had no jurisdiction to enter a judgment establishing the rights of the parties to the property involved until the expiration of one year from the date of the interlocutory judgment decreeing the divorce, or until such time as the entry of a final judgment came on to be heard. This contention has been met and determined adversely to appellant by this court in John v. Superior Court, 5 Cal. App. 264, 90 Pac. 53, and subsequently by the Supreme Court in Pereira v. Pereira, 103 Pac. 488, in both of which cases it is determined that, in the absence of an order continuing the hearing as to the property rights involved, the opportune time for hearing and final determination of the rights of the parties as to the property is at the time and place of the trial of the principal issue involved in the divorce. Accepting this proposition as established, it must be unquestioned that under section 147, Civ. Code, the court had jurisdiction and authority in the divorce proceedings to make an order relative to the disposition of the community property, and, if necessary, to order a partition or sale thereof. Aside from the fact of having such jurisdiction over the community property, and that of necessity there reposed in the court authority to determine what portion of the property claimed by each was of the community, we find that in this particular action the parties, in addition to the issues involved in the action for divorce, presented to the court by the cross-complaint another action in which they sought to have their conflicting claims to certain real property heard and determined. No objection being urged by any one to this joinder of actions, and all parties having appeared and tried the issues presented in each, all are precluded now from questioning the jurisdiction of the court to make and enter a judgment as affecting the issues thus presented. In so far, then, as the action involving the conflicting claims to real property is concerned, the judgment of the court thereon became final as to all parties six months after the entry thereof, in the absence of an appeal. By section 131, Civ. Code, the same time is allotted for an appeal from an interlocutory decree of divorce, which is, by section 939, Code Civ. Proc., the time within which an appeal shall be taken from any final judgment.

As said by the Supreme Court in Pereira v. Pereira, supra, except so far as the statute makes the decree of divorce ineffective for the period of one year as a deterrent from a new marriage, it was not the legislative intent to change in any other respect the procedure and practice in actions for divorce. We are then confronted with a case where, after the judgment affecting the property rights has become final, an appeal is sought from the order and judgment of the trial court refusing a new trial and denying the motion to modify the findings upon which such judgment is based. By reason of the finality of the judgment the court had no jurisdiction or authority to modify its findings, or to grant a new trial. Claudius v. Melvin, 146 Cal. 260, 79 Pac. 897. As a consequence, no error could be predicated upon an order denying a motion to modify the findings or to grant a new trial. The mere fact that the final decree restated and reaffirmed the previous judgment, made and entered at the time of the trial and included in the interlocutory judgment, conferred no right of appeal as to matters involved and finally determined by the original interlocutory judgment, even though it should be said that the effect of section 131, Civ. Code, is to hold in abeyance the execution of the final judgment as to the property rights until the entry of the final decree in divorce. The finality of the decree is not affected by any direction therein contained in aid of its execution. Freeman on Judgments, § 28; In re Norton, 108 U. S. 237, 2 Sup. Ct. 490, 27 L. Ed. 709. Any of the arguments of appellant urged in support of the theory that the order executing this interlocutory decree is judicial could be equally as well directed against any other order in execution of a conditional decree affecting real property. The direction in the decree that a segregation of the interests to which the parties by the decree were found to be entitled should be made, or a sale ordered, at the expiration of one year, did not render the decree fixing and determining the property rights any the less final. In our opinion, therefore, a notice of appeal given more than six months after the entry of the interlocutory judgment is not effective as presenting for review or consideration any question involved in such judgment. It is true that the final judgment as entered, in addition to its reaffirmance and restatement of the matters contained in the original or interlocutory judgment, provided for the appointment of referees to make a partition, or, in event the same could not be had, to sell at public auction the premises, and to make due report of their action and proceedings to the court. But the matter inserted in the final judgment and not contained in the original may be considered, as it is, an order to carry the judgment into effect, and were it to be treated as an appealable order under section 939, Code Civ. Proc., the appellant does not in her notice of appeal in terms seek to review the same, but, on the contrary, confines her notice to the judgment, which, as we have said, was final, and the order denying a new trial, which, in our judgment, was made too late to be effective for any purpose. This order, however, upon its face, does not purport to definitely determine the rights of the parties, or to conclude them in the assertion of any right. It is preliminary to and the basis of a report of referees ordered to be made to the court, and from which report, or the action of the court in confirmation or modification thereof, an appeal would lie. We see nothing in the order from which it may be said that judicial power is delegated to the referees, for by its terms it provides that, whatever may be the conclusion or report of the referees, the same should have no efficacy until the court acted thereon. People v. Hayne, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211. Nor does the order vest in the referees power reserved to the court in the interlocutory judgment. In both the interlocutory judgment and the final judgment the power of the court, as controlling all matters connected with the partition or sale, is declared. On the other hand, should this preliminary order be considered as an order after judgment, and included in the notice of appeal, nothing indicating its irregularity or erroneous character is suggested. That the court possessed jurisdiction to make the order is to our mind clear; and, having such jurisdiction, the action of the court must be sustained in the absence of any showing of prejudicial error in connection therewith.

It is finally contended by appellant that the divorce law of California is inhibited by the fourteenth amendment to the Constitution of the United States, in that it denies equal protection under the law. This claim is based upon the proposition that, under our statutes, the defendant is bound by the decree after the lapse of six months, while the plaintiff is accorded the right of dismissal within one year after entry. That the statute should give plaintiff the right to dismiss the action for divorce instituted by him, while withholding the same right from the defendant, is not denying equal protection under the law. "What satisfies this equality has not been, and probably never can be, precisely defined. Generally it has been said that it only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." Magoun v. Illinois Trust Co., 170 U. S. 293, 18 Sup. Ct. 598, 42 L. Ed. 1037; Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414. This divorce law of our state undertakes to and does confer upon all citizens who are parties plaintiff equal and exact rights, and the same to all citizens who are parties defendant, and it does operate equally and uniformly upon all similarly situated as parties litigant. Aside from the peculiar character of actions for divorce, and the latitude which should be accorded each sovereign state in dealing with this unsolved problem in connection with its regulation, we see nothing in the sections referred to inhibited by the federal Constitution. The jurisdiction of the divorce courts, like the jurisdiction of probate courts, rests upon the right of a sovereign state to exercise control over all the property within its boundaries, and to determine the status or condition of its inhabitants or persons found within its borders, and no federal question is involved here. Estate of Clark, 148 Cal. 112, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197; De la Montanya v. De la Montanya, 112 Cal. 101, 117, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Richards v. Blaisdell et al., 106 Pac. 732.

We see no prejudicial error in the record sufficient to warrant a reversal of any action or order of the court made in the proceeding. The appeal from the judgment and order denying a new trial is ordered dismissed, and the orders of the court made in aid of the execution of the judgment are affirmed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 192

PEOPLE v. SWAILE. (Cr. 142.)

(Court of Appeal, Second District, California. Dec. 16, 1909.)

1. EXPLOSIVES (§ 5*)—MISUSE—INFORMATION—DESCRIPTION — "NITROGLYCERIN" — "DYNAMITE"—"GIANT POWDER."

An information for the malicious placing of an explosive near a dwelling house, describing the explosive as "nitroglycerin," commonly known as "dynamite" or "giant powder," was not objectionable for indefiniteness as to the explosion charged, the substances all being nitroglycerin explosives.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 2; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 5, p. 4810; vol. 3, p. 2298.]

2. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY—ILLEGAL USE OF EXPLOSIVES—INTENT.

An information for illegal use of explosives, alleging such use with intent then and there to endanger, intimidate, and terrify certain specified persons, was not defective for duplicity because it alleged more than one intent.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 375; Dec. Dig. § 125.*]

3. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY—STATUTORY OFFENSES—SEVERAL ACTS.

Where a statute enumerates a series of acts, either of which or all together may constitute the offense, all such acts may be charged in a single count, since, though each may by itself constitute the offense, all together do no more, and constitute but one and the same offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 337; Dec. Dig. § 125.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. Explosives (§ 5*)—Illegal Use—Instructions.

Where an information charged that defendant placed dynamite on the porch of a dwelling house with intent to endanger, intimidate, and terrify certain individuals, the court properly charged that the evidence was sufficient to sustain a conviction if it showed that defendant intended either to endanger, to intimidate, or to terrify either of the persons designated.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 2; Dec. Dig. § 5.*]

5. Witnesses (§ 191*)—Communication Between Husband and Wife—Letter from Husband to Wife.

Introduction of a letter written by accused to his wife containing a confession of the charge was not objectionable under Code Civ. Proc. § 1881, relating to privileged communications between husband and wife; there being no examination of the wife as to a privileged communication.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 738; Dec. Dig. § 191.*]

6. Witnesses (§ 52*)—Competency—Husband and Wife—Letter from Husband to Wife.

A letter from husband to wife containing a confession of crime is not inadmissible under Pen. Code, § 1322, rendering the wife incompetent to testify against her husband in a criminal case; she not being examined as a witness against accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 132–134; Dec. Dig. § 52.*]

7. Criminal Law (§ 394*)—Evidence Illegally Obtained.

Evidence otherwise admissible against accused cannot be excluded because illegally obtained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 875, 876; Dec. Dig. § 394.*]

8. Criminal Law (§ 517*)—Evidence—Confession—Corpus Delicti.

Though ordinarily the corpus delicti should be proved before a confession is admitted, the court may change the order of the proof in its discretion, and, if it does so, its ruling is not reversible error unless accused is prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146, 1147; Dec. Dig. § 517.*]

9. Criminal Law (§ 517*)—Evidence—Confession—Corpus Delicti.

Where, in a prosecution for the illegal use of explosives, it was proved that some person placed dynamite on the porch of a dwelling house in which certain named persons resided, and also placed a fuse so as to explode the dynamite, and had fired the fuse, such evidence sufficiently showed the corpus delicti to justify the admission of accused's confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146, 1147; Dec. Dig. § 517.*]

10. Criminal Law (§ 706*)—Trial—Retender of Evidence—Misconduct of District Attorney.

Where certain evidence was excluded in the first instance because it was not so closely connected with the defendant as to bind him, it was not misconduct of the district attorney thereafter to retender the evidence on the court's apparent change of ruling on the subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

11. Criminal Law (§ 407*)—Evidence—Admissions—Silence.

Where statements of fact tending to connect a person with a crime are made to him, the admissibility thereof depends on his answer or acts. If he admits the truthfulness of the accusation, or fails to deny it under such circumstances as may be construed to be an admission that it is true, the statement, with its answer or act, may be admitted; but if he denies it there is no admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898, 899; Dec. Dig. § 407.*]

12. Criminal Law (§ 407*)—Evidence—Admissions—Silence.

An accusation of crime calls for reply even from a person under arrest or in the custody of an officer, where the circumstances surrounding him indicate that he is free to answer if he chooses to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898, 899; Dec. Dig. § 407.*]

13. Criminal Law (§ 407*)—Evidence—Admissions—Silence.

In a prosecution of accused for misuse of explosives, in connection with his confession accused said that he was prompted all the way through by the "almighty dollar." He was then asked whether that was what he threw the rocks through the window for, to which he replied, "I am not saying anything about those rocks at all." *Held*, that defendant's reply to the accusation as to the rocks was the same as though he had said nothing, and was admissible as an admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898, 899; Dec. Dig. § 407.*]

14. Criminal Law (§ 371*)—Evidence—Other Offenses.

Where, in a prosecution for the illegal placing of dynamite on the porch of a dwelling house, defendant claimed that he did not intend to injure any one, but placed the dynamite on the porch as "a harmless bluff," evidence that he also threw rocks into the house was competent to rebut his claim as to his intent, and was not objectionable as tending to establish an independent offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

15. Courts (§ 99*)—Trial—Rulings on Evidence—Law of the Case.

The ruling of the trial court on evidence is the law of the case for all purposes of the trial.

[Ed. Note.—For other cases, see Courts, Cent Dig. § 340; Dec. Dig. § 99.*]

16. Criminal Law (§ 719*)—Argument of Counsel—Matters not Sustained by Evidence—Nature of Evidence.

In a prosecution for the illegal use of explosives, the admission of an officer's accusation to accused that he threw rocks through the windows of the house on the porch of which the explosives were placed, and defendant's failure to deny the charge, was sufficient to warrant the district attorney in discussing defendant's intent and, in reply to defendant's claim that his act was "a harmless bluff," in calling the jury's attention to the rocks.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

17. Criminal Law (§ 1171*)—Misconduct of District Attorney—Prejudice.

In a prosecution for the misuse of dynamite, in placing it on the porch of an inhabited dwelling, the district attorney's use of the words "one of his dynamiting plots," in refer-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ring to accused, while objectionable, was not so erroneous as to be prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

18. CRIMINAL LAW (§ 720*)—ARGUMENT TO JURY—INFERENCES FROM EVIDENCE.

In a prosecution for the misuse of explosives, the district attorney in his argument to the jury was justified in drawing an inference that a person who places dynamite on the porch of an inhabited dwelling, or one he believes to be inhabited, intended to assassinate some one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

19. CRIMINAL LAW (§ 1178*)—APPEAL—BRIEFS—ARGUMENT.

Accused was not entitled to an examination of instructions refused on appeal where his only argument thereof consisted of a statement that the court erred in refusing to give the following instructions, etc., giving their numbers and the page of the transcript where found.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Charles R. Swaile was convicted of placing an explosive near a dwelling house with intent to endanger, etc., and he appeals. Affirmed.

Mills & Hizar, L. R. Kirby, and A. J. Morganstern, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

TAGGART, J. The defendant was informed against for the crime of placing an explosive near a dwelling house with intent to injure, intimidate, and terrify human beings. This is alleged to have been done by depositing "at, in and near a certain dwelling house, the property of Edgar W. Dickenson, to wit, upon the porch thereof, a certain nitroglycerin explosive commonly known as dynamite or giant powder; * * * that said nitroglycerin explosive was so placed by said defendant at, in and near said dwelling house as aforesaid with the intent then and there to injure, intimidate and terrify Edgar W. Dickenson and J. A. Dickenson, human beings." The jury returned a verdict of "guilty," and defendant was sentenced to imprisonment in the state prison for a term of 20 years.

On this appeal, which is from the judgment and the order of the court denying him a new trial, appellant first urges as a reason for a reversal: That the information does not state a public offense in this, that the explosive named is not one of those enumerated in section 601 of the Penal Code under which the charge was made; also, that the "intent" with which the act was done was not specifically alleged, three different intents being stated. This multiplicity of intent is the basis of an assignment of error in connection with the refusal of the court to require the district attorney to elect which particular intent was relied upon for a conviction, and also of error assigned in the giving of certain instructions by the court.

The information is sufficient against the objections urged by appellant. There is no uncertainty as to the explosive charged. Had it stated nitroglycerin explosive alone the information would have been certain within the meaning of the statute, and that it alleged a particular nitroglycerin explosive commonly known as dynamite or giant powder did not render it any less certain. These substances are both nitroglycerin explosives. According to the expert evidence in the case, they are the same nitroglycerin compound, and the two terms are mentioned as synonymous by some of the lexicographers.

The information is not bad for duplicity because it alleges more than one intent in the commission of the crime. Accepting the contention of appellant that the "intent" is one of the essential elements of this offense the rule applicable here would be the one declared in People v. Frank, 28 Cal. 507, as follows: "Where, in defining an offense, a statute enumerates a series of acts, either of which separately or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that, notwithstanding each may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense." People v. Leyshon, 108 Cal. 440, 442, 41 Pac. 480. As the information charged but one offense—but one act—at a particular time and place, there was no basis for the motion of defendant that the district attorney be required to elect which charge he would try. Cases such as People v. Williams, 133 Cal. 165, 65 Pac. 323, where the information is so drawn that the conviction of the defendant might be had upon a showing as to any one of numerous violations of the law, do not support appellant's contention that it was error for the court to refuse to require an election. From this it is also apparent that in our view it was proper for the trial court to charge the jury that the evidence was sufficient to sustain a conviction if it showed "that the defendant intended either to injure, or to intimidate, or to terrify either of the persons named in the information."

Neither the provisions of section 1881 of the Code of Civil Procedure, relating to privileged communications between husband and wife, nor those of section 1322 of the Penal Code, rendering the wife incompetent to testify against her husband in a criminal case, were violated by the introduction in evidence of the letter written by defendant to his wife. This letter reads as follows: "I have had to confess to pututting Dinamite on Dickenson's Porch. you cannot see me before Monday bet 9 and 11 the Det found the dinamite in the shed." The letter was given to one of the officers to carry to the wife. It was not sealed or inclosed in an envelope, and, at the request of the officer, was returned to him by the wife after she had read it. The statement introduced by the letter is that of the husband, and there was no examination of the wife as to a privileged communication, nor was she examined as a witness against her husband. People v. Chadwick, 4 Cal. App. 63, 72, 87 Pac. 384, 389. If it be conceded that the letter was illegally obtained this would not operate to exclude it from evidence on the ground that it was a privileged communication, or that the evidence was self-criminating. Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. 1 Greenleaf on Evidence (16th Ed.) § 254a. The foundation laid for the introduction of defendant's confession was sufficient. Accepting the rule that ordinarily the corpus delicti should be shown before a confession is admitted, it is nevertheless true that the order of proof is largely within the discretion of the trial court, and, unless it clearly appears that the defendant was prejudiced by the ruling of the trial judge permitting the confession to be given before the corpus delicti was established, it is not reversible error. People v. Besold, 154 Cal. 363, 97 Pac. 871. We think, however, that the corpus delicti in this case was sufficiently established before the confession was introduced. That some one had placed the explosive on the porch of a dwelling house and not only placed a fuse so as to explode it, but had fired the fuse, was clearly shown. All the intent necessary for the offense charged could be inferred from this evidence.

The complaining witness in describing the condition of the dwelling house, after testifying to finding the explosive with the charred fuse attached, made the following statement: "When I went inside of the house, I noticed in the bedroom and bathroom leading directly north from the bedroom there was glass strewn around in there and I found two large rocks in there." On motion of defendant, this testimony was stricken out and the jury instructed to disregard it; and the labeled rocks were also directed by the court to be removed from the sight of the jury. In connection with the confession of the defendant, introduced in evidence, the officers who testified thereto were permitted to give as part of the conversation had with the defendant at the time the following: "Defendant: * * * I was prompted all the way through by the almighty dollar. Officer: And was that what you threw those rocks through the window for? Defendant: I am not saying anything about those rocks at all." Defendant moved to strike out this portion of the narration by the officer, and his motion was denied. The same matter was permitted to be testified to by another officer against the objection of defendant. Thereafter the district attorney recalled the complaining witness, and again sought to introduce the rocks and the evidence relating to the finding of them in the house, but his tender was denied. Appellant assigns this renewed offer of this testimony by the district attorney, and further mention by him of the rocks to the jury in his argument, as prejudicial misconduct. What was said by the district attorney in the last instance was in connection with the matter of the intent of the defendant in placing the explosive on the porch, and in reply to the suggestion of defendant's counsel that the act was a "harmless bluff" as the defendant told the officers. The language used was: "What was he doing with the rocks? You remember the rocks? What was the defendant doing with the rocks?"

It was not misconduct on the part of the district attorney to retender the evidence after the court's apparent change of ruling in this respect. The reason assigned by the court for not admitting the evidence in the first place was because it was not so closely connected with the defendant as to bind him. The statement in relation to the rocks testified to by the officers was only admissible upon the theory that it was an admission by the defendant that he had thrown the rocks, and that such evidence was competent in the case. Where statements of fact tending to connect him with a crime are made to a person suspected of having committed such crime, the admissibility of such evidence depends entirely upon the answer or acts of the person accused. If he admits the truthfulness of the accusation, or fails to deny it under such circumstances as may be construed to be an admission that it is true, the statement with his answer or act may be introduced as a declaration made by him; on the other hand, if he denies it, there is no admission upon his part to be introduced. In this state, an accusation of crime calls for a reply, even from a person under arrest, or in the custody of an officer, where the circumstances surrounding him indicate that he was entirely free to reply, if he chose to do so. People v. Amaya, 134 Cal. 531, 66 Pac. 794. The answer of defendant to the officers' accusation as to throwing the rocks was the same as if he had said nothing, or that he did not care to make any statement as to them. This entitled the statement to be admitted, if otherwise relevant, material, and competent. We think it was properly admitted. But this testimony as to the rocks was no more relevant and competent than that of the complaining witness which was stricken out. The mere fact that it tended to establish an independent offense was not sufficient to exclude it if it tended to throw any light upon the conduct of the person who placed the explosive. There can be no doubt that it tended to rebut the statement of defendant that he did not intend to injure the complaining witness, but placed the dynamite upon the porch as a harmless bluff. The error in the ruling of the court excluding the evidence tendered by the prosecution, however, would not justify the district attorney in commenting upon this evidence in his argument. Right or wrong, the ruling of the trial court was the law of the case for all purposes of the trial as to the particular evidence to which it related. But the admission of the accusation made by the officers and defendant's failure to deny it, was, we think, sufficient to warrant counsel in using the language complained of.

The other statements of the district attorney in his argument which are assigned as misconduct do not warrant a reversal of the case. In one instance, perhaps, the inference from the evidence was not justified. It was hardly proper to use the words "one of his dynamiting plots," but we do not think it was so far out of the bounds of legitimate argument as to be prejudicial. An inference that a person who places dynamite on the porch of an inhabited dwelling, or one he believed to be inhabited, intended to assassinate some one was legitimate, and was not an improper one for the district attorney to draw in his argument to the jury.

The instructions of the court upon the matter of intent which are assigned as error were proper under the view hereinabove expressed. The instructions requested by the defendant which the court refused to give to the jury can hardly be said to be presented to us on this appeal. It is neither the duty nor the practice of appellate courts to pass upon matters which the appellant himself does not consider of sufficient importance to more than refer to with the statement: "The court erred in refusing to give the following instructions," etc.; giving the numbers of them and the page in the transcript where found. People v. Pembroke, 6 Cal. App. 593, 92 Pac. 668. On examination, however, we are unable to discover that defendant was in any manner prejudiced by the refusal to give them or such portions of them as would have been proper, and which were not substantially given elsewhere.

The objections of the Attorney General to the consideration of certain questions which he contends are not before us on this appeal are not passed upon; it being assumed, for the purposes of this decision, that the matters brought up on suggestion of diminution of record cover the objections made.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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12 Cal. App. 121

YUBA COUNTY v. NORTH AMERICAN CONSOL. GOLD MINING CO. et al. (Civ. 623.)

(Court of Appeal, Third District, California. Dec. 3, 1909.)

1. COURTS (§ 212*)—APPELLATE COURT—JURISDICTION—EQUITY CAUSE.

A suit to restrain defendants from discharging or depositing tailings or other refuse from a mine into a river, or certain named branches thereof, was a suit in equity; and hence an appeal from a decree therein could not be taken to the appellate court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

2. COURTS (§ 212*)—APPELLATE COURT—JURISDICTION.

Where the appellate court has no jurisdiction to determine the merits of a suit in equity, it has no jurisdiction to entertain an appeal from any judgment or order therein, whether involving the merits or not.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

3. COURTS (§ 486*)—INTERMEDIATE APPELLATE COURT—ERRONEOUS APPEAL—TRANSFER.

Where an appeal was erroneously taken to the appellate court from an order changing the place of trial of a suit in equity, it would be transferred to the Supreme Court, as required by Const. art. 6, § 4.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 486.*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Yuba County against the North American Consolidated Gold Mining Company and others. From an order transferring the cause to another county for trial, both parties appeal. Case transferred to Supreme Court.

See, also, 107 Pac. 139.

F. H. Greely and W. H. Morrissey, for appellant. Niles E. Wretman, for respondents.

CHIPMAN, P. J. This is an action brought to restrain defendants from discharging or depositing tailings and other refuse matter from their mine into Yuba river, or certain named branches thereof. A motion was made by the defendants, or some of them, to change the place of trial from Yuba county, and upon hearing the trial court granted the motion, but transferred the case to a county different from that which in the judgment of both parties the court was without authority to name. Both plaintiff and defendants appealed from the order. The parties have filed a stipulation that the appeal be taken up at the earliest opportunity.

The action is clearly one in equity, and without the jurisdiction of this court. We held, in Rickey Land & Cattle Co. v. Glader, 6 Cal. App. 113, 91 Pac. 414, that where we are without jurisdiction to determine the merits of the controversy, we are also without jurisdiction to entertain an appeal from any judgment entered in the case, whether or not involving the merits. In this view it becomes our duty to transfer the case to the Supreme Court, under article 6, § 4, of the Constitution. The appeal, though improperly taken to this court, is not lost. The cause and all the papers thereto are, under rule 32, transferred to the Supreme Court. 78 Pac. xiii.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We concur: BURNETT, J.; HART, J.

Retransferred by Supreme Court.

12 Cal. App. 223

YUBA COUNTY v. NORTH AMERICA CONSOL. GOLD MINING CO. et al. (Civ. 623.)

(Court of Appeal, Third District, California. Dec. 17, 1909. Rehearing Denied by Supreme Court Feb. 14, 1910.)

1. VENUE (§ 72*) — CHANGE — CONSIDERATION OF DEFENDANTS NOT SERVED.

Defendants, sued under fictitious names and not served, cannot be regarded in the consideration of a motion for a change of venue made by defendants who have been served, and who have appeared, demurred and filed their affidavit of merits.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 72.*]

2. VENUE (§ 36*)—CHANGE OF VENUE—STATUTES—"ACTION"—"SPECIAL PROCEEDING."

Code Civ. Proc. § 22, declares that an "action" is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and section 23 declares that every other remedy is a "special proceeding." *Held*, that a suit in equity to restrain defendants from polluting a water course was an "action" and not a "special proceeding" within Code Civ. Proc. § 394, providing that whenever an action is brought by a county or a city against residents of another county or city, or a corporation doing business in the latter, the action must be, on motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff is a county, and other than that in which the plaintiff is situated, if the plaintiff is a city, the term "special proceeding" being limited to a proceeding in a court which under the common law and equity practice was neither an action at law nor a suit in equity.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 54; Dec. Dig. § 36.*

For other definitions, see Words and Phrases, vol. 1, pp. 128–140; vol. 8, p. 7563; vol. 7, pp. 6586–6590; vol. 8, pp. 7802, 7803.]

3. VENUE (§ 36*)—CHANGE OF VENUE—ACTION BY COUNTY.

A suit by a county against a corporation doing business in another county for polluting a water course was within Code Civ. Proc. § 394, providing for a change of venue whenever an action is brought by a county against residents of another county or a corporation doing business in the latter, on motion of the defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 54; Dec. Dig. § 36.*]

4. VENUE (§ 42*)—CHANGE OF VENUE—COUNTY TO WHICH CHANGE SHALL BE MADE.

Code Civ. Proc. § 394, provides that whenever an action is brought by a county against residents of another county, or a corporation doing business in the latter, the action must be, on motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff is a county. *Held*, that while a defendant, sued by a county other than that of defendant's residence, is entitled as of right to a change of venue under such section, defendant is not entitled to have the cause transferred to the county of its principal place of business, nor to any particular county, but the county to which the case shall be transferred is within the discretion of the court to which the application is made, to be determined by considering the situation, place of business of the parties, convenience of witnesses, etc.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 64; Dec. Dig. § 42.*]

5. VENUE (§§ 13, 36*)—PLACE OF TRIAL—SITUATION OF SUBJECT.

A suit by a county to restrain the pollution of a water course against a corporation having its principal place of business in another county, was properly commenced in the county where the subject of the action was situated, under Code Civ. Proc. § 392, though defendants were authorized to have the same removed to another county by section 394.

[Ed. Note.—For other cases, see Venue, Dec. Dig. §§ 13, 36.*]

6. VENUE (§ 36*)—CHANGE OF VENUE—CONSTITUTIONAL PROVISIONS.

Const. art. 12, § 16, provides that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or where the principal place of business of such corporation is situated, "subject to the power of the court to change the place of trial as in other cases." *Held*, that the quoted clause is authority for the court to look to Code Civ. Proc. § 394, providing for a change of venue in actions by counties, as providing some of "the other cases" referred to in the Constitution in which a change of place of trial is provided for.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 36.*]

7. STATUTES (§ 85*) — SPECIAL LEGISLATION — PRACTICE IN COURTS OF JUSTICE.

Code Civ. Proc. § 394, providing for a change of venue in actions by counties against a corporation doing business in another county, is not unconstitutional as special legislation regulating practice in courts of justice and providing for changing the venue of actions, in that it accords special privileges to corporations doing business without the county where the action is commenced, not accorded to corporations doing business within the county.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. § 85.*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Yuba County against the North America Consolidated Gold Mining Company and others. From an order changing the place of trial, both parties appeal. Affirmed.

See, also, 107 Pac. 138.

F. H. Greely and W. H. Morrissey, for appellant. Niles E. Wretman, for respondents.

CHIPMAN, P. J. Defendants, North America Consolidated Gold Mining Company and Charles S. Deisem, moved for a change of the place of trial either to Sierra county or Santa Clara county. The court granted their motion to transfer the case, but designated

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the county of Sacramento as the place of trial. The trial judge, in making his order, rendered the following opinion in which the facts appear, and in which we think the learned trial judge correctly states the law:

"Some of the defendants in the above-entitled action have been sued under fictitious names and have not been served with summons, and under well-settled decisions they are not to be regarded in the consideration of the motion for a change of venue, made by the defendants who have been served, have appeared, demurred, and filed their affidavits of merits. This motion for a change of venue is based upon section 394 of the Code of Civil Procedure, or that portion of said section which is as follows: 'Whenever an action is brought by a county or city against residents of another county or city, or a corporation doing business in the latter, the action must be, on motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff is a county, and other than that in which the plaintiff is situated, if the plaintiff is a city.' It is contended by the plaintiff herein that this section does not apply, basing that contention upon the claim that this is not an 'action,' but 'a special proceeding.' It is a suit for an injunction, a proceeding in equity. 'An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' Section 22, Code Civ. Proc. 'Every other remedy is a special proceeding.' Section 23, Code Civ. Proc. 'Any proceeding in a court which, under the common-law and equity practice, was not either an action at law or a suit in equity is a special proceeding under this section.' In Matter Central Irr. Dist., 117 Cal. 382 [49 Pac. 354] vol. 1 Encyc. of Plead. & Prac. 112. There can be no doubt at all upon the matter of application of section 394, Code Civ. Proc., to this suit. It appears from the complaint and defendants' showing that the county of Yuba, as plaintiff, has brought an action against a corporation doing business in another county, and the language of the section is mandatory: 'The action must be, on motion of the defendant, transferred to a county other than the plaintiff, if the plaintiff is a county.'

"All the steps taken by defendant seem to have been duly taken in time, and in the manner exactly prescribed by the Code, except in one respect. It appears that under the said section, when the plaintiff is a county suing a corporation doing business in another county, a right to a change of venue is given to have the cause transferred to another county, but no right is given to the defendant to have the cause transferred to the county where it has its principal place of business, nor to any other particular county. The naming of the county is left, in my opinion, to the discretion of the court. In the consideration of the question of what county the cause should be transferred to, the court will take into consideration all the matters and things apparent upon the face of the record, such as the situation and place of business of the parties, the convenience of witnesses (as far as may be apparent before answer filed), and all other reasons that may properly affect the exercise of its discretion. The defendant herein has moved that the action be transferred to either the superior court in and for the county of Sierra or to that in and for the county of Santa Clara. This portion of the motion relating to the two counties named may be regarded as mere surplusage—irrelevant and redundant matter in the motion, which may be disregarded, so that there is left only the demand and motion for a change of venue as contemplated by the statute.

"In the argument upon this motion no case has been called to the attention of the court, and none has been found after most diligent search, not in consonance with the views herein expressed, and it may be safely said that there is none. The statute was amended in 1891, and again in 1907, for the express purpose of meeting just such cases as this. It has so happened in the past that when similar motions have been made for a change of venue in other cases of the same general character as the one at bar, this court has denied the motions for technical reasons and upon technical grounds that do not appear nor exist herein. There is no possible doubt that the action was properly commenced in this county under section 392, Code Civ. Proc., and under the Constitution, and could be properly tried here; but defendants have seen fit to avail themselves of the right given them by section 394, and the court is bound by the mandatory terms of the law as there expressed. In view of the opinion of the court that none of the cases cited by counsel for plaintiff interprets the law to be other than mandatory or as meaning anything different from what the language itself sets forth in clear and unambiguous terms, it would seem to be entirely unnecessary to discuss any of them.

"In determining the county to which the cause should be transferred, I take into consideration the fact that it would be most inconvenient for the attorneys and witnesses for plaintiff to have to go to either Sierra or Santa Clara county, because of the distance, etc.; that Sutter, the neighboring county has her hands full of similar cases, as I am informed, and I have decided that Sacramento county would probably be more favorably located, taking everything into consideration, than almost any other county within reasonable distance of Yuba. The motion for a change of venue to a county other than the plaintiff is granted, that part of the motion relating to either Sierra or Santa Clara county is denied, and the superior court in and for the county of Sacramento is hereby designated as the court to which the above-named action is transferred for trial.

"Dated this 24th day of December, 1908.

"Eugene P. McDaniel, Judge."

Defendants have filed no brief. We discover no point in plaintiff's brief which is not satisfactorily disposed of by the opinion of Judge McDaniel, except the point made by plaintiff that section 394, Code Civ. Proc., is violative of section 16, art. 12, and subdivisions 3, 4, § 25, art. 4 of the Constitution. Section 16, article 12, reads as follows: "Sec. 16. A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." It seems to us that the clause "subject to the power of the court to change the place of trial as in other cases" is authority for the court to look to section 394, Code Civ. Proc., as providing for some of the "other cases" referred to in the Constitution in which the change of the place of trial is provided for. The further point that section 394 is obnoxious to the provisions of the Constitution prohibiting special legislation, "regulating the practice of courts of justice," and "providing for changing the venue" of actions, because according privileges to corporations doing business without the county where the action is commenced not accorded to corporations doing business within the county, is not in our opinion, well taken. This discrimination is found in other sections where the right to have the place of trial changed is placed upon the distinct ground that the defendant resides in a county other than the county in which the action is commenced, and this although, had the defendant been a resident of the latter county, he could not have the venue changed. Such legislation has never been regarded as in any just sense special legislation within the meaning of the inhibitory provisions of the Constitution.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

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12 Cal. App. 262

BATCHELLER v. WHITTIER. (Civ. 741.)

(Court of Appeal, Second District, California. Dec. 21, 1909. Rehearing Denied Jan. 20, 1910. Denied by Supreme Court Feb. 17, 1910.)

1. WORK AND LABOR (§ 4*)—ACCEPTANCE OF SERVICES OF ATTORNEY—IMPLIED PROMISE.

Where an attorney who had acted as attorney for a client for some time offered to prosecute an action for a specified fee, and the client made no response, and the attorney then offered to prosecute the suit for a contingent fee if the client did not want to pay attorney's fees, and the client made no response, but had knowledge of the subsequent prosecution of the suit and accepted the beneficial results thereof, the client under Civ. Code, § 1589, consented to all the obligations arising therefrom as far as known, or ought to have been known by him, for the circumstances under which the offer of the attorney was made called for election on the part of the client which he must communicate to the attorney by expressing his choice between paying attorney's fees or a contingent fee, and the client must be deemed to have promised to pay the reasonable value of the services performed.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 3; Dec. Dig. § 4.*]

2. EVIDENCE (§ 354*)—BOOK ACCOUNT—ADMISSIBILITY.

The rule that an account book is admissible in evidence to prove an account sued for extends to such entries only as are the proper subject of a book account.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1446; Dec. Dig. § 354.*]

3. EVIDENCE (§ 354*) — BOOK ACCOUNT — ADMISSIBILITY.

In an action for legal services for successfully prosecuting an action involving real estate, an account book of the attorney containing an entry "agreed fee to be one-half," is inadmissible, for the entry is a mere memorandum of a special contract and has no proper place in an account book.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1448; Dec. Dig. § 354.*]

4. EVIDENCE (§ 123*)—RES GESTÆ—DECLARATIONS—ADMISSIBILITY.

A declaration by an attorney claiming a half ownership in real estate for his services for successfully prosecuting an action therefor, made long after the making of the alleged contract to pay him a contingent fee of one-half of the property on his successfully prosecuting the action, and wholly disconnected with the transaction constituting the making of the contract, and in the absence of the client, is not a part of the res gestæ, and is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351–368; Dec. Dig. § 123.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by W. C. Batcheller against Henry F. Whittier. From a judgment granting partial relief, plaintiff appeals. Affirmed.

G. E. Delavan, Jr., and Waldo M. York (Thomas C. Ridgway, of counsel), for appellant. Wm. Rhodes Hervey and Frank G. Finlayson, for respondent.

SHAW, J. Action to recover compensation for services rendered by plaintiff as an attorney at law for defendant.

Plaintiff alleges that on April 25, 1902, he and defendant entered into a contract, whereby, in consideration of plaintiff prosecuting a certain action for defendant against one Thomas Gormley, defendant would pay all the costs of such litigation and plaintiff and defendant would equally divide the proceeds of such action, if successful, and, if unsuccessful, plaintiff should make no charge for his professional services so rendered therein; that plaintiff brought the action and prosecuted the same to a successful termination, as a result of which defendant received valuable real estate and a sum of money. In his answer defendant admits the employment of plaintiff as his attorney in said matter, and also admits the action was prosecuted to a successful termination with the alleged resultant benefits, but denies making the alleged agreement touching the compensation to be paid plaintiff for services rendered in said matter, but, on the contrary, alleges "that it was agreed between plaintiff and defendant that plaintiff should receive the sum of $250 for his services in such litigation in the superior court of the county of Los Angeles, state of California," and that no agreement was had as to compensation for services in case an appeal should be prosecuted to the higher court. Upon the trial the court, among other facts, found that plaintiff offered to render his services in the prosecution of the action for a fee of one-half of the proceeds thereof, if successful, and that he would make no charge if unsuccessful, "but said defendant did not accept said proposition of plaintiff." The court further found "that it was not agreed between plaintiff and defendant that the plaintiff should receive $250 for his services in such litigation in the superior court of the county of Los Angeles, state of California"; that at the date of the employment plaintiff was the adviser and attorney at law of defendant, and that plaintiff fully performed his services as an attorney at law on behalf of defendant; and that the reasonable value of such services was and is $2,500, for which sum judgment went for plaintiff, from which, and an order denying his motion for a new trial, plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There is no question as to defendant employing plaintiff to prosecute the suit. The sole controversy relates to the existence of the alleged agreement fixing the compensation to be paid plaintiff for his services.

The chief contention upon which appellant urges a reversal is that the finding to the effect that defendant did not accept the offer found by the court to have been made by plaintiff is unsupported by the evidence. The alleged contract rests in the parol testimony of plaintiff. It appears therefrom that defendant on several occasions prior to instituting the suit consulted him as to the former's legal rights and the propriety of bringing an action to protect such rights before there was any discussion of the question of plaintiff's charges for services to be rendered; that in one of these conversations (when they were talking about the suit) defendant asked plaintiff, "How much would it be worth to bring the suit?" to which plaintiff replied that the services in the superior court would be worth from $250 to $500. "He (the defendant) didn't say anything to that." "And then," continues plaintiff, "the matter ran on, as I say, until this final conversation," which occurred on April 25, 1902. On this occasion, plaintiff testifies, defendant was uncertain what he would do, and plaintiff urged him to proceed with the suit, and, after further discussion of the details, defendant said "that he didn't want to take the chances of having to pay out attorney's fees and then losing the suit or losing the property." Thereupon plaintiff said: "Well, let's commence suit. If you don't want to pay attorney's fees, I will tell you what I will do. I will take it and put it through, and you pay the costs, and I will do the work, and we will each take one-half of what we get out of it, and, if we don't win I won't charge you anything for my services"—to which defendant replied, "Well, I will go you on that," and plaintiff said, "Very well, I will get the papers ready just as quick as I can and start the suit." Contrary to this evidence, defendant testifies that he called upon plaintiff, who for 10 or 12 years had acted as his attorney, told him that he desired to employ him in the matter and gave him the particulars of the case; that two or three days after this he asked the plaintiff what he was going to charge him for his services in the matter, and plaintiff replied $250; that no other conversation relating to plaintiff's compensation for his services in the matter was had between them, and no conversation ever occurred wherein plaintiff offered, as he testifies, to take charge of and prosecute the case to a termination for one-half of the proceeds that might result therefrom.

It thus appears the evidence of the parties was in sharp conflict upon the question of defendant giving expression to any verbal assent to the offer made by plaintiff. The denial that the conversation occurred at all, as testified to by defendant, is tantamount to a denial that he consented thereto by saying, in reply to the offer made by plaintiff, "I will go you on that." Appellant insists, however, that, conceding there were no words used by defendant communicating his acceptance of the offer, nevertheless, the making of the offer as found by the court imposed upon defendant the duty of rejecting it by expressing his dissent therefrom; otherwise, defendant must be deemed to have accepted by reason of his permitting plaintiff to perform the services as a result of which the former was benefited. The testimony of defendant clearly tends to prove that there was on his part no express verbal acceptance of the proposal. The question then resolves itself into this: Did the making of the proposal as expressed in the language of plaintiff and performance of the services with defendant's knowledge, but in the absence of express words whereby defendant signified his assent thereto, constitute a promise on defendant's part to pay the sum specified in the offer? We say "promise" because the action is based upon a promise in consideration of which plaintiff performed the service.

The evidence of plaintiff clearly tends to show that at the time of instituting the action plaintiff had made two propositions

One for services to be rendered in the superior court for a compensation of $250 to $500, as to which plaintiff testifies defendant said nothing. Later, when plaintiff urged defendant to institute suit and the latter expressed himself as reluctant to pay attorney's fees, plaintiff made a proposal for a contingent fee, which is embraced in his statement of what he said to defendant, above quoted. To this proposal the court, in effect, finds that defendant "likewise said nothing." In view of the existing and long continued relation between the parties of attorney and client, as found by the court, the fact that the plaintiff had offered to perform the services incidental to a trial in the superior court for a specified fee, the subsequent offer made upon the condition that "if" defendant did not "want to pay attorney's fees" plaintiff would prosecute the action to a final determination for a contingent fee, necessarily called for some verbal expression on the part of defendant in order to signify his choice of evils between paying attorney's fees and the acceptance of the offer predicated upon the conditional clause introduced by the word "if." Clearly the offer was not absolute, but made dependent upon the condition as to whether or not defendant wanted "to pay attorney's fees." The nature of the proposal and circumstances under which it was made were such as called for an election on the part of defendant, which election, if made, could only be communicated by some verbal expression as to his choice between the paying of attorney's fees and accepting plaintiff's offer. The effect of the court's finding that "defendant did not accept the offer" is that defendant made no reply thereto, but stood silent. Under the circumstances, the prosecution of the action with his knowledge and acceptance of the beneficial results thereof "was equivalent to a consent to all the obligations arising from it so far as" were known or ought to be known by him. Section 1589, Civ. Code. Inasmuch as he did not signify his election between paying attorney's fees and accepting plaintiff's offer, and as performance by plaintiff does not appear to have depended upon his promise to do either, it follows there was no meeting of the minds of the parties upon the subject of plaintiff's compensation. In the absence of an agreement upon the subject, defendant must be deemed to have promised to pay the reasonable value of the services performed in his behalf and with his consent and knowledge. This sum the judgment accords to plaintiff.

The court refused to receive in evidence an account book offered by plaintiff which purported to contain items of personal account between plaintiff and defendant relative to the Gormley suit, and which contained an entry as follows: "Agreed fee to be one-half." This entry, according to plaintiff's testimony, was made a month, or perhaps three months, after the alleged transaction. Conceding that an account book is admissible in evidence to prove an account sued on, the rule extends to such entries only as are the proper subject of a book account. 9 Ency. of Law, p. 930. The entry "agreed fee to be one-half" is a mere memorandum of a special contract and had no proper place in an account book (2 Wigmore on Ev. § 1541), and as to which the extent of its use in evidence is fixed by section 2047, Code Civ. Proc. Reid v. Reid, 73 Cal. 209, 14 Pac. 781; People v. Lanterman, 9 Cal. App. 684, 100 Pac. 720. There was no error in the ruling thereon.

Defendant borrowed from one C. K. Book $5,250, for which he gave his note and a mortgage securing its payment upon the real estate involved in the Gormley suit. Negotiations for this loan were conducted by plaintiff. The court refused to permit Book to testify that during these negotiations, had long after the making of the alleged contract, plaintiff stated to him that he (plaintiff) had a half interest in the property. This ruling is assigned as error. The making of this statement was wholly disconnected with the transaction claiming to constitute the making of the contract. Upon no theory could it be regarded as a part of the res gestæ. We are acquainted with no principle of law under which this self-serving declaration, made without the presence of defendant, could properly be admitted in evidence. Authority to the contrary is found in Hausman v. Hausling, 78 Cal. 283, 20 Pac. 570; Nicholson v. Tarpey, 70 Cal. 608, 12 Pac. 778; Shamp v. White, 106 Cal. 220, 39 Pac. 537.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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12 Cal. App. 255

Ex parte BOND. (Cr. 155.)

(Court of Appeal, Second District, California. Dec. 20, 1909.)

1. INTOXICATING LIQUORS (§ 147*)—PROHIBITORY ORDINANCES—SCOPE OF ORDINANCE.

An ordinance, providing that any person who establishes, keeps open, maintains, or carries on a place where spirituous liquors are sold or given away "or" who, either as owner, employé, agent, etc., sells or gives away spirituous liquors, shall be guilty of a misdemeanor, is broad enough to include the selling or giving away of liquors, whether at a place of business or not, as the two clauses are connected by the disjunctive.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent Dig. § 162; Dec. Dig. § 147.*]

2. INTOXICATING LIQUORS (§ 146*)—UNLAWFUL SALE—ONE SALE AS OFFENSE.

Under an ordinance making it a misdemeanor for any person to sell or give away

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spirituous liquors, one sale is sufficient to constitute the offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 159; Dec. Dig. § 146.*]

3. INTOXICATING LIQUORS (§ 10*) — POLICE POWER—ORDINANCES.

A city has power under its police power, by virtue of Const. art. 11, § 11, to pass an ordinance making a single sale of spirituous liquor, in violation of the terms of the ordinance, an offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 9, 10; Dec. Dig. § 10.*]

4. INTOXICATING LIQUORS (§ 146*)—OFFENSES —SALE BY SECRET SOCIETY — BONA FIDE CLUB.

A prohibitory ordinance, making it a crime for any person, corporation, club, or association to sell or give away spirituous liquors, was enacted. A decision was handed down by the court thereafter that, though the ordinance was valid, in a proper case it would preserve the personal right of one at his fireside to serve his guests. Thereafter a secret society was formed, having for its declared objects charity, moral and social ethics, etc., and to "purchase, store and distribute goods and supplies to its members," and the society established a bar, and supplied its members with liquors from a common stock and for pay, punched tickets which each member was provided with, and for which he had given an order authorizing the society to purchase for him the different supplies to an amount represented by the figures on the tickets. The bar bill of the club was the least in amount of all the supplies. *Held*, that the society was not a bona fide social club entitled to claim fireside rights.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160; Dec. Dig. § 146.*]

5. INTOXICATING LIQUORS (§ 146*)—SALE BY CLUBS—WHAT CONSTITUTES.

Neither under such facts could a member who, in the absence of the steward of the club, furnished liquor from the common stock to other members, and for pay, punched the tickets which they presented, claim nonresponsibility on the ground that he was a host serving his guests, since it was a sale by the member acting for the club to the members receiving the liquor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160; Dec. Dig. § 146.*]

Application by James E. Bond for a writ of habeas corpus to secure his release from custody. Writ discharged, and petitioner remanded.

John D. Pitts, for petitioner. Ralph E. Swing, for respondent.

PER CURIAM. Petitioner was found guilty of violating a prohibitory liquor ordinance of the city of Upland, and sentenced to pay a fine of $50, with the alternative of imprisonment of one day for each dollar of fine. On application of his attorney to this court a writ was issued against the city marshal of Upland, in whose custody petitioner was detained, and the matter is before us for hearing upon the sufficiency of the petition.

The complaint and a stipulated statement of the evidence upon which the conviction was had are made part of the petition. The complaint charges that the defendant did "* * * willfully and unlawfully sell, furnish, distribute, deliver, and give away, and for a long time prior thereto had been willfully and unlawfully selling, furnishing, distributing, and giving away, spirituous and malt intoxicating liquors, to wit, whisky and beer." The portion of the ordinance necessary to be considered here reads: "Section 1. Any person, firm, corporation, club, or association that within the city of Upland, California, establishes, keeps, opens, maintains or carries on a place where spirituous, vinous or malt, or mixed liquors, or any alcoholic or any intoxicating drink or drinks, or so-called temperance beer, containing alcohol in any quantity whatever, are sold, kept for sale, offered for sale, furnished, distributed, divided, delivered, drank or given away; *or*, that within said city, either as owner, employé, agent, servant, clerk, or otherwise, sells, keeps for sale, offers for sale, furnishes, distributes, divides, delivers, or gives away, any spirituous, vinous, malt or mixed liquors, or any alcoholic or intoxicating drink or drinks, or so-called temperance beer containing alcohol in any quantity whatever, except as herein provided, shall be deemed guilty of a misdemeanor." The exception relates to sales for medical and mechanical purposes.

The petition shows that the defendant is a member of a secret society organized in Upland, and incorporated in this state under the name of the "Protective Brotherhood of the Alamo." The purposes of the order, as set forth in the articles of incorporation, are: "To promote charities, moral and social ethics, fraternalism, righteous citizenship, the brotherhood of its members and benevolence to all mankind. To encourage useful and profitable industries, to provide amusements, athletic sports, libraries, reading rooms, cafés, social halls and clubrooms for its members. To provide for sick and disabled members and the families of deceased members. To organize, charter, equip and institute subordinate lodges of the Protective Brotherhood of the Alamo, in this and other states. To *purchase, store and distribute goods, wares and supplies* for its members and the subordinate lodges of the order."

The organization leased and occupied a building formerly used as a hotel, and therein, in addition to lodge rooms, clubrooms, including parlors, reception rooms, library and reading rooms, banquet hall, dining room, sleeping apartments, and committee rooms, maintained a bar from which members of the organization only were furnished with spirituous, vinous, and malt liquors, for which there had been procured a United States retail liquor license. The method of disbursing the liquors, which was ordinarily attended to by a steward, was as follows:

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Any member who wished to become a patron of the bar deposited (presumably with the steward) such sum as he desired to invest in a ticket or tickets, bearing upon the face the figure 5 or a series of 5's, representing at five cents per figure the amount paid or deposited. Upon ordering liquors or other supplies, if any such were included, the number of 5's on the ticket which represented the value of the purchase, the figures being taken at a valuation of five cents each, were punched by the person delivering the goods. Thus, for a glass of beer, valued at five cents, one figure would be punched, and for a drink of whisky, valued at ten cents, two figures would be punched. No money passed directly at the time the liquor or supplies were received by the patron, but an order blank, directing the board of directors to purchase for the member who bought the ticket certain specified supplies, liquors, lodgings, meals, cigars, etc., specified thereon, was signed and delivered at the time of the "deposit" for the ticket. To show that the organization was a bona fide fraternal and secret society, a showing is made of the value of the furniture and fixtures, lodgeroom accessories and supplies on hand, making an aggregate of $4,500. The vinous and malt liquors totaled only $16.50. each of the other supplies named having a greater value; even mineral waters reaching an aggregate of $37.50.

Amid these surroundings the defendant, in the absence of the steward, furnished and delivered to various members of said corporation holding the above-mentioned tickets both beer and whisky, punching and canceling their respective tickets in the manner above described. The beer and whisky so furnished and delivered by defendant was taken and furnished from the common stock kept on hand by said corporation for the purpose of serving to members, on demand, holding tickets regularly issued, and was not the individual, separate property of the persons to whom defendant served the same.

We are satisfied that the ordinance is broad enough in its terms to include the selling or giving away of intoxicating liquors, whether at a place of business or not. The two clauses of section 1 of the ordinance are stated in the disjunctive, the first relating to the keeping of a place, and the second to a sale, gift, or distribution by any person, either "as owner, employé, agent, servant, clerk, or otherwise." That one sale may be a violation of the second clause is supported by the leading opinion in Ex parte Fedderwitz, 130 Cal. xviii, 62 Pac. 935, 940. The ordinance before the court in that case, like the one here, was a prohibitory as distinguished from a license ordinance. Like this, also, it contained one clause applying to the keeping of a place of business, and another relating to the selling, offering for sale, and giving away of intoxicating liquors. Reviewing the opinion in Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399, in which it was said that a single sale did not constitute a violation of the ordinance there under consideration, Beatty, C. J., in the Fedderwitz opinion, says: "But that case has no bearing on the proposition. That was a civil action to recover a license which was imposed, and could only be imposed, for the privilege of conducting the business." A single sale was there held not to be carrying on the business in the sense of a license law. "It does not follow from this, however, that a single sale may not constitute a crime, if the ordinance so provides, as this clearly does." It was also held in that case that the power to pass an ordinance such as the one before us is unquestionably conferred by section 11, art. 11, of the Constitution of the state. Speaking with reference to earlier cases distinguished, it is said: "It was not decided or intimated that a prohibition of single sales was beyond the power of the municipality. In this case —for the first time apparently—that question is directly involved, and we can only say that no law has been called to our attention with which the Berkeley ordinance conflicts. The dissenting opinions in that case discuss other matter considered in the leading opinion, and do not affect the question before us, but McFarland, J., in his concurring opinion, limits his support of the decision in this respect by the declaration that the language of the complaint charged a sale, whereas the ordinance also included a "giving away." As to the latter he says: "So that by the terms of this ordinance it would be a public offense, punishable by imprisonment, for any person in Berkeley, in his own home, and at his own table or fireside, to offer a glass of wine or beer to a guest; and I desire to say that when a petitioner convicted of this time-honored hospitality shall come here for relief, I will not feel myself precluded from again inquiring whether or not a personal right guaranteed by the Constitution has been violated."

Relying upon the principle announced in the reservation made by Justice McFarland, and claiming the right to extend that reservation to the hospitality of the social club by virtue of what is said in the case of Cuzner v. California Club (Cal.) 100 Pac. 868, 20 L. R. A. (N. S.) 1095, the petitioner contends that the bona fide social character of the club of which defendant was a member had been established. The Cuzner-California Club Case is readily distinguished from the case before us in that it was a license case pure and simple, while here we have no question of when a traffic in liquors may be carried on without a license. The question is, Did the defendant traffic in, sell, or give away liquors in violation of an ordinance prohibiting each and all of these things? The matter before the Supreme Court in the California Club Case was not, "Has a municipality the right to prohibit by ordinance the distribution of liquors in the manner shown in the record in that case?" but, Was the club violating a license ordinance by such a distribution without procuring a license? We fully approve and concur in the views of Justice McFarland as to the invasion of the hospitality of the fireside, and in a proper case it might be that we should recognize that the club was the fireside of its members, or some of them. The question, however, of whether or not a club is the bona fide fireside of one claiming this protection from prosecution for the violation of a prohibitory liquor ordinance must depend upon the facts in each particular case.

Considering this question as it affects the Protective Brotherhood of the Alamo, we find the following conditions: On July 2, 1906, the city of Upland passed a prohibitive liquor ordinance which made it unlawful for any person or persons to keep any and every form of place in which traffic in intoxicating drinks as a beverage is ordinarily carried on, including "blind pigs" and "boot legs." On July 30, 1908, the section as hereinabove quoted was introduced as an amendment to the ordinance; the terms "club, corporation, and association" not appearing in the original. This amendment appears to have slept for a year, but was finally passed and adopted on the 3d day of August, 1909. In the meantime the decision in the California Club Case was filed on March 6, 1909, and on April 12, 1909, the Protective Brotherhood of the Alamo was incorporated. Accepting the moral, athletic, healthful, benevolent, and philanthropic purposes of the order as being declared in good faith, we cannot overlook those other purposes appearing in the articles of incorporation which are not so closely allied with the foregoing, and more nearly connected with and more easily made applicable to the transactions in which the defendant was engaged. That a fraternal brotherhood equipped as this one was should be organized in the prohibition community of Upland at such a time, with the declared purposes, "To purchase, store and distribute goods, wares, and supplies for its members and the subordinate lodges of the order," and should upon its organization proceed at once to establish a bar, and provide the "machinery" which this one did to extract the "goods, wares and supplies" from the bar, gives strong support to the implied finding in the judgment of conviction of the defendant that these purposes of the order were intended to cover an evasion of the prohibition laws of the community in which it resided. Like many efforts of litigants to establish "too good a case," the evidence here seems to prove too much. Simplicity and directness are the best evidences of good faith; and, when complexity and intricate machinery are introduced to accomplish that which from its very nature does not require it, we usually and naturally assume that such use was intended to cover up something. If the case were before us on appeal, we should say at once that there was abundant evidence to support a finding of an intent to evade. The use of the written order and deposit and ticket in the manner shown by the evidence does not change the transaction. The commuter who purchases his ticket for 10 or 20 or 30 rides cannot be said to buy a share in the car or railroad; neither can it be said that when the conductor punches his ticket to cover his transportation he does not by this act pay his fare. The defendant was acting for the club in serving, from the common stock held by it, liquors to the members of the club and punching their tickets therefor. The liquor he served did not belong to him, and he was not dispensing the hospitality of himself or of the club. No attempt was made to show in any manner that the hospitality in question was his. It was a sale by the club to such of its members as obtained the liquor from the defendant.

Writ discharged, and petitioner remanded to the custody of the marshal of the city of Upland, with direction that he be imprisoned in the county jail of San Bernardino county, in accordance with the commitment returned with the writ issued by the court, in default of payment of the fine therein provided.

12 Cal. App. 285

KLEIN v. ATCHISON, T. & S. F. RY. CO.

(Civ. 725.)

(Court of Appeal, Second District, California. Dec. 22, 1909. Rehearing Denied Jan. 21, 1910; Denied by Supreme Court Feb. 17, 1910.)

1. Carriers (§ 318*)—Injuries to Passengers—Evidence—Sufficiency.

In an action for injuries to a passenger in a collision, evidence *held* to justify a finding that the injuries complained of were proximately caused by the collision.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

2. Damages (§ 132*) — Personal Injuries — Excessive Damages.

Where a person afflicted with nervous and stomach trouble received an injury which aggravated the trouble and which caused rupture, bowel trouble, ataxia, hemianesthesia, and chronic peritonitis, permanently impairing his health, a verdict for $8,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

3. Appeal and Error (§ 1002*) — Verdict — Conclusiveness.

Where the evidence is conflicting, appellate courts will not determine its sufficiency as a matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

4. Trial (§ 350*)—Special Verdicts—Interrogatories—Materiality.

In an action for injuries to a passenger caused by his being thrown from his seat against an opposite seat and on the floor in a collision, the refusal to submit a special interrogatory as to whether the seat on which the passenger sat at the time of the collision struck him was proper, since the test under the law in force at the time of the trial in January, 1908, as to whether a special interrogatory should be submitted, depended on whether it was a necessary and material question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828–833; Dec. Dig. § 350.*]

5. Trial (§ 260*)—Instructions—Refusal of Requested Instructions Covered by the Charge Given.

It is not error to refuse instructions in substance given by the court in other instructions which are sufficiently explicit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Eugene Klein against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

T. J. Norton and A. H. Van Cott, for appellant. Williams, Goudge & Chandler and Jones & Drake, for respondent.

ALLEN, P. J. This is an action for damages on account of personal injuries, it being averred that plaintiff, a passenger on defendant's train, which collided with another train through defendant's negligence, was, by such collision, thrown from his seat against the opposite seat and on the floor of the car, thereby sustaining injuries in the back, lower abdomen, a shock to the nervous system, a sprain of the back, a double inguinal hernia, together with other internal injuries, permanently affecting and impairing his health, and by which he is disabled for life. The cause was tried by a jury and a verdict in plaintiff's favor for $8,500 returned, upon which verdict a judgment was entered January 21, 1908. A motion for a new trial was denied, and from the judgment and the order denying a new trial defendant gave notice of appeal on July 21, 1909. The principal claim of appellant is that the testimony of plaintiff bears the imprint of falsity and the jury should have rejected the same, and that the corroborative testimony is insufficient, when taken in connection with plaintiff's evidence, to sustain the verdict. It is evident from an examination of the record that many inaccuracies and inconsistencies are observable in the testimony of plaintiff; in fact, serious contradictions of former statements and former testimony are made to appear. But the verdict does not rest upon the evidence of plaintiff alone, as was the case in Railway Company v. Somers, 71 Tex. 700, 9 S. W. 741.

The negligence which occasioned the collision was conceded upon the trial, and, as stated by the trial court to the jury, the only issues to be determined were whether or not all or any of the injuries complained of by plaintiff were proximately caused by such collision, and, if so caused, what damages should be assessed therefor. There was testimony by plaintiff and other witnesses, some of whom were disinterested, to the effect that before the accident plaintiff had the appearance of being a well man, and was able to work and undergo great physical effort without apparent fatigue. As his wife expressed it, "he was the picture of health." There is other testimony—that of a physician who made an examination of plaintiff as early as 1903, who testified that at the time he had no organic disease, and his only affliction seemed to be a nervous condition produced by overwork and worry. There is nothing in the record indicating that in the interval between that examination and the collision any serious change had been produced in his physical condition, unless it be assumed from certain expert testimony which was introduced upon the part of defendant tending to show that certain physical defects were of long standing. The jury, in considering this evidence in connection with the other evidence in the case, and in answering certain special interrogatories submitted by the court, determined, as may be inferred from such answers to the special interrogatories, that plaintiff before the injury complained of was afflicted with nervous and stomach trouble, but that the same was exaggerated by the collision. They further found, however, that a rupture and a bowel trouble were both caused by the collision and that plaintiff was permanently injured and diseased and the same were caused by the collision. There is evidence in the record warranting such answers to the special interrogatories. There is also evidence in the record tending to show that after the collision medical examinations developed that, in addition to a complete rupture, plaintiff "had an ataxia," and was suffering "from hemianesthesia and from chronic peritonitis"; and it is in evidence that all of these ailments might be attributed to a sudden shock or injury. There was independent testimony showing at the time of the collision plaintiff was thrown from his seat onto the floor of the car; that his appearance after the accident was such as to indicate great suffering. Considering the entire record, the evidence was such as to justify the jury in determining that the injuries were proximately caused by the collision, and that the answers to the various special interrogatories as to his ailments and their cause had support from the evidence.

It is insisted further that the verdict is excessive. This proposition is surely answered by what has heretofore been said as to the extent of the injuries established. It would be a strange doctrine which could be invoked in support of appellant's contention. Human suffering and a shortened life can scarcely be measured by a money standard, but certain it is that the amount of this verdict, when taken in connection with the extent of the injuries developed by the testimony, is open to no criticism, except it be directed to its inadequacy.

As to the matters involved in the credibility of witnesses, and the weight and effect which should be given their testimony, whether that of plaintiff or any other witness, it is sufficient to again call attention to the well-established rule that such questions are for the jury in the first instance and the judge who presides upon the hearing of the motion for a new trial. Where a conflict exists, appellate courts will not weigh evidence and determine its sufficiency or insufficiency as a matter of law.

Error is assigned on account of the refusal of the trial judge to submit the following special interrogatory: "Did the seat upon the seat in the section in which plaintiff was riding at the time of the collision strike the plaintiff in the abdomen?" The test as to whether, under the law as it then stood, such interrogatory required submission depends upon whether or not it is in answer to a material question involved in the case. As said by Chief Justice Beatty in Plyler v. Pacific, etc., Cement Co., 152 Cal. 130, 92 Pac. 59: "The very purpose of special findings is to test the validity of the general verdict by ascertaining whether or not it may have been the result of a misapplication of the law to actual findings in material conflict with the findings which in their absence would be implied from the general verdict." The particular thing which occasioned the injury, as alleged, was not the contact with the seat of the car upon which the plaintiff was riding, but the fact that plaintiff was thrown from such seat against the opposite seat and upon the floor. It was unnecessary for the jury, in order to arrive at a verdict, to all agree upon the subject of this interrogatory. The general verdict did not imply a finding in the regard stated. It was neither an issue, nor was it a material fact, and, had it been submitted and answered in the negative, would not have been such an inconsistent finding as to have affected the general verdict.

The instructions refused, and on account of which appellant claims error, were in substance given by the court in other instructions, and were sufficiently explicit as information to the jury in relation to the law of the case applicable to the facts submitted.

We see no error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 251

PAYNE v. PAYNE. (Civ. 696.)

(Court of Appeal, First District, California. Dec. 20, 1909. Rehearing Denied by Supreme Court Feb. 17, 1910.)

1. CONTRACTS (§ 96*)—VALIDITY—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS.

Equity closely scrutinizes gifts and contracts between parties occupying confidential relations, such as parent and child, guardian and ward, etc., in which dominion may be exercised by one over another, and will forbid one occupying such a position from profiting at the expense of the other party without the fullest disclosure of the circumstances of the transaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 441; Dec. Dig. § 96.*]

2. DEEDS (§ 196*)—UNDUE INFLUENCE—BURDEN OF PROOF.

The burden is upon one occupying a confidential or fiduciary relation to another to show that the execution of a deed from such other was fair, free from fraud or undue influence, and that the grantor was mentally competent at the time.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 588, 589; Dec. Dig. § 196.*]

3. DEEDS (§ 211*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

Evidnce *held* to sustain a finding that a deed executed by plaintiff to defendant was procured by undue influence, while plaintiff was feeble and mentally incompetent.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 211.*]

4. DEEDS (§ 203*)—UNDUE INFLUENCE—ADMISSION OF EVIDENCE.

In a suit involving the validity of a deed claimed to have been made to grantor's daughter-in-law through undue influence, while grantor was feeble and mentally incompetent, the court must necessarily be liberal in admitting evidence of the acts, conduct, and expressions of the grantor to show undue influence.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602–611; Dec. Dig. § 203.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Belinda J. Payne against Anna B. Payne. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

H. E. Wilcox and D. M. Burnett, for appellant. Beasley & Fry, for respondent.

COOPER, P. J. It is claimed that the finding of the trial court to the effect that the deed made by plaintiff was procured by undue influence, and executed while plaintiff was weak, feeble, and mentally incompetent, is not supported by the evidence. We have carefully examined the evidence in the record, and in our opinion it is sufficient to support the finding.

The plaintiff was over 79 years of age at the time she made the deed to the defendant, and very feeble, being confined to her bed most of the time. The defendant was the daughter-in-law, of whom she was very fond, being the widow of her deceased son and the mother of two grandchildren. Defendant had, at the request of plaintiff, left her home, and devoted her time and attention to the plaintiff as companion and nurse for some weeks prior to the time the deed was made. The evidence does not show any intentional fraud or deceit on the part of defendant, but on the other hand she appears to have been kind, patient, and attentive during the days and nights she nursed and cared for plaintiff. Plaintiff was very feeble and under the influence of medicines most of the time. She talked a great deal, and at times incoherently, and seemed to fear that she would lose all her property. She told defendant that there were evil spirits in the house and that the spirits kept her from sleeping. She said that a web was being woven against her, and that the pills the doctor gave her had legs; she could feel them crawling in her stomach. She said her feet were Pandora's feet, and made other similar remarks. While the evidence is not sufficient to show that she was mentally incompetent, yet it does show that she was delirious at times, weak and very nervous. In such condition it is a matter of common knowledge that one will exaggerate the virtues of a friend who is kind and attentive, and even conceive a totally unfounded dislike, or even hatred, to one who has apparently been negligent or remiss. A hint or even a suggestion by one who has gained the confidence of such weakened and feeble person is often very potent in its results. We cannot say in this case that during the many days and nights in which the defendant had been faithfully and apparently lovingly attending to and nursing the plaintiff, such hints or suggestions were not made. The defendant had the deed prepared by her own attorney. Although in the home of plaintiff's daughter, Mrs. McGraw, the matter was not even mentioned to her, or to her husband, Dr. McGraw. The plaintiff did not advise with any third party, nor was it suggested to her that she do so. The notary who took the acknowledgment was brought to the house while Mrs. McGraw and her husband were absent. The deed was executed, acknowledged, delivered, and recorded before any one was informed of it other than the notary. In such case, even if we had doubts as to whether or not the deed was the free, voluntary act of the plaintiff, and if we were inclined to the belief that it was, we would not interfere with the finding of the trial judge. He saw the defendant upon the witness stand, and had the advantage of seeing and observing her and of hearing her voice while she was testifying. In such case, if error is committed it is better to err in favor of restoring the property of a feeble old woman to her dominion and control than to err in upholding a deed given under such circumstances as to cast suspicion upon it. Courts of equity not only view gifts and contracts which are made or take place between parties occupying confidential relations with a jealous eye, but they go further, and forbid any persons, standing in a fiduciary position, from making any profit in any way at the expense of the party whose interest he is bound to protect without the fullest and most complete disclosure. This rule applies to all the variety of relations in which dominion may be exercised by one person over another. It applies as between parent and child, guardian and ward, husband and wife, attorney and client. In such case the law does not presume consent, but casts the burden upon the person receiving such deed or benefiting by such transaction to prove that the transaction was fair, free from fraud or undue influence, and made by a person in full possession of his faculties. Honest transactions need not be concealed. They are usually done openly, in the daylight, in the face of the world. It is of the utmost importance that this class of cases should be carefully scrutinized, and in all cases set aside if attended with fraud, or if the instrument or deed is procured by undue influence. The elderly person who has become feeble, and whose physical and mental powers are waning, should not be allowed to become the victim of a designing person, whether such person be a relative, a child, a member of the same church or society or even a minister of the gospel. It is to the credit of courts of equity that in such cases they reach out their protecting hands and restore to the weak and feeble that which has been obtained from them by such improper influence or advice.

We have examined the various errors assigned by appellants as to rulings on the admissibility of testimony during the trial, and find no error of sufficient importance to justify a reversal of the case. In cases like this much latitude is allowed, and the courts necessarily are liberal in admitting evidence as to acts, conduct, and expressions by the person who is claimed to have been mentally incompetent.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

12 Cal. App. 228

BOYD v. BARGAGLIOTTI. (Civ. 632.)

(Court of Appeal, Third District, California. Dec. 17, 1909.)

1. Appeal and Error (§ 1011*)—Findings—Review.

Where there is a substantial conflict in the evidence, and the record on appeal reveals enough evidence to support the findings, the court on appeal will not examine in detail all the evidence presented by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

2. Contracts (§ 322*)—Building Contracts—Actions for Balance Due—Evidence.

In an action for the balance due under a contract for the construction of a bridge, evidence *held* to justify a finding that the failure to complete the bridge within the contract time was caused solely by the failure of the owner to supply materials as required by the contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.*]

3. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

4. Contracts (§ 324*)—Work and Labor (§ 14*)—Actions—Nature and Form of Remedy.

Where the entire performance of a special contract has been prevented by one of the parties, or where its terms have been subsequently varied by mutual agreement, the action for the amount due for work done should be in the form of indebitatus assumpsit, and not on the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549–1557; Dec. Dig. § 324;* Work and Labor, Cent. Dig. §§ 31–33; Dec. Dig. § 14.*]

5. Work and Labor (§ 27*)—Actions—Evidence—Contract.

In indebitatus assumpsit for work done under a contract, entire performance of which was prevented by the adverse party, or the terms of which were subsequently varied by mutual agreement, the contract is admissible in evidence as an admission of the standard of value, or as proof of any other fact necessary to the recovery.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 53; Dec. Dig. § 27.*]

6. Work and Labor (§ 15*)—Contracts—Actions.

Where a written contract for the construction of a bridge was modified by an oral agreement during the progress of the work, and the completion of the work within the contract time was prevented by the failure of the owner to provide material as required by the contract, the owner could not defeat a recovery on quantum meruit by proving that he received no benefit from the work because of the destruction of the bridge by a flood.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 36; Dec. Dig. § 15.*]

7. Contracts (§ 300*)—Failure to Perform—Excuses—Delay of Other Party.

Where the failure to complete a structure within the time fixed in the contract therefor was due solely to the negligence of the owner, he could not recover the liquidated damages stipulated for in the contract, for failure to complete the structure within the time specified.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1378; Dec. Dig. § 300.*]

8. Arbitration and Award (§ 57*)—Sufficiency of Award.

The rule that it is essential to the validity of an award by arbitrators that it should finally determine the matters submitted, and leave nothing to be done except to execute the award, is true, both under the common law and under Code Civ. Proc. §§ 1281–1290, relating to arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 280–288; Dec. Dig. § 57.*]

9. Arbitration and Award (§ 59*)—Statutory Arbitration—Award—Sufficiency.

Where the submission to arbitration of a controversy between a contractor and the owner was not in writing, and the arbitrators merely pointed out the particulars in which they deemed the structure to be uncompleted under the contract, but did not assess damages, and did not settle definitely the differences between the parties, there was no arbitration under Code Civ. Proc. §§ 1281–1290, relating to arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 291–297; Dec. Dig. § 59.*]

10. Arbitration and Award (§ 59*)—Law Arbitration.

Nor in such case was there a common-law arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 291–297; Dec. Dig. § 59.*]

11. Work and Labor (§ 30*)—Findings—Sufficiency.

Where, in indebitatus assumpsit for work done under a contract for the construction of a bridge, the court found that the contractor did not fail to complete the bridge in any manner whatever, and that if there was any failure, it was due entirely to the failure of the owner to furnish necessary material, and that the failure to complete the work within the time specified in the contract was not due to the negligence of the contractor, but was caused by the neglect of the owner to comply with his part of the contract, the finding was not so uncertain as not to support a judgment for the contractor for the value of the work done.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 30.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by J. S. Boyd against P. Bargagliotti. From a judgment for plaintiff, defendant appeals. Affirmed.

McNab & Hirsch, for appellant. Robert Duncan, for respondent.

HART, J. By the terms of a certain contract, entered into by and between the parties on the 17th day of September, 1906, the plaintiff and one J. L. Hughes agreed to construct for the appellant a bridge across Russian river, near the town of Pieta, in Mendocino county, for the sum of $575. Said contract, although made on the 17th day of September, 1906, was not signed by the parties until the 13th day of October of said year. By the contract, however, the defendant agreed to furnish all the materials with which said bridge was to be built, and to place the same on the bridge site, where they would be accessible to the builders. The parties of the second part (plaintiff and Hughes) covenanted to complete the erection of said bridge "within sixty working days from the date hereof." It was stipulated on the part of the defendant that he would pay Boyd and Hughes "twenty-five per cent. of said $575.00 when fifty per cent. of said work shall have been completed and the remainder of said sum, $575.00, at the completion of said work." The contract further contained the following clause: "And for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents covenant and agree each with the other that the sum of three hundred dollars ($300.00) gold coin of said United States, as fixed, settled, and liquidated damages shall be paid to the other by the failing party, if such there be." On November 26, 1906, the defendant made a payment to the plaintiff and Hughes of the sum of $200 on the contract price.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The bridge was not completed within the time stipulated in the contract, and a controversy arose between the parties upon the question whether the contractors had performed their work according to their agreement. This led to an agreement on the part of all the parties to submit the question upon which the differences between them rested to the determination of two disinterested persons, to be selected by the parties—one by the contractors, and the other by the defendant. Accordingly two persons were selected to arbitrate and decide the controversy, and, in furtherance of the agreement to arbitrate, they heard the statements of the parties to the contract, examined the contract and the specifications, and inspected the bridge, and finally rendered the following decision or award: "We find that said bridge is not completed in accordance with the written contract, in so far as that the railing is not in place. One strut is not in place. Three cross-rods are not in place. Bracing between piling of center pier is not in place. As far as the concrete work is concerned, the preponderance of evidence is in favor of the contractor, and we must so hold. The time limit of the written contract certainly has expired, and no doubt the owner has been injured thereby. But we will not assess damages thereon, provided the contractor without unnecessary delay completes said structure. Provided, further, that under all the circumstances, contractor should devote at least five days' actual time of a good mechanic to assist the owner in completing the approaches to said bridge. If the contractor does complete said structure, fully and in accordance with each and every stipulation herein contained, then it is our judgment that the contractor shall be entitled to the compensation as it is contained in the original contract." The submission of the controversy to arbitration was not in writing, and it is not pretended, and obviously it could not be, that the arbitration herein mentioned is the proceeding authorized by sections 1281 to 1290, inclusive, of the Code of Civil Procedure.

In February, 1907, however, the bridge was carried away by the force of the high waters of Russian river, and whether the contractors completed the bridge according to the terms of their agreement, or, if they did, whether their default in so completing it within the time prescribed by the contract was excused because of the conduct of the defendant, constitute the principal propositions in the case, and from which arise all the legal points upon which appellant asks for a reversal. The defendant claims that the plaintiff and Hughes failed to complete the bridge in accordance with the stipulations of the contract, and upon such claim refused to pay to the contractors the balance which they claimed was due them under said contract.

The complaint contains several distinct counts, all, with the exception of one, being pleaded in the form of a general assumpsit, to wit: For "lumber and material, and work and labor and money laid out and expended," by the plaintiff, in the sum of $226.70; (2) for "labor performed and for moneys laid out and expended by said plaintiff and said Hughes for said defendant," of the value of $46.05; (3) the balance due under the terms of the contract, to wit, the sum of $375. The first and second counts are upon a quantum meruit. It may here be stated that, under an oral agreement made between the parties subsequently to the execution of the written contract, there were some deviations in the erection of the bridge from the original specifications, and hence the plaintiff not only declared upon the contract, but also counted upon the unpaid balance thereunder in the form of a common count, or in indebitatus assumpsit. The complaint further pleads an assignment to plaintiff by Hughes of all his right to and interest in the claims pleaded in the complaint. The answer denies each and all the material allegations of the complaint, and, furthermore, and in addition to general damages, sets up a number of counterclaims—one in the nature of damages for loss of lumber alleged to have been sustained by the defendant through the negligence of plaintiff and Hughes, and others, for the reasonable value of the use of defendant's tools and implements; for rent and occupation of a house and barn while the bridge was in process of construction; for labor performed for plaintiff and Hughes "at their special instance and request"; for wines and vegetables furnished to the said contractors at their request, and for the alleged liquidated damage provided for in the contract for negligently failing to complete the contract within the stipulated time. The answer, moreover, pleads the award of said arbitrators as a defense and also in abatement of the action. The prayer of the answer is for affirmative relief by way of general damages, liquidated damages, and for a sum on account of the other claims alleged in said answer to be due defendant.

The defendant also filed a cross-complaint making Hughes a party thereto, wherein the contract between the parties is pleaded, failure of the contractors through inexcusable negligence to complete the bridge is alleged and general damages, in addition to those fixed by the contract, pleaded and prayed for. Boyd and Hughes answered the cross-complaint, denying each and all of the material allegations thereof. The court found in favor of Boyd and Hughes upon all vital points, and accordingly rendered and entered judgment in favor of Boyd for the sum of $562.75 and in favor of Hughes, as defendant to the cross-complaint, for costs. This appeal is from said judgment and the order of the court denying Bargagliotti's motion for a new trial.

Among other things, the court found: That Boyd and Hughes completed the bridge according to the specifications of the contract, but not within the time fixed by the contract; that their failure to complete it within said period of time was due to no fault of the contractors, but solely to the negligence of Bargagliotti in failing to furnish the material with which to construct it; that the claims pleaded in the first and second counts of the complaint were for money expended, services, etc., in connection with the erection of the bridge; that, as to the claim for the sum of $226.70, alleged in the complaint as being the reasonable value of "lumber and materials, and work and labor performed, and money laid out and expended, by plaintiff for said defendant," the sum of $167.45 was the reasonable value thereof, and that the same was due Boyd from Bargagliotti on that account; that as to the second count, wherein it is alleged that plaintiff and Hughes performed labor and expended money, "at the special instance and request" of appellant, of the reasonable value of $46.05, the sum of $20.30 was the reasonable value of such services, and the money so expended. The court further found that the sum of $375—the balance due under the terms of the contract—was still unpaid and due plaintiff, and "that said work and labor so performed by said plaintiff and said Hughes under said contract was and are reasonably worth the sum of $375." The court further found against all the allegations of the answer upon which affirmative relief was asked by the defendant. The court also found that the differences between the parties were not, as a matter of fact, submitted to arbitration, and that the sum of $300 (fixed in the contract as liquidated damages for failure upon the part of either of the parties thereto to comply with the vital terms thereof) "is not, and was not at the time of the commencement of this action, or any other time, due or owing from Boyd and Hughes, or either of them, to the cross-complainant, Bargagliotti," etc.

The appellant makes these points, upon which he claims to be entitled to a reversal of the judgment and order: (1) That the evidence is insufficient to justify the findings; (2) that the plaintiff, having counted on a quantum meruit as to the value of the services performed in pursuance of the terms of the written contract, waived his right to rely upon the express contract, and, the defendant having received no benefit from the labor so performed, the bridge having been destroyed before completion and prior to its acceptance, the plaintiff cannot recover on a quantum meruit; (3) the arbitration abated the action; and (4) certain errors of law occurring at the trial.

1. There exists a substantial conflict in the evidence upon all the important issues of fact presented by the pleadings. It will not be necessary to examine in detail all the evidence presented by the record; it being sufficient to say that the record reveals enough evidence to justify and support the findings. It is necessary, however, to refer to the evidence in a general way in order that some of the legal points urged by the appellant may be the better understood.

It appears that at some time prior to the making of the contract between the parties to this litigation an old bridge, which had been erected and maintained across the Russian river about a mile distant from the site of the bridge involved here, had been swept away by the high waters of the stream. Such of the materials of the old bridge as remained intact—piling and the like—were to be removed by the defendant to the site of the new bridge, and used by the contractors in the erection of said last-mentioned bridge. Boyd and Hughes undertook to remove the piles of the old bridge from the bed of the river, but experienced considerable difficulty, on account of the depth of the water at that point, in doing so. In fact, many of the piles they were required to saw off at as near their lower extremity as the condition of the river, as to quantity of water in its bed then, would permit. It was soon discovered that some of the piling thus secured would be entirely unsuitable for the purposes of the new bridge, and this finally led to an oral agreement, in the month of October, between the parties to the effect that cement should be used to brace the center pier of the bridge in the place of the piling called for by the written contract.

The principal contention of Bargagliotti here is that the contractors failed to complete the bridge either within the time stipulated and limited by the contract, or within a reasonable time after the so-called award by the arbitrators. The oral agreement, to which reference has been made, necessitated some delay; and, according to the testimony of Boyd and Hughes, Bargagliotti expressly acquiesced in such delay. By the written contract, as we have seen, the defendant (and we shall hereafter refer to Bargagliotti as "the defendant") agreed to furnish and place, or caused to be placed, at the site of the bridge, so that it would be readily accessible to the contractors, all materials necessary for the construction of the bridge. Boyd testified (and he was corroborated upon the point by Hughes) that the delays which occurred in the work on the bridge were occasioned by the neglect of the defendant to readily furnish the materials from which the structure was to be built. Boyd said: "There was a delay in not having the piling there in the neighborhood of two weeks. * * * There was other delay on account of flooring necessary for the construction of the bridge that necessitated our stopping work. * * * There was a delay of about a week on account of waiting for lumber."

Hughes testified, in part: "There was a change made in the plan with reference to that center pier. We were to put in 10 barrels of cement, and whatever gravel it would take to mix it up in this center pier, in lieu of putting in these pilings on each side. * * * There was something said at that time about an extension of time on account of the change being made. Mr. Bargagliotti allowed us an extension of time—as near as I could say, he didn't say any definite time to do it or anything. Mr. Bargagliotti made the proposition of change." Hughes continued, saying that they were delayed in the completion of the bridge because the defendant failed to have necessary material on the ground. On one occasion, he said, they were delayed two weeks, and on another about 10 days, on account of the neglect of the defendant to have material in readiness. These delays, it must be understood, were in addition to the delay due to the change of the material with which the center pier was to be braced.

Both Boyd and Hughes testified that, prior to the so-called submission to arbitration, they had completed the bridge. One of the points of controversy between the parties was whether it was the duty of the contractors to place a railing on the bridge. The specifications are silent on this point, and the contractors claim that they made no agreement to put on railing. Another point of divergence between them was as to the quantity of cement which was to be used in the concrete brace to the center pier of the bridge. Boyd and Hughes testified that they were, under the oral agreement, to furnish 10 barrels of cement only, and that they furnished that quantity of cement. The defendant, it is true, contradicts Boyd and Hughes and other witnesses produced by them on the question of the causes of delay, as well as upon all the other important points involved in the controversy, but this only creates such a conflict as estops this court from declaring, as a matter of law, that the findings are not sustained by the evidence.

Both Boyd and Hughes testified that, after the award was made by the arbitrators, settling the question whether the bridge had been completed according to the plans and specifications, they expressed willingness to Bargagliotti to do the work which the arbitrators had decided ought to be done on the bridge as soon as the defendant could get the material necessary to do so and place it at the bridge site. Bargagliotti, they said, replied that he desired to wait until he could secure the services of neighbors in building the approaches (these the defendant had agreed to build), and that then all the final work could be done at one time. Plaintiff and Hughes further testified that on several occasions after the "award" they went to the bridge to perform the work, but there was no material at hand for the purpose. Once Hughes called at defendant's residence to propose to go on with the work, but defendant was not at home. On these points, too, they are contradicted by the defendant, but again we are confronted with a situation in which there is presented a substantial conflict in the evidence. It was, as is well understood, for the trial court to say on which side the truth prevailed or the evidence preponderated, and, having found with Boyd and Hughes upon the proposition whether the failure to complete the bridge within the stipulated time was caused by the neglect of the contractors or that of the defendant, we are not at liberty to declare that the conclusion is erroneous. As to the other counts of the complaint the same conflict exists in the evidence, and the findings thereon cannot therefore be disturbed by this court.

2. The course of the plaintiff in pleading the indebtedness under the contract in the nature of a common count, or indebitatus assumpsit, was proper under the circumstances as disclosed by the evidence. We have already seen that the written contract, subsequently to its execution, and after work on the bridge had progressed to some extent, was modified by an oral agreement of the parties, and that the completion of the work was prevented by the conduct of the defendant, and it has frequently been held in this state that, "where the entire performance of a special contract has been prevented by one of the parties, or where its terms have been afterwards varied by the agreement of both parties, the action for the amount due for

work and labor should be in the form of indebitatis assumpsit, and not upon the contract. In such case the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery." Reynolds v. Jourdan, 6 Cal. 112, the opinion being by Chief Justice Murray. The rule as thus stated has uniformly been followed in this state wherever the precise question has arisen. See Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127, and Adams v. Burbank, 103 Cal. 646, 37 Pac. 640. The contract, after its execution, and after work had been performed in pursuance of its terms, having been altered in a material particular by agreement of the parties, it is obvious that, had plaintiff declared upon the instrument as it was originally made, he would, at the trial, have encountered a variance between the proof and his pleading, for it would necessarily transpire, in view of the modification referred to, that the terms of the written contract had not been carried out. But, in any event, even if it be assumed that the count is upon a quantum meruit, the position of appellant would not be maintainable, since his failure to derive benefits from the work performed by the contractors was occasioned by his own inexcusable remissness. The truth is, according to the findings, the defendant himself was guilty of a breach of the contract by his negligence in failing to provide, as it was required by the contractors, the necessary material with which to perform the work, and whether the count under consideration be a common count or a quantum meruit, it is no defense to say in this action that the defendant received no benefit from the labor performed.

3. The claim that the defendant was entitled to a judgment for the liquidated damages prescribed by the contract because the contractors failed to complete the bridge within the time fixed by said contract is without merit, as is likewise the contention that the court should have awarded defendant damages, set up in the answer by way of recoupment to the claims counted upon in the complaint, for loss of lumber, rent of house, and loan and use of tools, implements, etc., and for general damages. If the evidence, as we have held to be the fact, supports the findings of the court that the bridge was not completed within the time stipulated in the contract because of the fault and culpable negligence of the defendant himself, then clearly the defendant is not entitled to either liquidated or general or any damages. Upon the questions involving the alleged claims for the use of the tools and implements referred to in the answer, and for rent alleged therein to be due the defendant for use and occupation of a house and barn, and for wines and vegetables alleged to have been furnished Boyd and Hughes by Bargagliotti during the progress of the work on the bridge, the evidence discloses a sharp conflict, and the findings thereon cannot consequently be disturbed.

4. The court was right in finding that no arbitration of any matters connected with the contract was had. The object of submitting questions of difference as to the rights of parties which are within the legitimate scope of a legal arbitration is to obviate or put an end to litigation, and it is essential to the validity of an award that it should be final—that it should finally determine the matters submitted to the arbitrators, thus leaving nothing to be done but to execute and carry out the terms of the award. Porter v. Scott, 7 Cal. 312; Jacob v. Ketcham, 37 Cal. 197; Pierson v. Norman, 2 Cal. 599; 3 Cyc. p. 693, and cases cited; 2 Am. & Eng. Enc. of Law (2d Ed.) pp. 749, 751. This is true both under the common law and under the Code. 2 Blackstone's Com. (4th Cooley's Ed.) p. 17; sections 1281 to 1290, inclusive, Code Civ. Proc. In the case at bar, the proceeding, called an arbitration, was not, as is obvious, an arbitration under our Code. But, assuming it to have been good as a common-law arbitration, as counsel for appellant contend, the decision of the arbitrators itself is lacking in the essentials of a valid award. No damages are assessed or awarded against the contractors, nor is there any other determination involved in the award which definitely settles the differences between the parties. It merely points out, as we have seen, certain particulars in which the arbitrators deemed the bridge to be uncompleted under the terms of the contract. This still left to be determined later whether, assuming that they had proceeded to comply with the requirements of the decision of the arbitrators, the contractors had in fact done as directed by the award. In other words, assuming that the contractors had undertaken to comply with the terms of the award, the defendant would still have been at liberty to object that the work had not been performed as required by the award, and no one would doubt his right to so defend in an action against him to recover on the contract.

5. It is argued that certain of the findings are uncertain and contradictory. This contention is founded on the following language of one of the findings, based on an allegation in the cross-complaint: "That said Boyd and Hughes did not fail and neglect to complete said bridge in any manner whatever or fail to comply with their contract, *and if there was any failure to complete said bridge in any respect, such failure was due entirely to the failure of said defendant, Bargagliotti, to furnish the necessary materials* to complete said bridge." The italicized portion of the foregoing finding is the subject of the criticism to which we refer, and there can be no doubt that, if it stood alone upon the proposition to which it relates, it would afford little support to the judgment. But the court not only in other findings, but in

the very one from which we have quoted, distinctly and unqualifiedly finds that "said bridge was not completed within 60 working days from September 17, 1906, but the failure to complete the same was not due to the negligence or carelessness on the part of said plaintiff, Boyd, or said Hughes"; that the failure to so complete the bridge was caused by the neglect of Bargagliotti to comply "with his part of said contract," etc. The findings amply support the judgment.

6. We have found no prejudicial error in any of the rulings of the court.

As before stated, the findings upon all the vital questions of fact in the case are sufficiently supported by the evidence, and no reason appears justifying a reversal of the judgment and order.

The judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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12 Cal. App. 247

FORREST v. SOUTHERN PAC. CO.

(Civ. No. 692.)

(Court of Appeal, First District, California. Dec. 20, 1909.)

MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—CO-SERVANT ON THE SAME TRAIN.

Civ. Code, § 1970, as amended in 1907 (St. 1907, c. 97), exempts an employer from liability to his employé for injuries by the negligence of employés in the same general business, provided that the employer shall be liable when the injury results from the wrongful act or default of a co-employé employed upon a railroad train other than that upon which the injured employé is employed. The train upon which decedent was engineer and another work train took the side track at a station to await a passenger train going in the same direction, and a brakeman on decedent's train and one on the other work train went ahead on the passenger train to notify all trains that their respective trains would follow the passenger train, the other work train running first, but the brakeman from decedent's train negligently failed to notify another train that his train would follow the other work train, causing the collision in which decedent was killed. The company's rules permitted brakemen to ride on passenger trains to inform other trains of the movement of their own train. *Held* that, as the duty which the brakeman on decedent's train neglected was imposed for the safety of that train, he was employed on decedent's train within the statute at the time and not on the passenger train, though he was then riding on it, and hence the company was not liable for injuries caused by his negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Mary O. Forrest against the Southern Pacific Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Cassin & Lucas, for appellant. Carl E. Lindsay and Benj. K. Knight, for respondent.

HALL, J. Plaintiff, as the widow and sole heir at law of James Forrest, brought this action to recover damages for the death of her said husband, caused by the collision of two railroad trains of defendant, upon one of which said James Forrest was employed as the locomotive engineer. The train upon which decedent was employed was known as train No. 21. The train with which it collided was known as train No. 2089. The collision occurred between Felton station and Big Tree station. Appellant and respondent agree that the collision and death of Mr. Forrest were the result of the negligence of a brakeman employed by defendant, one Jesse Manning. The point upon which appellant and respondent do not agree is as to whether or not at the time of the accident the said brakeman was employed, within the meaning of section 1970 of the Civil Code, as amended in 1907, upon a railroad train other than that on which Forrest was employed. The pertinent part of the statute under which it is claimed that defendant is liable for the death of Engineer Forrest is as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter * * * in consequence of the negligence of another person employed by the same employer in the same general business * * *; provided, nevertheless, that the employer shall be liable * * * when such injury results from the wrongful act, neglect or default of a co-employee * * * employed upon a railroad train * * * other than that upon which the employee is injured is employed. * * *"

There is no dispute as to the facts in the case, which are as follows: Defendant operates a railroad from Boulder creek to the city of Santa Cruz. Felton station is between these points, and between Felton station and Santa Cruz is Big Tree station. Between Big Tree station and Santa Cruz is Felton Junction, from which a spur track extends to Old Felton. Shortly before the collision occurred train No. 21, which was a work train, and another work train No. 15, were lying on sidings at Felton station, intending to pass to Felton Junction, but waiting for the regular passenger train from Boulder creek to Santa Cruz, designated as No. 516, to pass on its way to Santa Cruz, while an extra work train designated as No. 2089 was lying upon the siding at Big Tree station, intending to pass to and beyond Felton station, but also waiting for the same train to pass. Trains Nos. 15 and 21 both had the right of way over No. 2089, and it had been agreed between the conductors of trains 15 and 21 that train 15 should precede train 21 to Felton Junction. Jesse Manning upon the day of the accident was employed as a brakeman on train 21, and had been so employed for 11 days prior thereto. Decedent was the locomotive engineer of the same train. Upon the day of the accident passenger train 516 was upon schedule time, and when it left Felton station on its way toward Santa Cruz a brakeman from train 15, by direction of the conductor of train 15, got upon and went with it to notify all trains that might approach from the direction of Santa Cruz that train 15 would follow train 516. Likewise Jesse Manning, the brakeman of train 21, under instructions from the conductor of said train, got upon and went with train 516 for the purpose of notifying all trains that might approach from the direction of Santa Cruz that train 21 would follow train 15. It was the duty of brakemen to act as flagmen, and to notify approaching trains of the presence and movements of their respective trains. According to the rules and practice of defendant it was allowable and proper for such brakeman to ride upon the locomotives of passenger trains to their objective points in the discharge of such duty.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The brakeman of train 15 properly performed his duty, and as the passenger train 516 passed Big Tree station notified train 2089 that train 15 would shortly follow train 516; but Jesse Manning, the brakeman of train 21, engaged in a conversation with a lady on the passenger train, and wholly failed to notify train 2089 of the intended movement of train 21, but passed on to a point beyond Felton Junction. The result was that after train 15 had passed Big Tree station train 2089 started toward Felton station, and shortly collided with train 21 which was following train 15 toward Felton Junction. It was in this collision that Mr. Forrest, the engineer of train 21, was killed.

Although it is not disputed that Manning was employed as a brakeman and flagman of train 21, it is contended by respondent that at the time of the accident he was not employed on such train within the meaning of the statute, but was employed on the passenger train within the meaning of the statute by reason of the fact that he was riding on such passenger train for the purpose of discharging a duty that he owed to train 21 and the crew thereof, of which he was clearly a member. He was a member of the crew of train 21, and the duty that he failed to perform was a duty that was imposed upon him because he was a brakeman upon such train and a member of its crew. The duty he failed to perform had no relation to the operation of the passenger train, upon which he was riding simply as a matter of convenience, but did have a most important relation to the operation of train 21 and the safety of its crew.

Before the amendment to section 1970 of the Civil Code of 1907 it would not be contended that the brakeman of a given train was not a fellow employé with the locomotive engineer of the same train. While Manning was riding upon the passenger train, he was not employed thereon within the meaning of the statute. He was still employed on the train of which he was the brakeman and flagman. He was then acting under the directions of the conductor of train 21. His mission, while riding on the passenger train, was because of his employment on and in the operation of train 21. He was just as much employed on train 21 as though he had been sent off on foot to flag against an expected approaching train. The cases cited from Texas, decided under the Texas statute, are not in point.

Under the undisputed facts of this case the brakeman whose negligence caused the death of Mr. Forrest was not employed upon a train other than the one upon which decedent was employed.

For this reason the verdict is not supported by the evidence, and the judgment and order must be reversed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

12 Cal. App. 268

ALBERT v. ALBERT. (Civ. 724.)

(Court of Appeal, Second District, California. Dec. 21, 1909.)

1. Public Lands (§ 144*)—Certificate of Purchase—Assignment—Conditional Delivery.

Civ. Code, § 1056, providing that a grant cannot be delivered to a grantee conditionally, is applicable to an assignment of a certificate of purchase of public lands, and where such assignment, absolute on its face, is delivered to the assignee on oral conditions, the delivery is absolute, and the assignment takes effect immediately.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

2. Evidence (§ 444*)—Assignments—Conditional Delivery—Parol Evidence.

An absolute assignment of a certificate of purchase of public lands delivered to the assignee cannot be varied by parol evidence that the assignment was delivered on certain conditions, such as the payment of a note and mortgage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929–1944; Dec. Dig. § 444.*]

3. Evidence (§ 444*)—Written Instruments—Parol Evidence to Vary.

Though delivery of an instrument is a question of fact which may be established by parol evidence, where it is shown that an assignment of a certificate of purchase of public lands has been duly delivered to the assignee, the rule will not permit the showing that the delivery is on condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929–1944; Dec. Dig. § 444.*]

4. Assignments (§ 59*)—Rescission—Mutual Consent.

Where an absolute assignment of a certificate of purchase of public lands is delivered to the assignee, though on a parol agreement that the assignee would pay a note and mortgage, a subsequent agreement by which the assignee agreed to reassign and the assignor pay the note and mortgage, would not constitute a rescission

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by mutual consent, since rescission presupposes the existence of an executory contract.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 59.*]

5. Assignments (§ 59*)—Right to Rescind—Assignment of Land Certificate.

Under Civ. Code, § 1689, authorizing the rescission of a contract by a party thereto, on failure of consideration through the fault of the other party, the assignor in an absolute assignment of a certificate of purchase of public lands, delivered to the assignee, cannot rescind because the assignee failed to perform an oral agreement, on which the assignment was based, that the assignee would pay a note and mortgage, since the agreement was a contract, a breach of which would only give a cause of action for damages.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 59.*]

6. Public Lands (§ 144*) — Certificate of Purchase — Assignments — Collateral Agreements—Rights of Parties.

An absolute assignment of a certificate of purchase of public lands was delivered to the assignee on an oral agreement that he would pay a note and mortgage. On failure to pay, it was subsequently agreed that, if the assignor would relieve the assignee of his covenant as created by the oral agreement, the latter would reassign each certificate. *Held*, in a contest over the right to have a duplicate certificate issued under provisions of Pol. Code, § 3518, which was referred to the court by virtue of section 3414, that such subsequent agreement could not avail the assignor in the contest, since it was a collateral agreement, which could only be enforced by an action for specific performance.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

7. Appeal and Error (§ 852*)—Review—Relief Awarded—Assignment of Land Certificate—Collateral Agreement.

The assignee of a certificate of purchase of public lands applied to have a duplicate certificate issued to him under Pol. Code, § 3518, and, on objection of the assignor, a contest was referred to the court under Pol. Code, § 3414. The assignment had been delivered on an oral agreement that the assignee would pay a note and mortgage. Subsequently it was agreed that if the assignor would pay the note and mortgage the assignee would reassign the certificate. *Held*, on appeal from the decision of the court finding for the assignor, that the judgment could not be affirmed as holding that the assignment was absolute, and that the assignor had no rights therein on the ground that the assignor was entitled to specific performance of his subsequent agreement where the complaint did not contain allegations sufficient to support such action.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 852.*]

8. Frauds, Statute of (§ 73*)—Transfer of Real Property—Assignment of Land Certificate.

Under Pol. Code, § 3514, making the property evidenced by a certificate of purchase of public lands an interest in real estate, an oral agreement for its sale and transfer is obnoxious to the statute of frauds. Code Civ. Proc. § 1973.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 73.*]

9. Frauds, Statute of (§ 129*)—Transfer of Real Property—Assignment of Land Certificate—Part Performance.

Under Pol. Code, § 3514, making the property evidenced by a certificate of purchase of public lands an interest in real estate, an oral agreement to assign such a certificate cannot be sustained on the ground of part performance within Civ. Code, § 1741, where, though the assignee paid the purchase price, he did not enter into possession of the land or improve the same.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 129.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Charles Albert against Charles C. Albert. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Judgment and order reversed.

Rowen Irwin, for appellant. Chas. W. Sears, for respondent.

SHAW, J. This action involves a contest over the right to purchase certain school lands of the state. Judgment went for defendant, from which, and an order denying his motion for a new trial, plaintiff appeals. On May 7, 1896, a certificate of purchase of the lands involved was duly issued to defendant, Charles C. Albert. On November 25, 1904, pursuant to the provisions of section 3518, Pol. Code, he made application to the register of the state land office for the issuance to him of a duplicate certificate of purchase. On December 20, 1904, plaintiff duly filed in the office of said register his protest against the issuance of said duplicate certificate, claiming that he was the owner of said original certificate of purchase under an assignment thereof theretofore made to him by defendant. Whereupon, the surveyor, in accordance with the provisions of section 3414, Pol. Code, made his order whereby such contest was referred to the superior court of Kern county for adjudication.

The complaint alleges that in August, 1896, the certificate of purchase was, for a valuable consideration, duly and regularly assigned to plaintiff by defendant, and that ever since said date he has been the owner and holder thereof. Not only does the answer admit the making of the assignment, but the court found that the defendant "assigned the said certificate to plaintiff Charles Albert and the same was delivered by defendant to plaintiff, which assignment purports to assign all the right, title and interest in and to" the lands described in the certificate. In paragraph 4 of the answer, "defendant alleges that at the time of the execution of said assignment of said certificate of purchase, to wit, on or about the 4th day of August, 1896, that the said certificate of purchase was assigned and delivered by the said defendant to the said plaintiff under and by virtue of an agreement between the said parties that the said plaintiff would, on or before the said note and mortgage hereinbefore referred to (a certain note made by defendant to one Hannah and secured by mortgage upon the real estate described in the certificate of purchase) became due and payable, pay and satisfy the same and thereby relieve the said defendant from the payment thereof, and that the said execution of said certificate by the said defendant and the delivery thereof to the said plaintiff was made absolutely upon the agreement of the said plaintiff to pay the said note and mortgage as aforesaid, and for no other reason or consideration whatever; and it was then and there agreed by and between the plaintiff and defendant that said assignment should not take effect and should not be of any force or pass any interest whatsoever to said plaintiff until said plaintiff paid and satisfied and fully discharged the note and mortgage hereinbefore referred to, and in the event that said plaintiff failed to pay said note and mortgage as aforesaid, then the said plaintiff was to reassign at once and redeliver to said defendant the said certificate." The court, in substance, found this allegation to be true, and also found "that the said assignee, plaintiff herein, wholly failed to comply with his agreement so made, and failed and has ever failed to pay the amount payable on said note," or any part thereof. The facts thus alleged and found by the court to be true are supported solely and alone by oral evidence received over plaintiff's objection.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This ruling of the court is assigned as error. Since the certificate of purchase is a contract evidencing an interest in real property, and was "subject to sale, by deed or assignment, executed and acknowledged before any officer authorized by law to take acknowledgments of conveyances of real property" (section 3515, Pol. Code), and since the due execution and delivery of the assignment is admitted in the pleadings, and also found by the court (though it does not appear to have been acknowledged—query, whether acknowledgment requisite as between the parties), it would seem that the rule established by section 1056, Civ. Code, with reference to the delivery of grants, is equally applicable to transfers by deed or assignment of certificate of purchase. That section provides that a grant cannot be delivered to the grantee conditionally. Mr. Jones in his Law of Real Property, § 1303, says: "If the delivery be to the party to whom it is made, though upon the express condition, not appearing upon the face of the deed, that it is to take effect only upon certain conditions, whatever may be the form of the words, the delivery is absolute, and the deed takes effect immediately." To the same effect is Devlin on Deeds, § 314, and Mowry v. Heney, 86 Cal. 471, 25 Pac. 17. Moreover, to permit the introduction of oral evidence tending to establish an agreement contrary to the plain import of the written assignment, which on its face is absolute, would be in direct violation of that cardinal rule that the terms of a written instrument cannot be varied or altered by evidence resting in parol.

Respondent cites a number of authorities in support of the proposition that the delivery of an instrument is a question of fact to be determined by oral evidence. This is necessarily true, but the question of delivery is not involved here. The answer admits, and the court finds, that the certificate was assigned, and the instrument constituting the assignment was duly delivered by defendant to plaintiff. This being true, the terms and conditions of the assignment and transfer must be determined from the language of the instrument; nor can its operation and effect be abridged or limited by attaching thereto conditions and qualifications resting in parol. Finding 3 is based solely upon oral evidence, the admission of which constituted prejudicial error.

Defendant alleges in his answer and cross-complaint that plaintiff not only failed and neglected to perform his agreement to pay said note, but informed defendant that he was willing to, and did then and there at such time, agree with said defendant herein to redeliver and reassign the said certificate to said defendant and cross-complainant herein; that pursuant to said agreement defendant did on or about November 25, 1902, pay said note, and at the time of said payment plaintiff stated that he had no claim on said certificate or the property whatsoever. There was evidence tending to prove the facts contained in this allegation, and the court found the same to be true. It is suggested that such finding establishes a rescission by mutual consent, as well as by reason of a failure of consideration on account of plaintiff's neglect to pay said note. Section 1689, Civ. Code. Rescission presupposes the existence of an executory contract, while here the contract was fully executed so far as the transfer of the certificate of purchase was concerned. The effect of its assignment, if made pursuant to the statute, was to convey absolutely to plaintiff all interest which defendant had under and by virtue thereof to the land described therein. The transfer and assignment, as averred in the answer, "was made absolutely upon the agreement of the said plaintiff to pay the said note and mortgage as aforesaid and for no other reason or consideration whatever."

Disregarding, as we must, for reasons hereinbefore stated, the conditional delivery as alleged and found by the court, it seems clear that defendant transferred the certificate to plaintiff in reliance upon the latter's promise at a future time to pay the Hannah note. Under such circumstances, the breach of plaintiff's covenant would not warrant a rescission and revesting of the property in defendant under section 1689, Civ. Code, but a cause of action for damages only. Had plaintiff given his promissory note payable at a future date for the purchase price of the certificate and made default in its payment, it could not be seriously contended that defendant would have the right to rescind the contract and have the certificate reassigned him. Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Hartman v. Reed, 50 Cal. 485.

It is also suggested that the facts found show a parol agreement made by the parties to the effect that plaintiff would reassign and transfer the certificate to defendant, provided the latter would pay the Hannah note, thereby releasing plaintiff from his covenant to pay same, and that pursuant to such agreement defendant made said payment. Assuming this to be true, we are unable to perceive that such fact can avail defendant in securing an affirmation of the judgment. At most, the circumstances constitute a distinct transaction, wholly disconnected from the first, which could be enforced, if at all, by an action for specific performance. But defendant omits to allege the facts, if they exist, which are requisite to a sufficient complaint for specific performance. Stiles v. Hermosa Beach Land, etc., Co., 8 Cal. App. 352, 97 Pac. 91. Moreover, as the property evidenced by the certificate as between the parties is an interest in real estate (section 3514, Pol. Code; McCabe v. Goodwin, 106 Cal. 486, 39 Pac. 941), a parol agreement for its sale and transfer is obnoxious to the provisions of section 1973, Code Civ. Proc. Hill v. Den, 121 Cal. 42, 53 Pac. 642. Nor was there such part performance as to bring the transaction within the rule laid down in section 1741, Civ. Code, for the reason that, while it is found that defendant paid the purchase price, it is not found, though it is an issue raised by the pleadings, that he entered into possession of the land or made improvements thereon.

Judgment and order reversed.

We concur: ALLEN, P. J.; TAGGART, J.

157 Cal. 213

RAULET v. NORTHWESTERN NAT. INS. CO. OF MILWAUKEE. (S. F. 5,039.)

(Supreme Court of California. Jan. 24, 1910.)

1. Insurance (§ 146*) — Construction of Policy.

Contracts of insurance should be considered in view of their general objects and the conditions prescribed by the insurers, rather than on the basis of a strict technical interpretation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

2. Insurance (§ 283*) — Construction of Policy—Breach of Conditions — Incumbrances.

In determining whether insured property was incumbered within the condition of the policy, the court should look at the circumstances surrounding the execution of the instrument sought to be considered an incumbrance, at the situation of the parties, and at what was done under it to determine its true character, and is not concluded by the mere fact that it is called a chattel mortgage or is in the form usual to chattel mortgages.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 639; Dec. Dig. § 283.*]

3. Insurance (§ 283*)—Breach of Condition—Incumbered Property—Chattel Mortgage.

An instrument in the form of a bond to become effective on the nonpayment of rent, and creating a lien on personal property for such rent, is not a "chattel mortgage" within the provisions of an insurance policy, rendering the same void "if the subject of insurance be personal property and be or become incumbered with a chattel mortgage," where no rent was due and unpaid at any time, and the risk was not increased by such instrument.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 639–641; Dec. Dig. § 283.*]

4. Insurance (§ 283*)—Breach of Condition—Incumbered Property.

Property which is under a contract subject to a lien for unpaid rent is not "incumbered" within a policy of insurance thereon, providing that it should be void "if the subject of the insurance be personal property and be or become incumbered with a chattel mortgage," where no rent was due and unpaid at any time, and the value of the property was many times the amount of the insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 639; Dec. Dig. § 283.*]

5. Insurance (§ 632*)—Action on Policy—Pleading—Allegations as to Location of Property.

A complaint alleging that on a date specified "the said property was totally destroyed by fire; * * * that said property insured as aforesaid and described in said insurance policy consisted of household and kitchen furniture contained * * * in the five-story brick building occupied only as stores and lodgings," describing the building by street and number—sufficiently alleges the location of the property at the time of its loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1595; Dec. Dig. § 632.*]

6. Insurance (§ 665*)—Premium—Time for Payment—Evidence.

Evidence *held* to show that credit was given insured for the payment of premium on fire insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1715; Dec. Dig. § 665.*]

7. Insurance (§ 665*)—Premium—Waiver of Payment—Evidence.

Evidence *held* to show that the payment of the premium for which credit had been given until after loss was then waived on the agreement that it should be deducted from the face value of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1716; Dec. Dig. § 665.*]

8. Insurance (§ 645*)—Action on Policy—Pleading—Variance.

Though the complaint on a policy alleges that it was issued "in consideration of the stipulations herein and of $24 premium," evidence that credit for the premium was given insured does not constitute a variance as the policy may be construed to mean a promise to pay the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1642; Dec. Dig. § 645.*]

9. Insurance (§ 186*) — Construction of Policy—Intent of Parties.

The conduct of the parties may be considered when construing an insurance policy as to the payment of the premium or extending credit therefor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 396; Dec. Dig. § 186.*]

10. Insurance (§ 646*)—Premium—Extending Credit—Evidence.

Where a policy is delivered without payment of the premium, it may be assumed that credit for the premium was extended to insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1657; Dec. Dig. § 646.*]

11. Insurance (§ 670) — Construction of Policy—Payment of Premium—Credit—Findings.

In aid of a finding by the court that "the payment of the premium was not made a condition precedent to defendant's liability thereunder," the rule will be applied that "every indulgence not inconsistent with the plain meaning of the contract must be shown the insured."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1787; Dec. Dig. § 670.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12. INSURANCE (§ 349*)—PAYMENT OF PREMIUM—CONDITIONS PRECEDENT.

Though payment of the premium is expressly provided as the consideration for the policy, it is not a condition precedent to the operation of the policy and to any recovery on it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 891; Dec. Dig. § 349.*]

13. INSURANCE (§ 645*)—ACTION ON POLICY—WAIVER OF CONDITIONS — ISSUES AND PROOF.

In an action on a policy, the allegations of the answer that plaintiff did not at any time before the destruction of the property pay or offer to pay the premium, or any part thereof, and that the premium was unpaid at the time the property was destroyed, rendered admissible evidence of a waiver of prepayment, though the complaint alleged payment of the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1637; Dec. Dig. § 645.*]

14. INSURANCE (§ 282*)—BREACH OF CONDITION—OWNERSHIP OF PROPERTY.

Where insured was individually the owner of the property, subject only to her right and duty as executrix to hold temporary possession for the purpose of administration of her deceased husband's estate, she had the only insurable interest, and the validity of the policy was not affected by a provision therein that it should be void "if the interest of insured be other than unconditional and sole ownership."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 610; Dec. Dig. § 282.*]

15. DESCENT AND DISTRIBUTION (§ 74*)—WHEN PROPERTY VESTS.

Title to property vests in the heir or devisee from the moment of the death of the ancestor or testator.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 239; Dec. Dig. § 74.*]

16. INSURANCE (§ 138*)—CONTRACT OF INSURANCE—VALIDITY.

The rule that it must be presumed that persons are familiar with the contracts to which they are parties, and, in the absence of fraud, are bound by the provisions therein, should not be strictly applied to insurance policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246–249; Dec. Dig. § 138.*]

17. INSURANCE (§ 389*)—CONDITIONS OF POLICY—WAIVER—INCUMBRANCE OF PROPERTY.

Even if an instrument providing for a lien on personal property for unpaid rent of the premises on which it is situated constitutes an incumbrance within a condition of the policy of insurance, such condition is waived where the policy is issued without any inquiry as to whether the property is incumbered and no representations were made in respect thereto.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1028, 1029; Dec. Dig. § 389.*]

18. PLEADING (§ 36*) — CONCLUSIVENESS OF ALLEGATIONS.

That plaintiff alleged performance of the conditions of her contract of insurance does not prevent her showing that defendant waived the condition against incumbrances.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81–86; Dec. Dig. § 36.*]

19. INSURANCE (§ 552*)—PROOF OF LOSS—MISSTATEMENTS.

Only willful misstatements in proof of loss will prevent recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1358; Dec. Dig. § 552.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Rosalie Raulet against the Northwestern National Insurance Company of Milwaukee. From a judgment for plaintiff, defendant appeals. Affirmed.

Aitken & Aitken, for appellant. J. C. McKinstry (Orville C. Pratt, of counsel), for respondent.

MELVIN, J. After this cause was decided by the District Court of Appeal a rehearing was granted in order that this court might further examine the authorities and consider the arguments with reference particularly to two questions: (1) Was the chattel mortgage which was given to secure the payment of rent, the sort of incumbrance contemplated by the terms of the policy? (2) Assuming that it was, did the conduct of the defendant corporation at the time of the making of the contract of insurance amount to a waiver of the clause in the policy with reference to chattel mortgages?

To the first question the learned District Court of Appeal returned an affirmative answer, basing its conclusion in part upon sections 2920, 2958, and 2884 of the Civil Code, which prescribe the form of a chattel mortgage, and provide that a lien may be created to take immediate effect as security for the performance of obligations not then in existence. In the opinion of the District Court of Appeal cases are also cited with approval in support of the view of that court. Among these are Continental Insurance Co. v. Vanlue, 126 Ind. 140, 26 N. E. 120, 10 L. R. A. 843; Lee v. Agricultural Ins. Co., 79 Iowa, 379, 44 N. W. 683; Peet v. Dakota, etc., Ins. Co., 7 S. D. 410, 64 N. W. 206. The question is one of some difficulty, and, in view of the authorities cited, we would be loath to disagree with the learned District Court of Appeal if we were not convinced that the practice of this court has been to consider contracts of insurance in view of their general objects and the legitimate conditions prescribed by the insurers, rather than upon a basis of strict technical interpretation. The true rule has been recently expressed by this court as follows in Clayburgh v. Agricultural Ins. Co., 102 Pac. 813: "The language employed in the policy is to be given a reasonable construction, in view of the purposes, as well of the entire contract, as of the particular condition under discussion. The general object of the policy is to indemnify the insured against loss or damage by fire. The company, agreeing to furnish this indemnity in return for a certain premium, seeks to limit its risk by various provisions. Generally speaking, their purpose is to avoid liability in the event of the occurrence of circumstances which would naturally tend to increase the hazard beyond that which was in the contemplation of the parties when the insurance was effected. The insurer seeks to guard itself against libility in the event that the condition of the insured property should so change that the risk upon such property in its altered condition, would presumably not have been assumed for the premium paid." Keeping in mind the foregoing canon of interpretation and examining the phraseology of the policy, we find no difficulty in agreeing with the contention of respondent's counsel that: "The court was entitled to look at the circumstances surrounding the execution of the instrument, at the situation of the parties to it, and at what was done under it, to determine its true character; and was not concluded by the bald fact that it was labeled 'Chattel Mortgage' or was in the form usual to chattel mortgages, and also to examine into the theory of the provision against chattel mortgages, the reason for its insertion, the evils or added risks to the insurer that it was designed to guard against, and, after having made this examination, to determine whether the instrument before it was of such nature as to violate the true intent of that provision." The chattel mortgage here considered was in substance a bond, to become effective in the event of the nonpayment of the rent. We are just as much entitled to consider its true essence as we would be to determine in a controversy relating to real property that a deed absolute in form was in realty a mortgage. The clause in question provided that the entire policy should be void "if the subject of insurance be personal property and be or become incumbered with a chattel mortgage." It will be seen that the policy prohibits not the mere existence of a chattel mortgage, but that condition in which the property should be "incumbered" with such a mortgage. Whatever may be the definition of the word "incumbered" when matters of title are considered in connection with contracts of sale viewed as an insurable risk, Mrs. Raulet's personal property never was "incumbered." Its value was many times the amount of the insurance. The value of the furniture purchased after the date of the chattel mortgage and before the issuance of the policy of insurance was found by the court to be equal to twice the sum demanded in the suit. The appellant's risk was never increased one iota by the so-called chattel mortgage. In Caplis v. American Fire Ins. Co., 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535, while the alleged lien considered was not in terms a chattel mortgage, but was a stipulation in the lease that the lessor should have a first lien on all buildings for unpaid rent and taxes, the court did interpret this provision in the standard form of policy, saying: "The clause must be construed as simply guarding against the common, ordinary chattel mortgage and instruments of the same general nature, use, and purposes." The instrument here considered is of no greater dignity than the lease which was the subject of discussion in the Minnesota case, and the language is used for no different purpose. We think, therefore, that case is authority for the conclusion which we have reached. See, also, Place v. St. Paul Title Ins. & Trust Co., 67 Minn. 126, 69 N. W. 707, 64 Am. St. Rep. 404; Allen v. Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 446. The case of Continental Ins. Co. v. Vanlue, supra, is not strictly in point here, because in that case the mortgage was given to secure the payment of an annuity by Vanlue to his grantor of one-half the net income of the farm; such promised division of profits being the consideration of the conveyance to him. The court properly held that, although the payments were to be made at stated intervals and no default had ever occurred, the lien was continuing, and was strictly within the terms of the policy. The wisdom of such conclusion will more fully appear when we reflect that the mortgage provided for a foreclosure upon any default in the stipulated payments. Naturally any arrearage would put the mortgagor in danger of losing his whole property, and would greatly increase the "moral hazard." In that very case, although the policy was sufficiently comprehensive to include all liens, it was held not to be violated by the existence on the record of a lien of replevin bail which had been discharged but not satisfied of record at the date of the issuance of the contract of insurance. The case is really in line with our decision that we must regard an alleged lien with reference to its actual effect upon the risk assumed by an insurer. See, also, Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 355, 1 L. R. A. 216, 6 Am. St. Rep. 144. In Lee v. Agricultural Ins. Co., supra, the mortgage had been given to secure the plaintiff as surety for the assured for $125 borrowed money—quite different from the purely contingent obligation in the case at bar. Peet v. Dakota Fire & Marine Ins. Co., 7 S. D. 410, 64 N. W. 206, does in principle sustain appellant's position, but it differs from the case at bar in the circumstance that any violation of the lease would deprive the lessor of all interest in the property. The lease provides that "in case of violating these covenants, or any of them, said lessee and his assigns shall forfeit said lease and improvements, and lessors, without notice, may, either with or without any writ or legal process, at their option, re-enter and hold said premises and improvements, buildings, etc., from which time all claim by the lessee shall fully cease." In view of the foregoing discussion, we hold that the so-called mortgage did not render the policy void. After a careful consideration of the question of waiver, we are convinced that the conclusion of the learned District Court of Appeal upon this point is correct, and we hereby adopt the decision of said court upon that point, and, indeed, in all particulars, except the matter discussed in the foregoing paragraphs. Said decision, so far as applicable, is as follows: "The appellant contends that the judgment and the order denying its motion for a new trial should be reversed for the following reasons: '(1) There being no allegation as to the location and use of the property at the time of the fire, the complaint does not state a cause of action and the demurrer should have been sustained. (2) The policy never took effect, as the premium was never paid. (3) Plaintiff was not the sole and unconditional owner of the property. Her interest was concealed and misrepresented in respects made essential by the policy, and was not truly stated therein, although a true statement thereof was warranted. (4) The property was incumbered by a chattel mortgage in violation of a condition precedent. The invalidity was not waived by issuing the policy, in ignorance of the breach of the condition; the burden being on plaintiff to disclose the incumbrance. It could not have been waived except in writing. (5) The policy was avoided by false swearing by the insured.'"

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

As to the complaint, it is asserted that "there is no allegation that at the time of the fire the property was contained in the described building or that the building was at said time 'occupied only as stores and lodgings.'" To the effect that these allegations are material citation is made of Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac. 138, and Arnold v. American Ins. Co., 148 Cal. 660, 84 Pac. 182. In the former it is said: "The principal contention under this head is that the complaint does not allege that the building at the time of the fire was occupied as a dwelling house. It was in the contract between the insurer and the insured that the premises were insured while occupied as a dwelling house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling house. If it was essential to prove such fact, it was essential to allege it. * * * The allegation was not merely a condition precedent as referred to in section 457 of the Code of Civil Procedure. It went to the very essence of plaintiff's right to recover." In the Arnold Case, supra, it is declared: "That the houses were occupied as dwelling houses at the time of the fires, and that the furniture was at such time contained in the specified house were essential to any liability on the part of defendant, and therefore essential to the statement of a cause of action. Not being alleged, they must be taken as having no existence." It is also rightly held that the defect is not cured by verdict and judgment since there was "an entire absence of both direct and implied allegation of a material fact."

But in the case before us the location and use of the property are at least fairly implied, and the complaint in that respect meets the demand of the policy that the insurance shall extend "to the following described property while located and contained as described herein, and not elsewhere, to wit: * * * All while contained in the five-story brick building, occupied only as stores and lodgings and situate Nos. 566-74 north side of Geary street between Mason and Jones streets, San Francisco." Turning to the complaint, we find these allegations: "That on the 19th day of April, 1906, the said property was totally destroyed by fire, and plaintiff was thereby damaged in the sum of $15,000; that said property insured as aforesaid and described in said insurance policy consisted of household and kitchen furniture, etc., contained in the five-story brick building occupied only as stores and lodgings, and situate Nos. 566-74 north side of Geary street," etc. The location and use, it is manifest, appear as in the policy, but appellant refers the allegation to the time when the policy was issued, and not when the property was destroyed. This is, however, an unwarranted construction of the language used. At most it could only be said that the complaint is uncertain in this respect. But it is not even uncertain. The foregoing allegations mean simply this: "The property insured and described in the policy was destroyed by fire on the 19th day of April, 1906. It consisted of household and kitchen furniture, etc. It was contained in the five-story brick building which was occupied only as stores and lodgings and was situated Nos. 566-74 north side of Geary street," etc. No one would have much difficulty in determining from the foregoing where the property was located at the time of the fire, or that it was used in connection with the said stores and lodgings.

Appellant assails the finding of the court that "the payment of the premium was not made a condition precedent to defendant's liability thereunder, and that the true consideration upon which the defendant executed and delivered the said policy to the said plaintiff was not the payment of the said $24 premium, but was plaintiff's promise to pay the said $24 to defendant on demand." It is asserted that actual payment of the premium was made by the terms of the policy a condition precedent to its operation, and therefore to any recovery under it. In support of this position the following is quoted from Bergson v. Builders' Ins. Co., 38 Cal. 541: "The principal, and perhaps the only, consideration moving from the insured, is the payment of the premium, and upon that the promise of indemnity rests. The policy in this case, which is in the usual form in that respect, states that the company in consideration of the premium therein mentioned insures the persons named against loss or damage by fire, etc. It is no answer to say that a credit was given to the assured for the premium, at the time the policy was issued, for the payment of the premium is a condition precedent to the right to recover for a loss." The provision in the policy before us is:

"In consideration of the stipulations herein contained, and of twenty-four dollars premium," the defendant company insures, etc. There is no recital that the premium was paid, and it is admitted and found that it was not. The plaintiff testified that Mr. Quarre, her insurance broker, "sent me a letter from the insurance company after the fire, asking the payment of $24 premium on account of the insurance company. I went to the office of the Northwestern National Insurance Company in Oakland, Mr. Pon and I, and they told me 'Never mind'; they didn't pay the premium. They will keep that on the $2,000. I was in Oakland with my broker and I asked one gentleman to pay the premium because Mr. Quarre never asked me to pay the premium before, never sent me any bill. I was ready to pay, but no one sent me the bill before." It further appears that on June 1, 1906, a bill for the premium was sent to the plaintiff by the defendant. The foregoing, although somewhat incomplete, is sufficient to support the conclusion that credit was given for the premium, and that after the loss the payment of said premium was waived, and it was agreed that it should be deducted from plaintiff's claim to the face value of the policy. There was no objection to the evidence tending to show the credit given or the waiver, but it is insisted that plaintiff must stand or fall upon the allegations of the complaint, that these show performance of the conditions of the policy which include payment, and it is argued that proof of waiver or nonpayment presents a fatal variance in the light of the Bergson Case, supra, and other authorities upholding the rule, as stated in 19 Cyc. 923, that "plaintiff cannot, either generally or specifically, allege performance of the conditions of the contract and support such allegations by proof of waiver." But, as pointed out by respondent, the phrase "in consideration of twenty-four dollars premium" involves a latent ambiguity. It is manifest that it may be construed as indicating payment or the promise of payment of the premium as the consideration. Hence it was proper for the court to consider the conduct of the parties as indicative of their understanding of this provision. "The contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning if its terms are equivocal." Keith v. Electrical Engineering Co., 136 Cal. 181, 68 Pac. 599. If plaintiff had understood payment to be the consideration and had intended to rely upon it, there would have been no such unconditional delivery of the policy without prepayment. From this latter circumstance the court was justified in concluding that the defendant extended credit, as within common knowledge is usually done in favor of responsible parties. To the aid of the court's finding may be summoned, also, the rule of construction generally recognized and well established that "every indulgence not inconsistent with the plain meaning of the contract must be shown the assured." It is the law, also, that, even though payment of the premium is expressly provided as the consideration, it is not a "condition precedent to the operation of the policy and to any recovery on it." It is held in Farnum v. Phœnix Insurance Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233, virtually overruling the Bergson Case, supra, as stated in the syllabus, that "An express provision in a policy of insurance that the company shall not be liable on the policy until the premium is actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium, and the company is liable for a loss which may occur during the period of credit." To the same effect are Griffith v. Life Insurance Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96, and Berliner v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922. In the latter it is said: "It is also contended that evidence of a waiver of payment was not admissible under the complaint; that payment of the premium is alleged, and that, if the policy was delivered without payment, the facts showing that defendant was estopped from relying upon the failure to pay should have been alleged. It is true that payment is alleged, but it is also alleged that the insured performed all the conditions on his part, and defendant accepted performance thereof and delivered the policy. This was certainly sufficient as a pleading, and, the policy having been delivered, it is immaterial, so far as plaintiff's right to recover is concerned, whether the premium was paid or a credit given; the delivery of the policy as an executed contract being all that it was essential to allege or prove." Thus is completely answered appellant's contention as to the variance between the complaint and the findings and the authorities apparently to the contrary, cited from other states, do not declare the law as applicable here.

Again, the issue as to payment was directly presented by the allegation of the answer "that said plaintiff did not at any time, or at all, before the destruction of the property, pay or offer to pay to the defendant the said premium of $24 or any part or portion thereof, and said premium was wholly unpaid at the time when said property was destroyed by fire." This is clearly a matter of defense. It is deemed denied and it could be met by proof of payment or of any circumstance, such as waiver, excusing payment.

The next point made by appellant—somewhat more serious—is based upon the fact that the subject of the insurance was community property and was in possession of plaintiff as executrix of the estate of her deceased husband, Charles M. Raulet, who died September 25, 1904. His will was admitted to probate on November 14, 1904. The plaintiff was the sole devisee and legatee under said will. At the time of the destruction of the property by fire there had been no distribution of any part of the estate. The time for creditors to present claims had expired. Thereafter, on the 8th day of January, 1907, all the property of the estate was duly distributed to plaintiff. It is claimed that the property at the time of the insurance and until distribution after the fire belonged to the estate of Charles M. Raulet, deceased, and therefore the case is brought within the provision of the policy that "this entire policy shall be void if the interest of the insured be other than unconditional and sole ownership." Two cases are cited in support of the proposition that the estate has an insurable interest that is distinct from that of the heirs or devisees and that the latter cannot be said to be the sole and unconditional owners of the property before distribution. In Horton v. Jack, 37 Pac. 652, it appears that the property was community property, and the executrix was the widow of the deceased and his sole legatee. It was held that her taking of the estate property to pay a personal debt was a conversion—"a wasting of the estate which would constitute a devastavit." It did not appear whether or not there were outstanding debts of the estate. In Overton v. Insurance Co., 79 Mo. App. 1, as quoted by appellant: "It was stipulated in the policy that plaintiff was the sole and unconditional owner in fee simple of the property. It was further stipulated that, if the interest of the assured in the property be not truly stated, the policy should be void, and that the policy was made and accepted subject to such stipulation. There was no written application for insurance, and nothing was said at the time of the verbal application by either party as to the title. The case shows and in fact concedes that plaintiff was not the sole and unconditional owner. The property was owned by her husband prior to his death, and upon his death descended to his heirs and it had never been partitioned. In such state of facts there was clearly no right of recovery. To sustain the action would be, in the face of the provisions of the contract, without a semblance of excuse or reason in avoidance."

But those cases are not controlling here. There is a vast difference between the case where an executor as the sole heir or devisee converts the property during administration, and where he insures it as the sole and unconditional owner. It is the duty of the executor to hold the property to satisfy the claims of the creditors, and where he converts it the rights of the creditors are obviously prejudiced. But here the plaintiff was individually the owner of the property subject simply to her right and duty as executrix to hold temporary possession for the purposes of administration. As a matter of fact she had the only insurable interest and her title was never disturbed, as is conclusively shown by the decree of distribution afterwards made. In the light of subsequent events, it is clear that, if it could be said that technically she was not the sole and unconditional owner of the property because of her right to its temporary possession as executrix, she had the insurable interest in it, and no one else had any title to it and defendant suffered no prejudice by her representation as to ownership. It is well established in this state that title to property vests in the heir or devisee from the moment of the death of the ancestor or testator. Brenham v. Story, 39 Cal. 179; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Estate of Packer, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459; Civ. Code, §§ 1341, 1363, 1384. In that respect there is no difference under our law between personal and real property.

In Cooley's Briefs on the Law of Insurance, p. 1369, it is stated that: "Insurance policies generally contain a clause reciting that the policy shall be void if the insured's interest is other than sole and unconditional, or entire, sole, and unconditional ownership, and this is not expressed in the policy. * * * Its purpose is to prevent a party who has an undivided or contingent but insurable interest in property from appropriating to his own use the proceeds of the policy taken on the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime. It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title. In other words, the insured's interest must be of such nature that he will sustain the whole loss if the property is destroyed." In Miller v. Alliance Ins. Co. of Boston (C. C.) 7 Fed. 649, it is held that so long as the assured under claim of right had the exclusive use and enjoyment of the insured property without any assertion of an adverse right or interest in it by any other person he had the insurable interest under the sole and unconditional ownership clause. So here, the entire loss was sustained by plaintiff, and it seems to be a narrow view that would defeat the claim on the ground that within the contemplation of the policy she was not "the sole and unconditional owner." In Breedlove v. Norwich, etc., Insurance Society, 124 Cal. 169, 56 Pac. 772, it is said: "Notwithstanding the fact, then, that plaintiff's interest in the property was not that of a sole and unconditional owner, nevertheless she did have an insurable interest which will support her action." However, the judgment in the Breedlove Case was upheld upon the ground of waiver by the insurance company. In Sharp v. Scottish Union, etc., Co., 136 Cal. 542, 69 Pac. 253, it is held, as stated in the syllabus, that: "Where there was no fraud, false swearing, concealment, or misrepresentation by the applicant for a policy of fire insurance which made the loss payable to a mortgagee, and the policy was written by an agent of the company, who delivered it to a representative of the mortgagee, and a full premium was paid and retained by the insurance company without offer of rescission after knowledge of the facts, and the assured person had an insurable interest in the property, though his wife was the owner of an undivided half interest therein, the policy may be enforced by the mortgagee, notwithstanding a clause that, if the interest of the insured be other than unconditional and sole ownership, the policy should be void." While, of course, the case can be differentiated from this, as the facts are somewhat dissimilar, yet it involves a stricter construction of the policy against the insurance company than what is insisted upon here by the respondent. In the Sharp Case is cited with approval the following quotation from Manchester Assurance Co. v. Abrams, 89 Fed. 932, 32 C. C. A. 426: "Sound reason, as well as the weight of authority, inclines us to the view that when the assured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title and to assure the property with such knowledge."

In the case at bar there was no actual nor constructive fraud, no intentional misrepresentation nor concealment, no inquiry on the part of the insurance company. The plaintiff was really vested with the title, the entire loss was sustained by her, and it cannot be held that the policy was void by virtue of the sole and unconditional ownership clause. The declaration of the court in the Missouri case cited by appellant must be read in the light of the facts. It seems that the plaintiff there "had at most a life interest in the property, as there were other heirs and she had but a dower right." The case is therefore of little significance here, even granting that it was correctly decided.

The question arising from the chattel mortgage is less free from difficulty. The provision in the policy as to that is: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered with a chattel mortgage." There is also the general provision that "this policy is made and accepted subject to the foregoing stipulations and conditions," etc. There was in fact a chattel mortgage upon the property to secure the payment of the rent for the building, but the court found in relation thereto "that the said instrument executed by plaintiff and her husband to the said Aronson was not a chattel mortgage within the meaning of defendant's policy; that at no time from the date said instrument was executed was there any rent overdue from the lessees above named; that at no time was said instrument considered by said plaintiff as a chattel mortgage; that when the plaintiff applied, through the said George Quarre, to defendant for insurance on the said property, no inquiries were made by the said defendant as to whether or not the said property was encumbered by a chattel mortgage, nor were any representations made by the said Quarre as plaintiff's agent, to the effect that the property was not so incumbered; that the provision in defendant's policy relating to chattel mortgages was not a material part of said policy." The conclusion is therefrom drawn that there was no violation of this provision of the policy, and "that said defendant waived the last mentioned clause by its conduct when application was made therefor; and that defendant is estopped by its own acts from now setting up the said clause as a defense to plaintiff's claim in this action. * * *" We think, however, that under the circumstances it should be held that this provision in the policy was waived by the conduct of defendant. There was no written application for the insurance, and, as we have seen, no actual fraud and no intentional misrepresentation by plaintiff. She was ignorant of this provision in the policy, which was secured by her agent, and no inquiry was made by the company as to the existence of any chattel mortgage.

It must be presumed, ordinarily, that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions therein, but the rule should not be strictly applied to insurance policies. It is a matter almost of common knowledge that a very small percentage of policy holders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous—the one before us covering thirteen pages of the transcript—and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy holder such provisions as the one before us. The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent. The defendant should either have made inquiries in reference to the chattel mortgage, required a written application covering by question and answer all the material provisions of the policy, or have consulted the records in the recorder's office where it would have been apprised of the incumbrance. Considering the nature of the contract and the relation of the parties, there should be no difficulty in reaching the conclusion that this provision was waived, and it therefore constitutes no bar to recovery.

In Cooley's Briefs on Insurance, p. 1396, it is said: "The authorities are far from being agreed as to the necessity of disclosure, in the absence of inquiry, when the policy contains a stipulation declaring it void if the property is incumbered, and not so represented to the insurer. It has, however, been held in numerous well-considered cases that even if the policy contains a condition declaring it to be void if the interest of the insured be not fully stated, or if the property is incumbered and not so represented, or if the subject of insurance be personal property and be incumbered by a chattel mortgage, disclosure is not necessary, in the absence of inquiry." And further: "That a disclosure of incumbrances is not necessary under a condition calling for a representation as to title or interest, if not absolute in fee simple, or sole and unconditional, seems to be supported by the weight of authority." In Wright v. Fire Ins. Ass'n., 12 Mont. 485, 31 Pac. 91, 19 L. R. A. 211, the Supreme Court of Montana, discussing a similar provision, says: "According to defendant's position, only one condition of said contract of insurance was ever in force, and that was the clause providing that inasmuch as a portion of the property which defendant pretended to insure was mortgaged—a fact which existed and had not been made a condition of the agreement as negotiated—the policy was entirely void ab initio. If this interpretation is the proper one to be upheld by the court, its result is that plaintiff negotiated for insurance on her property, truly answering to all inquiries that were made concerning it. Defendant promised to place a risk upon it for a certain consideration, and received $105 from plaintiff for a paper which provided that she had no insurance, and this result was not according to the negotiations, because no inquiry was made as to a mortgage. No mention was made that the company would not take a risk on mortgaged property. * * * It seems to us that it would be unjust to the insurer, as well as the assured, to put such a construction on the transaction. It would be imputing turpitude to the conduct of defendant which the transaction hardly warrants, when we consider the conduct of the parties at the time the insurance contract was made as shown by the evidence. It would be assuming that the defendant was in such case obtaining, or attempting to obtain, money of plaintiff, under unscrupulous business methods, which fall but little short of false pretense; for it is proper in considering the effect of defendant's negotiating insurance on property, and receiving consideration therefor, to assume that defendant's managers and agents knew that mortgages, both of real and personal property, are lawful, and that not a few exist, as shown by the public records, and further, that they are fully acquainted with the conditions of the policy proposed to be issued. * * * The situation further involves the misleading of the one pretended to be insured into the belief that the property in question was insured, when in fact it was not, and thus not only so contriving as to get pay for the risk without assuming it, but doing the more grievous wrong of leading the party honestly seeking and paying for insurance into suffering the entire loss of the things proposed to be insured in the transaction. * * * We hold that under the state of facts shown defendant by writing the insurance on said merchandise without inquiry as to the mortgage thereon did consent to take the risk on the goods under mortgage as effectually as if consent had been indorsed on the policy."

In German Mut. Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. 534, it is held by the Appellate Court of Indiana that "where application for insurance is orally made, and there are no questions asked concerning incumbrances and the insured is unaware that the existence of a mortgage was fatal to his insurance, the insurer will be deemed to have waived a provision for forfeiture by reason of existing incumbrances. Relying upon appellant's failure to make any inquiry, appellee depends upon the policy as an indemnity in case of loss, but when the loss comes discovers that he had no insurance. If the law requires such a holding, then our province is but to declare it. The law, however, does not demand so inexorable adherence to the letter of the contract under all circumstances and all conditions. In quite a number of cases it has been adjudged that the failure of the company to inquire about, or call any attention to, some particular fact, operates to relieve the insured from a forfeiture which would follow his omission to disclose it, under the strict wording of his policy, although the fact was one material to the risk, but not one unusual or extraordinary"; and it is furthermore declared that in determining whether such a harsh and inequitable forfeiture clause is to be deemed waived the courts have generally applied the same liberal rule in favor of the assured as governs in the construction of the contract itself. In Philadelphia Tool Co. v. British-American Assur. Co., 132 Pa. 236, 19 Atl. 77, 19 Am. St. Rep. 596, the Supreme Court of Pennsylvania treated the similar question of waiver of "the sole and unconditional ownership clause," and it said: "The defense now taken is that the policy is partly upon real estate and partly on personal property, for which an entire premium was paid, and that as the assured had no title to the land the policy is void as to it, and being void in part is void in whole, so that no money can now be had. This position rests on one of the almost innumerable conditions, stipulations, and provisos which appear on the policy and which asserts that 'if the assured is not the sole and unconditional owner of the property, or if the building stood on ground not owned in fee simple by the assured, or if the interest of the assured is not truly stated in the policy,' then the policy shall be void. Is this condition applicable to the case presented on this policy? A policy of insurance, like any other contract, is to be read in the light of the circumstances that surround it. This policy was issued without any application or written request describing the interest of the assured in the building. No actual representation of any sort upon the subject, oral or written, is alleged to have been made by or on behalf of the assured. We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer and intended to cover in good faith the interest which the insured had in the buildings. * * * We must also remember that this policy is to be interpreted most strongly against the company whose contract it is. Applying these principles to the question now raised, we conclude that the policy written on within the knowledge of the insurer was made in view of the facts of the case, and was intended to cover such interest in the buildings as the insured had." It is clear that the waiver of "the sole and unconditional ownership clause" there involved a wider departure from the letter of the policy than that of the chattel mortgage clause involves under the circumstances disclosed here in view of the fact that nothing was overdue and the property insured was of greater value than the aggregate of the face of the policy and the sum secured by the mortgage. In line with the foregoing are decisions of the courts of Indiana, Kentucky, Montana, Nebraska, Oregon, Vermont, Virginia, and Washington. It is conceded by respondent that holdings to the contrary are to be found in the courts of District of Columbia, South Dakota, and Illinois. These latter may be "well considered cases," as contended by appellant, but they are opposed to what we conceive to be the just and equitable doctrine and we think they should not be followed.

As to the point made by appellant that the waiver could only be in writing as provided by the terms of the policy, the case of Farnum v. Phœnix Insurance Company, supra, seems decisive. A large number of cases are therein cited, and the conclusion is reached that: "An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions or that its contracts or waivers must be in writing that it cannot by its agents make an oral contract or oral waiver not forbidden by the statute of frauds. Whether or not any particular agent has the general power of the company to make an oral contract or oral waiver of a condition notwithstanding the provision in the policy requiring a writing is a question of fact." And in Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234, it is held that "general agents authorized to issue and deliver new policies are regarded as having the same power to waive conditions and forfeitures as the companies themselves. The limitations embodied in the stipulation do not prevent them from making new contracts; and waivers constituting a new contract upon sufficient consideration need not be evidenced by writing nor endorsed upon the policy, if made by a general agent having power to make the contract, no matter what limitations or conditions may be expressed in the policy." There is no evidence that the agent here was not a general agent. Indeed, there seems to have been no controversy in the court below as to his authority to bind the company. Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866, and Cayford v. Metropolitan Life Ins. Co., 5 Cal. App. 715, 91 Pac. 266, are not in conflict with the foregoing. In the former there was a written application made a part of the policy wherein the statements were warranted to be true. It was held that "the written answer of the insured as to whether he had ever had a specified disease is material to the risk assumed by the insurer and in the absence of any fraud on the part of the insurance company, when the application made and signed by the insured provided that only the officers of the home office had authority to determine whether a policy should issue on the application and that they acted on the written statements, answers, warranties, and agreements contained in it in determining that matter, the soliciting agent of the company cannot be deemed to have either actual or ostensible authority to waive such breach of warranty." In the Cayford Case the policy expressly provided that none of its terms could be modified nor any forfeiture waived or premiums in arrears received except by agreement in writing, signed by either the president, vice president, secretary, or actuary whose authority will not be delegated, and it was rightly held that a local collector had no such authority and could not waive any of the provisions of the policy.

The contention of appellant that since plaintiff pleaded performance of her contract she cannot prove waiver is not maintainable. The same principle is involved in reference to the chattel mortgage as to the payment of the premium. The declaration of the Supreme Court in Breedlove v. Norwich, etc., Ins. Co., 124 Cal. 168, 56 Pac. 772, is in point here: "It was incumbent upon the plaintiff to aver a performance of all conditions upon her part to be kept and performed. It was necessary for her then to plead performance of all promissory warranties, but it was not necessary for her to plead the truth of an affirmative warranty of title. Cowan v. Phœnix Ins. Co., 78 Cal. 181 [20 Pac. 408]. Still it was obligatory for plaintiff to show by her pleading that she had an insurable interest, and this she undertook to do by the averment touching her title. Defendant, however, by a separate defense, pleaded the warranty as to title and the falsity of it in avoidance of its liability. Since this new matter is taken as controverted under our laws of pleading, any defense to it by way of replication was open to plaintiff without pleading, and it was therefore permissible for her to show that there never had been such a warranty, and that it had been waived at the time of the delivery of the policy. That the warranty could be waived in the manner indicated is settled in this state." Indeed, as stated in the Cowan Case, supra: "There is no necessity of averring performance by the insured of anything warranted to be true when the policy is issued, for the reason that there is nothing to be performed. When the assured has warranted a thing to exist or a representation to be true at a time when a policy becomes consummated as a contract, he has done all that he can do. * * * Clearly when nothing is required to be performed by him, such an averment by him would be useless and without meaning; whereas, in the case of a promissory warranty, the assured has warranted that he will do something during the existence of the risk, the requisition of averment of such stipulation and of its performance is required. As is said in 2 Wood on Insurance, p. 1136: 'It can readily be determined of what matters performance should be averred by ascertaining what under the policy the assured has stipulated to do, and what he must do in order to recover, and he must aver performance of all such conditions, as when he stipulates to erect a chimney, to keep a watchman, to put in a force pump, to keep water in certain quantities and in certain places or any other matter or thing which the insured has contracted to do.'" The allegation, therefore, that "said plaintiff has performed all of the conditions on her part to be performed as set forth or contained in the said contract or required to entitle her to recover thereon," has reference to the promissory warranties, and does not present an issue as to the chattel mortgage. This issue is presented, however, by the answer, and, as we have seen, being deemed denied, to meet it it was proper for plaintiff to prove the equitable estoppel. In the case of Aronson v. Frankfort Accident & Plate Glass Insurance Company, 9 Cal. App. 473, 99 Pac. 537, it is clear that a promissory warranty is involved as the alleged waiver referred to something to be done by the insured after the accident. It states the law correctly and is in harmony with what we have stated. The court was justified in finding that there was no false swearing in the proof of loss on the part of plaintiff. It is well settled that only willful misstatements in that regard will avoid the policy. West Coast L. Co. v. State, etc., Co., 98 Cal. 502, 33 Pac. 258.

We see no reason to hold that plaintiff did not act in perfect good faith or that she desired to take any advantage of defendant.

The foregoing views are deemed decisive of the case, and render it unnecessary to consider any other alleged error.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.

We concur on the ground first discussed: ANGELLOTTI, J.; SLOSS, J.

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BIG THREE MIN. & MILL. CO. v. HAMILTON et al. (L. A. 2,265.)

(Supreme Court of California. Dec. 27, 1909. On Modification of Judgment, Jan. 26, 1910.)

1. Mines and Minerals (§ 38*) — Public Mineral Lands — Actions to Determine Rights—Sufficiency of Evidence.

In an action to quiet title to mining claims, in which it was in issue whether locations by plaintiff had been forfeited for failure to do the necessary work during the year previous to their location by defendants, testimony by a number of witnesses, who were familiar with the work done and able to estimate its value, *held* to sustain findings by the jury that the value of the work and improvements done on each of the claims during such year was $35.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 106; Dec. Dig. § 38.*]

2. Mines and Minerals (§ 23*)—Public Mineral Lands — Development and Improvement.

Under Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), providing that, where mining claims are held in common, the necessary expenditure may be made upon any one of the claims, the work must have been done in good faith for the benefit of all claims, and have been such as to have a tendency to develop or benefit the claims other than the one on which the work is done, and the assessment work may be done upon one of a group of claims owned in common, even though the claims are not all adjoining.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 54; Dec. Dig. § 23.*]

3. Mines and Minerals (§ 38*)—Public Mineral Lands—Development and Improvement—Question for Jury.

Whether work done on a mining claim is such as to benefit or develop other claims and so satisfy the requirement as to development of such claims is a question of fact.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 108; Dec. Dig. § 38.*]

4. Mines and Minerals (§ 38*)—Public Mineral Lands—Actions to Determine Rights —Sufficiency of Evidence.

In an action to quiet title to mining claims, evidence *held* sufficient to warrant the jury in finding that the work done on one claim was not for the purpose of developing two other claims located by the same persons and had no tendency to develop either of them.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 54; Dec. Dig. § 38.*]

5. Trial (§ 296*)—Actions—Harmless Error—Instructions.

In an action to quiet title to mining claims, any error in an instruction that the necessary work for improvements required to be done annually on a mining claim might be done outside the boundaries of such claim "on one of a group of claims adjoining each other and owned by the same party," as limiting the effect of the work to "adjoining claims," was cured by a later portion of the same instruction that, if the requisite work was done upon the H. claim, the title to which was not in issue, and such work was done "in pursuance of a system that tended to a development of the claims claimed by the plaintiff herein in its complaint," such work was sufficient to prevent a forfeiture of any such claims, as by including the H. claim the claims of plaintiff were adjoining claims, and the effect of the instruction was that work done upon any one of such claims could be applied to any of the others.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. § 296.*]

6. Mines and Minerals (§ 38*)—Public Mineral Lands—Actions to Determine Rights—Instructions.

In an action to quiet title to mining claims, a court in one instruction stated that work outside the limits of a claim must be such as has a tendency to benefit or develop the claim, and, in a subsequent instruction, that, in accordance with instructions theretofore given, the burden of proof was on defendants to show that the necessary work was not done as required by law, and that, in so far as plaintiff's case is made to depend upon work done outside of two claims named, the burden is on plaintiff to show that such work done outside of such claims did actually benefit such claims. *Held*, that as the first instruction was intended to specifically define the test whether work outside the claim could be counted as sufficient to hold the claim, and the declaration that the work must have a tendency to benefit or develop the claim was found at least six times in such instruction, the latter instruction, which dealt solely with the burden of proof, could not have misled the jury by substituting the expression "actually benefited" for the expression used in the first instruction, "tend to benefit."

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

7. Mines and Minerals (§ 38*)—Public Mineral Lands—Actions to Determine Rights—Instructions.

In an action to quiet title to mining claims, an instruction that the law requires clear and convincing evidence to effect the forfeiture of a claim duly located and worked in good faith, and that, if the evidence does not satisfy the jury by a clear preponderance thereof that plaintiff failed to perform the necessary work, then it follows that plaintiff did not forfeit its claim, is a correct statement of the law under Code Civ. Proc. § 2061, providing that a preponderance of the evidence is all that is required to establish a fact necessary to be shown in a civil action.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

8. Mines and Minerals (§ 29*)—Title by Adverse Possession.

To acquire title to a mining claim by prescription, possession of the property must not only be hostile, but must be exclusive, continuous, and uninterrupted for a period of five years prior to the commencement of the action, and any interruption of the adverse possession within the five years prevents the acquisition of title by prescription.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 67; Dec. Dig. § 29.*]

9. Mines and Minerals (§ 38*)—Actions to Quiet Title—Evidence of Adverse Possession.

In an action to quiet title to mining claims, evidence *held* insufficient to show title in defendant by adverse possession.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

10. Appeal and Error (§ 930*)—Review—Presumptions as to Findings.

Since a general verdict imports findings for the prevailing party upon all material issues, it will be assumed on appeal, in an action to quiet title to mining claims, in which defendant claimed title under prior location and also by adverse possession, and a general verdict was rendered for defendant, that the jury found in favor of defendant as to both defenses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3760; Dec. Dig. § 930.*]

11. Appeal and Error (§ 1028*)—Harmless Error—Defenses.

In an action to quiet title to mining claims, defendant claimed title under adverse possession and under prior location. *Held* that, either defense being sufficient, if either was sustained by the evidence and not affected by any error, the want of evidence to sustain the finding on the other defense or any error committed in regard to it could not have been prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

12. Mines and Minerals (§ 29*)—Public Mineral Lands—Location—Repeal of State Law.

A mining location made while the law of 1897 (St. 1897, p. 214, c. 159) was in force, but invalid for noncompliance with the provisions of that law, is still a valid location, providing the provisions of the mining laws of the United States have been complied with, and there are no intervening rights before the repeal of the state law, and the claim has been occupied, held, and worked up to the time of and after such repeal.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 29.*]

13. Mines and Minerals (§ 23*)—Public Mineral Lands—Possession of Claim.

In an action to quiet title to a mining claim, evidence that defendant had continuously, up to and after the repeal of the law of 1897 (St. 1897, p. 214, c. 159), which prescribes the manner of locating mining claims, prosecuted work under a system tending to the development of this claim and other claims which he had located, and that a part of the work had been done within the boundaries of the claim in suit, was sufficient to establish possession of the entire claim to the extent of the visible boundaries.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51–59; Dec. Dig. § 23.*]

14. Mines and Minerals (§ 26*)—Public Mineral Lands—Validity of Location.

If a person locates on a mining claim under the law of 1897 (St. 1897, p. 214, c. 159), and erects an initial monument at the place required by such law and posts the required notices thereon and remains in possession, no other person can make a valid entry thereon for the purpose of making another location until the person first locating the claim is in default, and within the 20 days allowed by the law of 1897 for recordation the claim of the locator is valid, and no other entry can be made as the basis for claim of title.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 63; Dec. Dig. § 26.*]

15. MINES AND MINERALS (§ 38*) — PUBLIC MINERAL LANDS—FAILURE TO PAY FOR IMPROVEMENT.

Where necessary improvement work is done on a mining claim, failure to pay for such work will not be considered in an action to quiet title to the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

16. APPEAL AND ERROR (§ 1053*)—QUIETING TITLE — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In an action to quiet title to mining claims, the admission, on cross-examination of plaintiff's witness, of evidence that assessment work done on the claims in a certain year was not paid for, is harmless, where the court instructed that whatever work was done during that year in connection with any of the mining claims claimed by plaintiff inured to the benefit of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

17. MINES AND MINERALS (§ 38*) — PUBLIC MINERAL LANDS—ACTIONS TO DETERMINE RIGHTS—ADMISSIBILITY OF EVIDENCE.

In an action to quiet title to mining claims, in which it was in issue whether the assessment work for a certain year had been performed, evidence that a mill put up on one of the claims was of no value for the purpose of reducing the ore there found is admissible as bearing on the good faith of the parties in erecting the mill, and affidavits of proofs of labor made by two witnesses and duly recorded were also admissible under St. 1891, p. 219, c. 155, making such proofs prima facie evidence of the fact therein stated.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

18. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—REJECTION OF TESTIMONY.

In an action to quiet title to mining claims, in which the question of the performance of assessment work was in issue, the rejection of affidavits as to labor performed by two witnesses was harmless, where both the witnesses testified fully as to all the material facts stated in their affidavits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

19. WITNESSES (§ 388*)—IMPEACHMENT—PREDICATE.

In an action to quiet title to mining claims, a witness for plaintiff testified that none of the locations claimed by defendant had actually been made as locations of quartz claims prior to a date specified, but that all claims located by defendant theretofore had been located as placer claims, that at that time defendant had not located the R. claim, and that the L. claim, when located by defendant as a quartz claim, was bounded on the south by plaintiff's claim, already located by plaintiff's predecessor in interest, G., which testimony established that G., and not defendant, was prior in time in the location of the R. claim, and that he and his successors, if remaining in possession and working the claim until the repeal of the state law under which it was located (St. 1897, p. 214, c. 159), were entitled to hold the same. To impeach the witness, defendant asked him on cross-examination, over objection, whether he had made certain statement to M.; but the questions did not specify, as required by Code Civ. Proc. § 2052, the time or place of the alleged conversations or the persons present thereat, and the witness denied the statements. M. was subsequently called, and, over the objection that no proper foundation had been laid, testified that the witness had told M. that G. had admitted to defendant that in locating the R. claim he had located upon a claim belonging to defendant, and that he would take his papers off the claim, which he did, and that the witness had also stated that defendant had arrived at the mines one day ahead of G. and placed his papers on the claim. *Held*, that the admission of his testimony was error, as the statement by the witness that G. had made such an admission tended to throw discredit on the testimony of the witness that defendant never made any location of the R. claim prior to G.'s location.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1242; Dec. Dig. § 388.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Big Three Mining & Milling Company against E. M. Hamilton and others. Judgment for defendants, and plaintiff appeals. Reversed in part, and affirmed in part.

J. W. P. Laird and Wm. Chambers, for appellant. Sherman Page and Roger S. Page, for respondents.

SLOSS, J. Appeal by plaintiff from an order denying its motion for a new trial. The action was brought to quiet plaintiff's title to four quartz mining claims, the "Occidental," the "Rosamond," the "Kid," and the "Home No. 1," together with the "Big Three Millsite." There is no dispute as to plaintiff's ownership of the Home No. 1, and all controversies relating to the ownership of the Millsite were settled by agreement of the parties before the trial. The questions presented upon this appeal relate entirely to the three claims first mentioned, the Occidental, the Rosamond, and the Kid. As claimed by plaintiff, these three, together with the Home No. 1, ran along an easterly and westerly line, end to end. The Occidental lay to the west; adjoining it on the east was the Rosamond; next came the Kid; and adjoining the Kid to the east lay the Home No. 1. Each of the claims, except the Kid, was of the full size permitted by the United States statutes, to wit, 1,500 feet in length by 600 feet in width, or thereabouts. The Kid was a smaller or fractional claim, occupying the space left between the Rosamond and the Home; its end lines constituting the easterly and westerly ends, respectively, of the claims last named. The north line of the Kid, according to plaintiff's testimony, is 64 feet in length, and the south line 87 feet 8 inches.

The allegations of plaintiff's complaint as to the ownership and possession of these claims were denied by the defendants. In addition, separate defenses were set up, whereby title to various portions of the property claimed by plaintiff was asserted by different defendants. The defendant E. M. Hamilton claimed ownership of substantially all of the Rosamond claim, in part by virtue of his prior location of a claim also designated the "Rosamond" (hereinafter referred to as the "Hamilton Rosamond"), and in part by reason of his location of two overlapping claims known as the "Fay No. 1" and the "Lida." The Rosamond, as claimed by this defendant, covered the greater part of plaintiff's Rosamond. The north lines of the two are very nearly identical. The east end line of Hamilton's Rosamond is 542 feet in length, while the west end line is 344.75 feet long. The Fay No. 1 is located to the south of Hamilton's Rosamond and overlaps plaintiff's Rosamond to the extent of 5¼ acres, being nearly all of that portion of plaintiff's Rosamond lying south of the Hamilton Rosamond. The Lida lies to the north and east of both Rosamond claims and overlaps them at their northeasterly corners to the extent of something over three acres. Said Lida claim overlaps the Kid, as claimed by plaintiff, to the extent of .64 of an acre. It should here be said that these statements regarding the location and extent of the Fay No. 1, the Lida, and the Hamilton Rosamond are disputed by appellant, which denies not only the fact of location of these claims, but contends that the Fay and the Lida, if located, did not cover any part of the Rosamond. Title to plaintiff's Rosamond is also claimed by Hamilton by virtue of adverse possession for the statutory period. Title to the Occidental and the Kid mining claims are asserted by various defendants by virtue of relocations made by them following an alleged forfeiture of said claims by plaintiff for failure to do the annual assessment work. The Occidental is claimed by E. M. Hamilton and J. Frank Walters; each asserting ownership to an undivided one-half interest. The Kid is claimed in like manner by D. M. Reck and Roger S. Page.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The case was tried before a jury, which, after hearing a considerable mass of testimony, much of it conflicting, returned a verdict as follows: "(1) With respect to plaintiff's claim of ownership of the Occidental mining claim, we find in favor of defendants. (2) With respect to plaintiff's claim of ownership of the Rosamond mining claim, we find in favor of defendants. (3) With respect to plaintiff's claim of ownership of the Kid mining claim, we find in favor of the defendants." In addition, the jury made answer to nine special issues. We shall have occasion to refer to some of these later.

Before taking up the issues arising with reference to the Rosamond, it will be convenient to consider separately the questions relating to the claims of title made to the Occidental and the Kid by virtue of relocations. The Occidental is claimed by Hamilton and Walters under a location made by them on the 1st day of January, 1905; the Kid by Page and Reck on a location made on the 5th day of March, 1904. The questions presented to the jury with reference to these claims were whether the Occidental had been forfeited by plaintiff by its failure to do the necessary work on said claim during the year 1904, and whether the Kid had been so forfeited by failure to do such work during 1903. On these points the jury found, in answer to the special issues submitted to them, as follows: "What was the value of the work and improvements done on the Occidental mining claim during the year 1904? Answer: $35. What was the value of the work and improvements done on the Kid mining claim during the year 1903? Answer: $35." There can be no question that the findings are fully sustained by the evidence in so far as such evidence related to the work done within the boundaries of the respective claims. A number of witnesses who had first shown their familiarity with the work done and their ability to estimate its value testified that the amount of work done on the claims in the years in question did not exceed the sums found by the jury.

It is claimed, however, by the appellants that, during the year 1904, plaintiff was the owner, not only of the Occidental and Kid claims, but also of the Home No. 1, and that it did work and placed improvements upon this claim to an amount in excess of that necessary to hold all three claims. Where claims are held in common, the expenditure required by the laws of the United States may be made upon any one of the claims. Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426). The work so done, however, must be done in good faith for the benefit of all the claims, and it must be such as to have a tendency to benefit or develop the claims other than the one upon which the work is done. Whether it is so done or has such tendency is a question of fact (Snyder on Mines, § 482; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; De Noon v. Morrison, 83 Cal. 163, 23 Pac. 374; Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; Book v. Justice Mining Co. (C. C.) 58 Fed. 106; Hall v. Kearny, 18 Colo. 505, 33 Pac. 373), and this question was submitted to the jury in the case at bar. The evidence was such as to fully warrant the jury in finding that the work done on the Home No. 1 was not done for the purpose of developing the Kid or the Occidental, and that such work had no tendency to develop either of them. The appellant offered some testimony in support of its theory that the four claims to which it asserted title were located upon the line of a vein running east and west, that this vein could be traced continuously through the four claims, and that a reasonable and proper mode of developing each of the claims was to enter the vein within the limits of the Home No. 1 and thence drift, along the vein, through the Kid, Rosamond, and the

Occidental, with a view to taking all of the ore extracted back to the Home, upon which reduction works had been placed. But as against this there was an abundance of testimony on behalf of the respondents to the effect that there was no such continuous vein, but that, on the contrary, the country was much broken up; that all veins which were discoverable ran from the northeast to the southwest or from the northwest to the southeast; and that such of them as were to be found within the limits of the Home No. 1 passed out of the side lines of that claim without entering either the Kid, the Rosamond, or the Occidental.

But, apart from the question of sufficiency of evidence, it is contended that the court erred in its instructions to the jury regarding the matter of forfeiture by failure to do the annual work. One instruction (numbered 6) reads as follows: "You are instructed that the laws of the United States require $100 worth of work or of improvements annually to be performed or made on a mining claim. Such work or improvements so required by the laws of the United States may be done or made within the boundaries of such claim, or such work may be done outside the boundaries of such claim on one of a group of claims adjoining each other and owned by the same party, if done in pursuance of a system of development and if the same has a tendency to benefit or develop each claim in the group. Work done on one of a group of mining claims which has a tendency to develop or benefit all of the claims in the said group inures to the benefit of each and all of said claims, even though the system adopted may not be the best that could have been devised under the circumstances. Improvements made, such as the construction of roads, mills, or mining machinery for the working and operation of an entire group owned by one party, and which said improvements tend to the benefit of all of the claims in said group, will inure to the benefit of each and all of the claims in said group, even though such improvements be made outside the lines of any of said claims. If you believe that in the year 1904 there was more than $400 worth of work done within the boundaries of Home No. 1 mining claim by the plaintiff in this case, or any one acting under the plaintiff, and with the plaintiff's consent, and that such work was done in pursuance of a system that tended to the development of all of the claims claimed by the plaintiff herein in its complaint, and tended to the development and benefit of all such claims, then the work so performed was sufficient to prevent a forfeiture of any of said claims on account of the annual labor or improvement requirements of the year 1904. You are further instructed that even though the work done on said Home No. 1 claim in 1904 was not of the value of $400, still if you believe from the evidence that improvements were made consisting of a mill, cyanide tanks, and waterworks of as great a value as $400 which, taken in connection with such work as you find to have been done on the claim under such conditions as those above stated, would equal or exceed the sum of $400, and that such improvements were of such a character and so constructed as to benefit and tend to the development of all of said four claims, and each of them, then the court instructs you that upon those facts existing there was no forfeiture of such claims, or either of them, on account of the said annual labor or improvement requirements. It is not necessary that a party in doing work on a claim or on a system for the benefit of all claims held by such party and contiguous to each other shall do the same specifically as annual labor or assessment work; but if such work is done in good faith, and is equal in amount to the work required to be done by the act of Congress, then the same will be sufficient to prevent a forfeiture."

One criticism of this instruction is that the court speaks of work done outside the boundaries of a claim as required to be done on one of a group of claims "adjoining each other." Undoubtedly, the better authority supports the contention that assessment work may be done upon one of a group of claims owned in common, even though the claims are not all adjoining. 1 Snyder on Mines, p. 444; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047. Accordingly, it is claimed that in this case, inasmuch as the jury found that the plaintiff was not the owner of the Rosamond, it must have concluded from the instruction of the court that it could not consider work done on the Home in connection with the Occidental, since the Occidental was, according to the verdict, not adjoining other claims owned by plaintiff. We think, however, that, in view of the language used by the court in a later part of the same instruction, the inaccurate expression first used could not have influenced the jury to plaintiff's detriment. The court specifically instructed the jury that if the requisite work was done upon the Home, and such work was done "in pursuance of a system that tended to a development of all the claims claimed by the plaintiff herein in its complaint," such work was sufficient to prevent a forfeiture of any of such claims. In view of this language, it is clear that the court had reference to plaintiff's assertion of title to the four claims, rather than to the validity of that title, and that it instructed the jury that work done upon any one of such four claims (which were in fact adjoining) could, under proper conditions, be applied to any one of the four. No prejudice could have resulted from the instruction, limited as it thus was.

It is not disputed that instruction 6 correctly defines the character of the work that may be done upon one claim for the development of another owned in common with it. It states that work done outside the limits of a claim must be such as has a tendency to develop or benefit the claim. It is argued, however, that a subsequent instruction is in conflict with it. Instruction No. 30 reads as follows: "In accordance with instructions heretofore given, the burden of proof is on the defendants to show that the necessary assessment work was not done as required by law on the Occidental claim for the year 1904, and on the Kid claim for the year 1903, but, in so far as the plaintiff's case is made to depend upon work done outside of the Occidental and Kid during said years 1903 and 1904, the burden of proof is on the plaintiff to show that such work done outside of said claims did actually benefit said claims." This instruction is assailed upon the ground that it requires the plaintiff to show that work done outside of the claim actually benefited the claim; whereas, the true rule is the one stated in the prior instruction that it need only tend to its benefit. We need not here enter into any extended discussion of the distinction, if there be any, between the words "actually benefit" the claim and "tend to benefit" the claim. It would seem that a greater burden is imposed upon a party if he be required to show that his work actually benefited the claim than if he be merely called upon to establish that it had a tendency in that direction. But under the familiar rule that the instructions of the court are to be read together and harmonized, if possible, we think there is no conflict between instruction 30 and the earlier one above quoted. The first instruction was intended to define to the jury in specific terms the tests by which they were to determine whether work done outside of the claim could be counted as annual work sufficient to hold it. The rule was set out at considerable length and with clearness. The declaration that the work must merely have a tendency to benefit or develop the claim is found at least six times in this instruction. Instruction 30, the one complained of, is one dealing, not with the question of the character of proof that must be made in such cases, but purely with the burden of proof. At its very beginning it is qualified with the words "in accordance with instructions heretofore given," and then goes on to define that in one state of circumstances the burden of proof is upon the plaintiff and in the other upon the defendants. But in either case such burden is sustained by making proof in accordance with instructions theretofore given. We do not think the jury could have been misled by the omission of the words "tend to."

One further point is made with regard to the instructions on the matter of forfeiture. In instruction 9 the court told the jury that "the law requires clear and convincing evidence to support the forfeiture" of a claim duly located and worked in good faith. It then stated that "if the evidence does not satisfy you by a clear preponderance thereof that the plaintiff failed to perform the necessary work, then it follows that the plaintiff did not forfeit the said claim." We are unable to see any error in this. While it is often said that a forfeiture can be shown only upon clear and convincing evidence, "the proof is made as required whenever it is shown by a preponderance of the evidence that the full amount of annual labor or improvements was not made or expended within a given year." Snyder on Mines, § 726. See further, to the effect that a preponderance of the evidence is all that is required to establish a fact necessary to be shown in a civil action, Code Civ. Proc. § 2061; Ford v. Chambers, 19 Cal. 143; Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

The foregoing discussion is directed to the contention that work done on the Home No. 1 in 1904 was applicable to the Occidental. It is not necessary to make any additional answer to the point that work done on the Occidental in 1903 was sufficient to prevent a forfeiture of the Kid.

As has been stated, the claim of Hamilton to the ownership of the Rosamond mine rests upon different grounds from those heretofore considered. He asserts title to this property by virtue: First, of adverse possession; second, of locations of three mining claims, the Fay No. 1, the Hamilton and Rosamond and the Lida, covering the territory of plaintiff's Rosamond. We are satisfied that the evidence is insufficient to support the finding that Hamilton had acquired title to this claim by adverse possession. To acquire title by prescription the possession of the property must not only be hostile to plaintiff's title, but must be exclusive, continuous, and uninterrupted for a period of five years prior to the commencement of the action. San Francisco v. Field, 37 Cal. 349, 99 Am. Dec. 278; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100. Any interruption of the adverse possession within the required five years prevents the acquisition of the title by prescription. Cave v. Crafts, 53 Cal. 136; Thomas v. England, 71 Cal. 456, 12 Pac. 491; Bree v. Wheeler, 129 Cal. 145, 61 Pac. 782; Hamilton v. Southern Nev. G. & M. Co. (C. C.) 33 Fed. 562.

It is shown by the testimony of the respondents themselves that the predecessors in interest of plaintiff went upon the Rosamond claim from time to time during the five years preceding the commencement of the action and conducted quite extensive mining operations there. While Hamilton protested against their presence upon the claim and asserted title in himself, his protests were not heeded, and the work continued. It is clear that Hamilton's possession was neither exclusive nor uninterrupted for the period required by statute to vest title in him.

Inasmuch as a general verdict imports

findings in favor of the prevailing party upon all material issues, we must assume that the jury found in favor of Hamilton on his claim under prior locations, as well as his plea of title by prescription. In fact, in answer to a special issue, the jury found specifically that the first location on the Rosamond was made by Hamilton on October 26, 1897. Either defense was sufficient in law to entitle the defendant Hamilton to judgment. If, then, either was sustained by the evidence and was not affected by any error, the want of evidence to sustain the finding on the other defense or any errors committed in regard to it could not have been prejudicial. Crosett v. Whelan, 44 Cal. 200; Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, 47 Pac. 364, 778.

The facts shown with reference to the locations of the various claims covering the ground included in plaintiff's Rosamond are as follows: Plaintiff offered evidence tending to show that on the 6th day of November 1897, Charles A. Graves and E. C. Johnson, plaintiff's predecessors in interest, located plaintiff's Rosamond by posting thereon a notice which was thereafter recorded and by distinctly marking the claim on the ground so that its boundaries could be readily traced. There was also evidence tending to show that the locators and their successors in interest had thereafter continuously done work upon the claim. On the other hand, the defendants offered evidence sufficient to justify the jury in finding that Hamilton had at a prior date, to wit, on the 26th day of October, 1897, taken steps to locate the claims hereinbefore described under the names of the Lida, the Fay No. 1, and the Hamilton Rosamond by posting notices of location upon said claims and distinctly marking the boundaries thereof after discovering upon each of said claims mineral bearing quartz in place. There is also evidence sufficient to show that after taking these steps Hamilton had continuously, up to the time of the commencement of the action, prosecuted work upon each of the locations. There had not been on his part a compliance with all of the requirements of the statute of 1897 prescribing the manner of locating mineral claims (St. 1897, p. 214, c. 159), nor, for that matter, had plaintiff's predecessors in interest complied with the requirements of that statute. Under these circumstances, the court instructed the jury that "mining locations made while the law of 1897 was in force, but invalid by reason of noncompliance with the provisions of that law, will be valid after the repeal of that law, providing the provisions of the mining laws of the United States have been complied with and there are no intervening rights before the repeal of that law, and provided, further, that the claim has been occupied, held, and worked up to the time of and after such repeal." This instruction was in accord with the rules laid down by this court in Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. (N. S.) 763. In that case it was held that a locator, entering upon unappropriated land of the United States while the act of 1897 was in force and performing all acts necessary to constitute a valid location under the laws of the United States and remaining in possession and working the claim until the repeal of the state statute (in 1899 or 1900), acquired upon the repeal of the state statute the rights incident to a valid location, notwithstanding his failure to comply with the requirements of the state law. Such was the situation of the defendant Dyer in the case cited, and there was sufficient evidence in the case at bar to justify the jury in finding that Hamilton occupied the same position with reference to the claim here in dispute. The evidence regarding Hamilton's possession of the Rosamond claim was, to be sure, sharply conflicting; but he did introduce testimony tending to show that he had continuously, up to and after the repeal of the law of 1897, prosecuted work under a system tending to the development of all three claims, and that a part of this work had been done within the boundaries of the Rosamond itself. This was enough to constitute possession of the entire claim to the extent of the visible boundaries. English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574; Dwinnell v. Dyer, supra. The court did not err in instructing the jury, in effect, that if Hamilton had on October 26, 1897, erected the first or initial monument at the place required by the state law and posted the required notices thereon and remained in possession of the claim, no other person could make a valid entry thereon for the purpose of making another location until Hamilton was in default. Under the state law the notice of location was required to be recorded in the office of the county recorder within 20 days after the posting thereof. Without passing upon the question whether the failure to record the notice within the required time worked a forfeiture (see section 6 of act of 1897), it must certainly be held that, within the 20 days allowed for recordation, the claim of the locator is valid, and no other entry can be made as the foundation or basis of a claim of title. This is the purport and effect of the instruction complained of. Assuming, as we must upon this appeal, that the jury found all controverted questions of fact in favor of the defendants, there is no basis for the claim that the doctrine of Dwinnell v. Dyer protects the plaintiff in its claim. The jury having found that Hamilton took the preliminary steps required to effect a valid location, and that he remained thereafter in possession of the claim, the predecessors of the plaintiff, in attempting to locate the same land within the 20 days allowed to Hamilton for recordation, were entering upon appropriated public lands in the possession of another. Such entry, as is well settled, confers no right to a valid location. Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735.

Various rulings of the court in admitting and rejecting evidence are assigned as error. We think that none of these affecting the issues concerning the ownership of the Occidental and the Kid claims were of sufficient consequence to justify a reversal. The witness Cochrane, one of the directors of the plaintiff, was asked on cross-examination whether the plaintiff paid for the assessment work that was done on the claims in 1904 by the Dry Process Company, which held under a contract with plaintiff. Over the objection of the plaintiff that the question was immaterial and irrelevant, he was permitted to answer that the plaintiff did not pay for such work. Whether or not the work was actually paid for was a fact entitled to no weight. Snyder on Mines, § 492. But the error in overruling the objection could not have harmed the appellant, inasmuch as the court instructed the jury that whatever work was done by the Dry Process Company in the year 1904 in connection with any of the mining claims claimed by plaintiff inured to the benefit of the plaintiff. It was proper to allow the same witness to testify that the mill which had been put up on the Home No. 1 by the Dry Process Company was of no value for the purpose of reducing the ore there found. This had a bearing upon the question of the good faith of the parties in making the expenditure, and their good faith was a matter proper to be considered by the jury in determining what amount of money had been expended in the development and working of the claims.

The court should have permitted the introduction of affidavits or proofs of labor made by the witnesses Cochrane and Donovan and duly recorded. Such proofs are by statute made prima facie evidence of the facts therein stated (St. 1891, p. 219, c. 155); but, inasmuch as both Cochrane and Donovan had testified fully and in detail to all of the material facts stated in their respective affidavits, no substantial injury could have resulted from the exclusion of their written declarations.

A more serious point arises in connection with the admission of evidence bearing upon the issues as to the locations of the Rosamond, the Lida, and the Fay. N. V. Gray, a witness for plaintiff, gave testimony tending to show that none of the locations claimed by Hamilton had actually been made as locations of quartz claims prior to November 8, 1897; but that all claims located by Hamilton theretofore had been located as placer claims. He further testified that at that time Hamilton had not located the Rosamond as claimed by him, and that the Lida, when located by Hamilton as a quartz claim, was bounded on the south by plaintiff's Rosamond already located by plaintiff's predecessor in interest, Charles A. Graves. This testimony, if true, established clearly that Graves, and not Hamilton, was prior in time in the location of the Rosamond, and that he and his successors, if remaining in possession and working the claim until the time of the repeal of the state law, were entitled to hold the same under the rule declared in Dwinnell v. Dyer. The defendants undertook to impeach Gray by proof of contrary statements made by him to one Moffett. With a view to such impeachment, Graves was asked upon cross-examination whether or not he had made certain statements to Moffett. The questions did not specify, as required by section 2052 of the Code of Civil Procedure, the time and place of the alleged conversations or the persons present thereat. Objection was duly made upon the ground that the proper foundation had not been laid. This objection was, however, overruled, and the witness answered denying the alleged statements. The substance of the matter alleged to have been stated by Gray to Moffett was that Graves had admitted to Hamilton that in locating the Rosamond he had located upon a claim belonging to Hamilton, and that he would take his papers off the claim, which he did. Moffett was subsequently called, and was permitted, over the objection of the plaintiff that no proper foundation had been laid for contradicting Gray in that regard, to testify that Gray had made the statements as claimed by defendants. This was error (Birch v. Hale, 99 Cal. 299, 33 Pac. 1088), and error that cannot be regarded as without prejudice to plaintiff. The statement by Gray that Graves had, at the time of the transaction, admitted locating his Rosamond claim upon ground already owned by Hamilton, had a strong tendency to throw discredit upon the testimony of Gray that Hamilton had never made any location of the Rosamond ground prior to Graves' location. But beyond all this, Moffett was permitted to testify, over the same objection, i. e., that no foundation had been laid, to statements made by Gray which had not in any way been called to the attention of the latter upon his cross-examination. One of these statements was to the effect that Hamilton had arrived at the mines one day ahead of Graves and placed his papers on the claim. This testimony clearly should not have been admitted. It is impossible to determine what effect it may have had on the jury, in leading it to its answer on the very material issue of priority in the location of the claims.

These errors, together with the insufficiency of the evidence to sustain the finding of title by prescription, will necessitate a new trial of the issues affecting the Rosamond.

The order denying a new trial is reversed as to the issues affecting the Rosamond (as claimed by plaintiff), and in all other respects it is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

On Modification of Judgment.

PER CURIAM. The appellant shall recover costs of this appeal against the respondent E. M. Hamilton; the amount of such costs to include the clerk's fee for filing transcript, together with such part of the cost of printing transcript as may by the trial court be fixed as the just proportion thereof made necessary by the issues hereby remanded for a new trial.

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157 Cal. 248

RATHBUN v. WHITE et al. (Sac. 1,716.)

(Supreme Court of California. Jan. 29, 1910. On Rehearing, Feb. 28, 1910.)

1. TRIAL (§ 235*)—INSTRUCTIONS—EFFECT OF EVIDENCE.

Where, in an action for injuries from an explosion, the evidence was conflicting whether, at the time of the explosion, defendant kept giant powder in his store, in violation of a municipal ordinance setting apart a tract, not including defendant's premises, as the exclusive territory in which giant powder might be stored, and plaintiff showed that giant powder had been in defendant's possession about a week before the explosion, and defendant showed that all the powder had been sold and removed before the explosion, an instruction that, if it was the custom of defendant, in his ordinary course of business prior to the explosion, to store giant powder, the jury could presume that the custom continued, unless defendant rebutted the presumption by a preponderance of evidence, was erroneous because plaintiff must prove the violation by a preponderance of the evidence, and defendant need only meet plaintiff's proof by evidence of equal weight.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539–548; Dec. Dig. § 235.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—ERROR IN ONE INSTRUCTION CURED BY ANOTHER.

The vice of the instruction was not cured by a general charge that plaintiff must establish the material allegations of the complaint by a preponderance of the evidence, for it at most only produced a conflict in the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–718; Dec. Dig. § 296.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.

Where the different instructions may not be harmonized, and it is impossible to determine which of the conflicting instructions was followed, the error in any of the instructions is prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–718; Dec. Dig. § 296.*]

4. EXPLOSIVES (§ 8*)—NEGLIGENCE—LIABILITY.

One complying with a municipal ordinance prescribing regulations for the storing of explosives is not relieved from liability for failure to comply with the obligations arising under the general rules of law to use such care in the maintenance and management of one's property as will be ordinarily used by a reasonably prudent man similarly placed.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

5. NEGLIGENCE (§ 108*)—PLEADING—SUFFICIENCY.

It is sufficient to charge negligence by the general averment that defendant negligently did the act which resulted in the damages complained of.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 175; Dec. Dig. § 108.*]

6. EXPLOSIVES (§ 8*)—INJURIES FROM NEGLIGENT STORING—RES IPSA LOQUITUR.

The explosion, during a fire in a store, of powder kept by the merchant in quantities dangerous to property and persons in the neighborhood raises a presumption of negligence, under the doctrine of res ipsa loquitur, and the burden of rebutting the negligence is on him.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

7. EVIDENCE (§ 249*)—ADMISSIONS—PARTNERS.

An admission, made by a partner after an explosion of powder on the firm premises, resulting in injury to a person lawfully there, is admissible against him; and, where the declaration was made in the course of the firm business, it is also admissible against the copartner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 965, 966; Dec. Dig. § 249.*]

8. EXPLOSIVES (§ 8*)—PERSONAL INJURIES—EVIDENCE.

One suing for personal injuries resulting from the explosion of gunpowder may show that the explosion caused the death of two bystanders occupying a position near him, to illustrate the violence of the explosion.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

9. TRIAL (§ 121*)—IMPROPER ARGUMENT OF COUNSEL.

Where, in an action for personal injuries from the explosion of gunpowder, the evidence showed that the explosion caused the death of two bystanders, the argument of plaintiff's counsel that defendant was guilty of manslaughter in causing the death of the two bystanders was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294–297; Dec. Dig. § 121.*]

10. EXPLOSIVES (§ 3*)—REGULATIONS FOR STORAGE—CONSTRUCTION.

A municipal ordinance, prohibiting the keeping in any one store of more than 50 pounds of gunpowder, and requiring the powder to be kept in a metal vessel, with the word "Powder" painted on the top or side, which top or side must be kept exposed to view, near the main entry of the store, does not require the box containing powder to be so located as to be visible from the street at times when, in the ordinary course of trade, the store is not open for business.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 1; Dec. Dig. § 3.*]

On Rehearing.

11. TRIAL (§ 253*)—INSTRUCTIONS—PRESUMPTIONS.

An instruction, directing the jury to presume the continuance of a course of conduct in violation of law, is erroneous because ignoring the presumption of innocence of wrong declared by Code Civ. Proc. § 1963, subd. 1, which overcomes, even in civil cases, that of the continuance of things once shown to exist, though the latter presumption is a proper matter for consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 618; Dec. Dig. § 253.*]

Department 1. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Harry Berton Rathbun against John C. White and others, copartners as White, Cooley & Cutts. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Richard Belcher and W. H. Carlin, for appellants. Brittan & Raish and Wallace Dinsmore, for respondent.

SLOSS, J. The defendants were conducting a hardware business in the city of Marysville. One of the buildings occupied by them, known as the tinning and plumbing shop, took fire on the 17th day of December, 1906. Plaintiff was a member of the fire department of Marysville, and was summoned to assist in extinguishing the fire. While he was engaged in this duty, and was stationed on the street in front of the tinning and plumbing shop, an explosion of powder kept by defendants in said building took place. The explosion was of such force as to demolish a part of the building and to inflict bodily injuries upon several persons standing near. Among these was the plaintiff, and he brought this action to recover damages for the injuries sustained by him. Trial resulted in a verdict and judgment in his favor for $2,000. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

At the time of the accident there was in force an ordinance of the city of Marysville regulating the manner of keeping and storing powder and other explosives. The ordinance by sections 1 and 3 set apart a certain tract (not including defendants' premises) as the exclusive territory within which Hercules, dynamite, or giant powder, or other similar explosives, might be stored or kept. Section 2 prohibited the keeping in any one store or building of more than 50 pounds of gunpowder. It further provided that "said gunpowder shall be kept in a strong metal vessel well secured and fastened and with the word 'Powder' distinctly painted upon the top or side of said vessel, such top or side to be kept exposed to view, and said vessel shall always be kept as near the main entrance of the store or building as is practicable."

The ordinance was set forth in the complaint, which alleged in paragraph 3 that the defendants "did negligently keep and store on said premises Hercules, dynamite, giant powder, gunpowder, and nitroglycerin, and other similar highly explosive substances, and also a large quantity of gunpowder, sporting powder, and blasting powder, to wit, more than 50 pounds, and not in a box with its top or side exposed to view, nor as near the main entrance of said building as practicable." It was further alleged in paragraph 7 that, while plaintiff was performing his duties as fireman "the said Hercules, dynamite, giant powder, gunpowder, nitroglycerin, and other similar highly explosive substances, and gunpowder, sporting powder, and blasting powder so stored and kept in said building on said premises, as alleged in paragraph 3 of this complaint, did explode. * * *" These allegations of the third and seventh paragraphs were denied. At the trial much testimony was introduced on the question whether the defendants had violated the ordinance, either by keeping Hercules, dynamite, or giant powder or other similar high explosives at all (their premises being without the territory where such keeping was permitted), or by keeping gunpowder in excess of the amount allowed, or without compliance with some of the required precautions.

There was a particularly sharp conflict over the question whether, at the time of the explosion, the defendants were keeping giant powder. The plaintiff offered testimony tending to show that giant powder had been in the defendants' possession about a week before the fire. The defendants, not disputing this, contended and offered evidence tending to show that all such powder had been sold and removed from their premises before the date of the explosion. The court, at the request of plaintiff, gave two instructions numbered 3 and 4 bearing upon this issue. It will be sufficient here to quote No. 4 (No. 3, so far as concerns the points to be discussed, was similar in general effect) as follows: "If you believe a preponderance of the evidence shows that it was the custom of defendants or their ordinary course of business, prior to the explosion, to keep or store giant powder or blasting powder in said plumbing and tinning shop building or any vessel therein, then I instruct you to presume that that custom and course of business of so keeping and storing such powder continued as long as it is usual for things of that nature to continue, unless defendants rebut this presumption by a preponderance of evidence." This was erroneous. In the first place, it directed the jury to presume that a course of conduct contrary to and in violation of law continued. There was thus ignored the counter presumption that the defendants were "innocent of crime or wrong" (Code Civ. Proc. § 1963, subd. 1), a presumption which as this court has said, overcomes, even in civil cases, that of the continuance of things once shown to exist. Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180. But, even if it can be said that the presumption arose as stated in instruction 4, the court was clearly in error in stating to the jury, in effect, that this presumption was to prevail unless the defendants should rebut it by a preponderance of evidence. The violation of the ordinance was a part of plaintiff's case. Before he could fasten on defendants any liability based on the ordinance, he was bound to establish its violation by a preponderance of the evidence. The affirmative of this issue might be shown by direct testimony, or by evidence giving rise to an inference or a presumption; but, in whatever way the plaintiff undertook to make this showing, the burden of proof was upon him, and the defendants were not called upon to do any more than to meet his proof by evidence of equal weight. If their showing merely balanced his, they were entitled to a finding in their favor. They were not required to overcome plaintiff's evidence by a preponderance, as this instruction declares. Upon the contrary, the plaintiff was required to sustain his side of the issue by a preponderance of all the testimony. This proposition is so elementary that it cannot be necessary to cite authority in its support. Indeed, the trial court recognized it in other instructions, in which it stated to the jury that the burden rested upon the plaintiff to establish by a preponderance of the testimony every material allegation of his complaint, and that if he failed to do so, the verdict must be for the defendants.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This instruction (No. 4) referred to a vital issue. If the defendants were keeping giant powder in their building at the time of the explosion, their liability for any injury caused by such explosion inevitably followed, inasmuch as the building was outside of the limits within which such powder might be stored. It is difficult to see how any instruction could have more directly prejudiced the case of the defendants than one which virtually required them to prove, by a preponderance of the testimony, that they were *not* storing giant powder. Nor was the vice of the instruction cured by the general direction that plaintiff must establish every material allegation of the complaint by a preponderance of the testimony. This produced, at most, a hopeless conflict between the various instructions. The different declarations of the court were not capable of being harmonized. In such case it is impossible to determine which of the conflicting rules presented to them was followed by the jury, and the error in any of the instructions must be deemed prejudicial. Estate of Cunningham, 52 Cal. 465; Sappenfield v. Main St. R. R. Co., 91 Cal. 48, 27 Pac. 590.

The ground just discussed will necessitate a reversal. Some of the other points raised may, however, arise upon a new trial, and with this in view they will be briefly noticed.

The defendants requested instructions directing the jury to return a verdict in favor of the defendants if they should find that the latter had in every respect complied with the ordinance. The court, however, modified such instructions by adding thereto the proviso "unless you should find that they negligently stored or kept the same [powder] in a way that directly, naturally, proximately, and materially contributed to said injuries." The defendants complain of these modifications. Considered as an abstract proposition of law, the rule declared by the court was unquestionably sound. The ordinance prescribed certain regulations that must be followed in the storing of explosives. It did not purport to, nor could it, declare that one who observed these regulations, but was otherwise negligent, should be free from liability. Compliance with the ordinance would not relieve from the obligation arising under the general rules of law to use such care, in the management of one's property, as would ordinarily be used by a reasonably prudent man similarly placed. It is contended, however, that the complaint was framed on the sole theory that the defendants had violated the ordinance, and that there was no issue concerning any other negligence. But it will be observed that the portions of the complaint hereinbefore quoted aver that the defendants *negligently* kept and stored Hercules, dynamite, giant powder, and gunpowder, and that the explosives *so kept* exploded. It is sufficient, under the rule well settled in this state, to charge negligence by the general averment that the defendant negligently did the particular act which resulted in damage to plaintiff. House v. Meyer, 100 Cal. 592, 35 Pac. 308; Stephenson v. S. P. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. It may be said that the complaint fails to allege that the negligent act charged (i. e., the keeping of the explosives) was the cause of the explosion and the consequent injury. Smith v. Buttner, 90 Cal. 95, 27 Pac. 29. It is perhaps equally defective in failing to allege any causal connection between the violation of the ordinance and the injury. But it is useless to pursue any discussion based on the form of the pleadings, since they may be amended in advance of another trial. The foregoing suggestions have been made with a view to indicating the propriety of requesting leave to so amend.

Plaintiff's instruction 8 directed the jury that the explosion of powder, kept by the defendants in such quantities as to be very dangerous to property in the neighborhood and to persons rightly in the neighborhood, raised a presumption of negligence, the burden of rebutting which would rest upon defendants. This application of the doctrine res ipsa loquitur was, we think, proper under the circumstances of the case. Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. Kleebauer v. Western Fuse Co., 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62, is not in conflict with this view. The trial court had there instructed the jury, in effect, that the defendant was liable for any injury resulting from the explosion, however caused, of powder kept in a place where, if exploded, it would be likely to injure or damage persons or property in the neighborhood. In other words, it made the person storing powder an insurer, and liable for damage resulting from an explosion, regardless of negligence. This was declared to be erroneous, but the decision did not question the doctrine of the Judson Case that the explosion of powder under the control of the defendant makes out a prima facie case of negligence which must be rebutted by the defendant. We do not understand instruction 8 as going any further than this.

Evidence of declarations, made after the accident by the defendant White, was certainly admissible against the declarant. If the statements were made in the course of the partnership business, they might also be properly introduced against White's copartners. Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141. On the facts disclosed by the bill of exceptions it is difficult for us to say whether White made the admissions in the course of the partnership business. The court below should, in the light of such showing as may be made upon a new trial, pass upon this question, and either admit the evidence generally, or limit its effect by proper direction to the jury.

We think plaintiff was entitled to show that the explosion resulted in the death of two bystanders, occupying a position near that of plaintiff. The extent of plaintiff's injuries was in issue and testimony tending to illustrate the force and violence of the explosion was relevant to this issue. The fact that others similarly situated had sustained injuries sufficiently severe to cause death had a logical tendency to support plaintiff's claim in this regard. Counsel for plaintiff should, however, have restricted himself in argument to such discussion of this fact as bore upon the purpose for which the evidence had been admitted. Statements that the defendants were guilty of manslaughter in causing the death of these two persons were manifestly improper. We are not, however, to be understood as saying that the remarks of counsel would, in and of themselves, furnish ground for a reversal.

The meaning of instruction 5, given at the request of plaintiff, is not quite clear. If the court intended thereby to construe section 2 of the ordinance as requiring the box containing powder to be so located as to be visible from the street at times when, in the ordinary course of trade, defendants' building was not open for business, we think it read into the section a restriction not justified by the language or the reasonable intent of the ordinance.

The foregoing discussion disposes of the important points that seem likely to arise upon a new trial.

The judgment and order appealed from are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

On Rehearing.

In Bank.

PER CURIAM. The petition for a hearing in bank after judgment in department is denied.

The opinion heretofore filed is modified, by striking therefrom the words: "This was erroneous. In the first place, it directed the jury to presume that a course of conduct contrary to and in violation of law continued. There was thus ignored the counter presumption that the defendants were 'innocent of crime or wrong' (Code Civ. Proc. § 1963, subd. 1), a presumption which, as this court has said, overcomes, even in civil cases, that of the continuance of things once shown to exist. Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180. But, even if it can be said that the presumption arose as stated in instruction 4"—and substituting therefor the following: "The presumption that 'a thing once proved to exist continues as long as is usual with things of that nature' (Code Civ. Proc. § 1963, subd. 32), was one that the jury was entitled to take into consideration in determining whether or not the defendants were, at the time of the explosion, keeping giant or blasting powder in contravention of the terms of the ordinance. Inasmuch, however, as the act charged against defendants constituted a violation of law, we think the jury should, in this connection, have been directed that they might consider also the presumption that 'a person is innocent of crime or wrong.' Code Civ. Proc. § 1963, subd. 1. The ultimate fact was to be determined upon a consideration of all of the evidence, including both presumptions. But, conceding that the presumption arose as declared in instruction 4," etc.

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157 Cal. 295

MORAN v. BONYNGE (GILMAN et al., Interveners). (L. A. 2,412.)

(Supreme Court of California. Feb. 7, 1910. Rehearing Denied March 9, 1910.)

1. PUBLIC LANDS (§ 144*)—STATE LANDS—RIGHT TO PURCHASE—CONTESTS—"ACTOR."

The rule that each party to a proceeding under Pol. Code, §§ 3414, 3415, to determine the right to purchase state lands, is an "actor" and must state in his pleading facts sufficient to show that he has some right to the land better than that of the adverse party, applies to one who is admitted as an intervener as well as to the original parties.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 394; Dec. Dig. § 144.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. PARTIES (§ 48*)—INTERVENTION—PROCEEDINGS.

The pleading of one admitted as an intervener, under Code Civ. Proc. § 387, because he has an interest in the subject-matter, an interest in the success of one of the parties, or an interest against both, must state facts sufficient to establish the right or interest which he claims, or he has no longer a standing in the court as a litigant where proper objection is made.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 75; Dec. Dig. § 48.*]

3. PUBLIC LANDS (§ 144*)—STATE LANDS—RIGHT TO PURCHASE—QUALIFICATION OF PURCHASER.

In an action under Pol. Code, §§ 3414, 3415, to determine the rights to purchase state lands, a complaint in intervention by one claiming as assignee of a third person must show that the third person was a qualified purchaser under Pol. Code, § 3495 (St. 1885, p. 207), by showing that he was a citizen of the United States, or that he had filed a declaration of intention to become a citizen, and that he was a resident of the state, and was of lawful age, etc.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 392, 394; Dec. Dig. § 144.*]

4. PUBLIC LANDS (§ 144*)—STATE LANDS—RIGHT TO PURCHASE—QUALIFICATION OF PURCHASER.

An averment, in a pleading to determine rights to purchase state lands, that one made application in due form to purchase from the state, and without stating that any affidavit was made or filed in the Surveyor General's office, is insufficient.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 392, 394; Dec. Dig. § 144.*]

5. PUBLIC LANDS (§ 144*)—STATE LANDS—RIGHT TO PURCHASE—QUALIFICATION OF PURCHASER.

The fact that the Surveyor General received 20 per cent. of the purchase money on a purchase of state lands, and issued a certificate, does not excuse a party relying on a purchase from alleging facts necessary to show a valid application.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 392, 394; Dec. Dig. § 144.*]

6. PUBLIC LANDS (§ 144*) — STATE LANDS — RIGHT TO PURCHASE — QUALIFICATION OF PURCHASER.

To show a right to purchase 640 acres of state lands, it is necessary to allege that the land was not suitable for cultivation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 392; Dec. Dig. § 144.*]

7. PLEADING (§ 8*)—PLEADING CONCLUSIONS—RIGHT TO PURCHASE STATE LANDS—QUALIFICATION OF PURCHASER.

An averment, in a pleading in a proceeding to determine the rights to purchase state lands, that an application was in due form, and that the applicant became the purchaser and entitled to the possession of the land and to receive a patent therefor in due course, is a mere conclusion of law, and insufficient as against a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 24; Dec. Dig. § 8.*]

8. PLEADING (§ 8*)—PLEADING CONCLUSIONS—RIGHT TO PURCHASE STATE LANDS—QUALIFICATION OF PURCHASER.

An averment, in such a pleading, that a certificate of purchase in due form was issued, is a mere conclusion of law, and is not the equivalent of an averment of the facts necessary to show a valid application to purchase.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 24; Dec. Dig. § 8.*]

9. PARTIES (§ 48*)—INTERVENTION—SUSTAINING DEMURRER TO COMPLAINT IN INTERVENTION—EFFECT.

Where the demurrer to the complaint in intervention was properly sustained, the intervener ceased to have any interest in the subsequent proceedings, and he could not object to the sufficiency of the findings and to the judgment declaring the rights of the other parties to the litigation.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 75; Dec. Dig. § 48.*]

10. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—SUSTAINING DEMURRER.

Where a complaint in intervention is fatally defective, any irregularity in entertaining and ruling on demurrer thereto is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4090, 4092, 4093; Dec. Dig. § 1040.*]

11. APPEAL AND ERROR (§ 918*) — PRESUMPTIONS—ABSENCE OF BILL OF EXCEPTIONS.

Where the complaint in intervention was fatally defective, the court on appeal must presume that the refusal of leave to amend was fully justified, in the absence of any bill of exceptions or any facts to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3710–3712; Dec. Dig. § 918.*]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by T. L. Moran against Mary A. Bonynge, in which Charles H. Gilman and another intervene. From a judgment for defendant, the interveners appeal. Affirmed.

F. D. Brandon and R. P. Henshall, for appellants. George E. Whitaker, Frank H. Short, and Hunsaker, Britt & Fleming, for respondent Bonynge. J. R. Dorsey and Charles G. Lamberson, for respondent Moran.

SHAW, J. The plaintiff's complaint states a cause of action, under sections 3414 and 3415 of the Political Code, to determine the respective rights of the plaintiff and defendant to purchase certain state lands. The contest was referred to the superior court by the State Surveyor General. The defendant appeared and answered setting up and claiming a right to buy the land under a prior application and certificate of the Surveyor General. Gilman and two others obtained leave of court and filed a complaint in intervention, in which they claimed the right to purchase the land, which included an entire section of 640 acres, under a Surveyor General's certificate antedating the claims of both plaintiff and defendant. Demurrers to this complaint filed by both plaintiff and defendant were sustained by the court without leave to amend. No order dismissing the intervention was made. Thereafter there was a trial of the contest between the plaintiff and the defendant, and judgment was given that the plaintiff take nothing, and that the defendant, Mary A. Bonynge, was entitled to purchase the land covered by her certificate. The interveners appeal from this judgment.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The record consists solely of the judgment roll. The only point that need be noticed is the alleged error in overruling the demurrers to the complaint in intervention.

It has long been settled that each party to a proceeding of this character is an actor and must state in his pleading facts sufficient to show that he has some right to the land better than that of the other parties; that if he claims as a purchaser from the state he must allege the facts necessary to give him a right to purchase the land from the state, paramount to the right of his adversaries. Cadierque v. Duran, 49 Cal. 357; Ramsey v. Flournoy, 58 Cal. 261; Aurrecoechea v. Sinclair, 60 Cal. 549; Dillon v. Saloude, 68 Cal. 270, 9 Pac. 162; Cushing v. Keslar, 68 Cal. 477, 9 Pac. 659; Gilson v. Robinson, 68 Cal. 543, 10 Pac. 193; Reese v. Thorburn, 78 Cal. 117, 20 Pac. 131; Prentice v. Miller, 82 Cal. 573, 23 Pac. 189; Anthony v. Jillson, 83 Cal. 300, 23 Pac. 419; Dollenmayer v. Pryor, 150 Cal. 4, 87 Pac. 616. In Cadierque v. Duran, supra, it is said: "When a contest originating in the Surveyor General's office, in relation to the right to purchase lands from the state, is referred to the proper court for determination, if all the parties are applicants for the purchase, each must state, in his pleadings, all the facts upon which he relies as showing his right to become the purchaser, and the steps he had taken to avail himself of and secure his right to make the purchase. If one of the parties merely protests against the approval of the application of another party, he must state the facts constituting the grounds of the contest, as, for instance, that he has acquired the title from the United States, or that he has the right of pre-emption, stating the facts upon which his right is based."

This rule applies to one who is admitted as an intervener as well as to plaintiffs and defendants. An intervener must have an interest in the subject-matter, an interest in the success of one of the parties, or an interest against both, or he cannot be admitted as a party. Code Civ. Proc. § 387. When he is admitted, the pleading which he presents and files must state facts sufficient, if true, to establish the right or interest which he claims; else he has no longer a standing in court as a litigant, if proper objection is made. He stands upon the same footing in this respect as the other parties.

The interveners claim solely as assignees or transferees of one S. Davis. The allegations of the complaint in intervention concerning the right of Davis are as follows: "(2) That on or about the 1st day of August, 1888, one S. Davis made application in due form to purchase from the state of California the land and premises above described, and then paid to the state of California twenty (20) per cent. of the purchase price of such lands, and the first year's interest in advance upon the balance of such purchase money, together with the deposit and filing fee as required by law, and thereafter received from the state of California a certificate of purchase in due form for said lands, dated on the 20th day of March, 1889, and No. 11,487, whereby said S. Davis became the purchaser and entitled to the possession of said land and to receive a patent therefor in due course."

This does not aver that Davis was a citizen of the United States, or that he had filed a declaration of intention to become a citizen, nor that he was a resident of the state, nor that he was of lawful age, nor that there was at the time no adverse occupation of the land, nor that the land was not susceptible of cultivation, nor that Davis had not entered other lands of the same class, which, with the land applied for, would exceed 640 acres. All these facts were necessary to show that Davis was a qualified purchaser, as the law stood at and ever since the time of his application. Pol. Code, § 3495; St. 1885, p. 207. It does not state that any affidavit was made or filed in the Surveyor General's office, but merely avers that Davis "made application in due form to purchase from the state." In Reese v. Thorburn, supra, this was declared to be insufficient as a statement of fact; the court saying: "The facts must be set out in the complaint so that the court can discern that the application is in due form of law, or rather that it complies with the requirements of the law." See, also, Hildebrand v. Stewart, 41 Cal. 392; Woods v. Sawtelle, 46 Cal. 391; Botsford v. Howell, 52 Cal. 158. The fact that the Surveyor General received 20 per cent. of the purchase money and issued a certificate does not excuse the interveners from alleging the facts necessary to show a valid application. Woods v. Sawtelle, supra. It was necessary to allege that the land was not suitable for cultivation, in order to show a right to purchase 640 acres. Polk v. Sleeper, 143 Cal. 73, 76 Pac. 819; Manley v. Cunningham, 72 Cal. 243, 13 Pac. 622. It was also necessary to aver the facts which would make Davis a qualified purchaser. Polk v. Sleeper, supra. The complaint in intervention on these subjects states only that the application was "in due form," and that Davis "became the purchaser and entitled to the possession of said land and to receive a patent therefor in due course." These are bare and general conclusions of law, wholly insufficient in a pleading when challenged by a demurrer. The demurrers were properly sustained.

The interveners cite Bieber v. Lambert, 152 Cal. 562, 93 Pac. 94, and claim that it holds contrary to the above authorities. They misapprehend the effect of that case. It discusses and declares only the effect of the recitals of the certificate of purchase as evidence, when it is given in evidence upon the trial; and what was there said has no bearing whatever upon the question of the sufficiency of a complaint when attacked by general demurrer. Moreover, the complaint of the intervener does not set forth the contents of the certificate, but merely avers that "a certificate of purchase in due form" was issued. This also is a conclusion of law, and clearly not the equivalent of an averment of the facts necessary to show a valid application to purchase.

The demurrers having been properly sustained, the interveners ceased to have any interest in the subsequent proceedings, and their objections to the sufficiency of the findings, and to the judgment declaring the rights of the other parties, are without avail. It being settled that they had no right to purchase, their right to be heard on other points in the case terminated. Ramsey v. Flournoy, supra.

It is also asserted that the demurrers to the complaint were not properly served. Waiving the point that there is no bill of exceptions, and hence that the lack of proper service does not appear in the record before us, it is a sufficient answer to this claim to say that the complaint in intervention is fatally defective, and that this renders any irregularity in entertaining and ruling on the demurrer entirely harmless. We must regard the refusal of leave to amend as fully justified, since there is no bill of exceptions, nor any facts to show the contrary. Incidentally we note that the respondent states in her brief, and appellants do not deny it, that the right of Davis to purchase the land from the state, by virtue of the certificate issued to him, was foreclosed by the judgment of the superior court of Kern county in 1892, and that this judgment has become final. See People v. Davis, 143 Cal. 673, 77 Pac. 651, where the case was finally determined on appeal to this court. Doubtless the court below had its former judgment in mind when it refused leave to amend.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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12 Cal. App. 219

DI VECCHIO v. LUCHSINGER et al.
(Civ. 688.)

(Court of Appeal, First District, California. Dec. 17, 1909.)

1. LANDLORD AND TENANT (§ 128*)—LIABILITY OF TENANT.

Where a tenant in a lease of flats, which provided that, until the lessees in possession under monthly tenancies on the date of the execution of the lease, July 27, 1906, should vacate the premises, the lessor would allow the tenant a rebate of a specified sum per day not beyond November 1, 1906, and that on failure of such lessees to vacate, the tenant should take possession with knowledge that the flats were occupied, and one of the lessees retained possession until June 1, 1907, under the claim that he was a tenant for a year, when he was in fact a tenant from month to month, the loss resulting from the failure to oust the lessee must fall on the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 128.*]

2. FRAUD (§ 66*)—SPECIAL FINDINGS—GENERAL VERDICT—INCONSISTENCY.

Where, in an action by a tenant for false representations inducing the execution of the lease, the tenant relied on the theory that a lessee in possession at the time of execution of a lease was a tenant for a year, and not from month to month, as represented by the lessor, and the jury specially found that such lessee was not a tenant for a year, a general verdict for the tenant could not be sustained because it was inconsistent with the special finding, since under Code Civ. Proc. § 625, a special finding inconsistent with a general verdict controls.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 66.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Ermenegildo Di Vecchio against George H. Luchsinger and others. From a judgment for plaintiff, defendants appeal. Reversed, with directions.

Alexander D. Keyes, for appellants. Edmund Tauszky, for respondent.

KERRIGAN, J. This is an action for damages for false and fraudulent representations made to induce the execution of a lease. The appeal is from the judgment in favor of plaintiff, taken more than 60 days after its entry, and from an order denying defendants' motion to vacate the judgment, and to direct the entry of a judgment in favor of defendants.

On July 27, 1906, the defendants, George H. Luchsinger, Alvina L. Goodrich, Rose A. Buckingham, and their sister Annie L. Summerhayes, since deceased, leased to the plaintiff certain premises on Golden Gate avenue in San Francisco, consisting of three flats, for the term of five years commencing August 1, 1906, at a monthly rental of $200, payable in advance on the first day of each month. At the date of the execution of the lease each of the flats was in the occupancy of a tenant of the lessors, and the lease provided that until the tenants should vacate the premises the lessors would allow the lessee a rebate of $2.75 per day from the beginning of the lease until the last occupant should vacate, provided, however, that such rebate should not extend beyond November 1, 1906, whether said occupants vacated the premises or not. The lease further provided that the premises were taken subject to the tenancies of the occupants; that in the event said occupants failed to surrender peaceable possession of the premises by September 1, 1906, actions were to be commenced as soon as possible for the purpose of ejecting them, the actions to be in the names of the lessors, but at the expense of the lessees, and they were to be prosecuted with due diligence.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The tenants occupying the lower and middle flats vacated in due time, but one Mrs. Kaiser, who claimed to be a tenant of the upper flat for a year from June 1, 1906, actually remained in possession of it until June 1, 1907.

On October 11, 1906, plaintiff leased the middle and upper flats for the remainder of his five-year term at $164 per month, with the understanding that the tenants were not to pay rent for the upper flat until they obtained possession. They had been informed that Mrs. Kaiser was a tenant from month to month. It was further stipulated in the lease that, as soon as possession of the upper flat could be had, it would be given to them; that in the meantime they could take the middle flat and pay therefore $77 a month. This they did. Between the date of the lease last mentioned and July, 1907, rents depreciated from 15 to 20 per cent., and when Mrs. Kaiser finally vacated the upper flat the subtenants refused to accept possession under their lease, whereupon a new lease was made to them, by the terms of which they were to pay plaintiff $128 per month, instead of $164. It is alleged in the complaint that at the time of the execution of the lease to plaintiff, and prior thereto, the lessors represented to him that Mrs. Kaiser was a tenant from month to month at a monthly rental of $42.50, but that in truth and in fact she was a tenant of said premises for the term of one year beginning June 1, 1906, at a monthly rental of $37.50. In their answer defendants admitted that they had informed plaintiff that Mrs. Kaiser was a tenant from month to month at a monthly rental of $42.50, but they denied that the statement was false as charged, or that it was known to them, or any of them, to be false. On the contrary, they alleged that Kaiser was a tenant from month to month at said monthly rental, and did not have a lease for a year. The jury returned a general verdict in favor of plaintiff, assessing the damages at $1,000, for which sum judgment was entered against defendants.

Plaintiff took possession of the premises with knowledge that the three flats were occupied, and if Mrs. Kaiser was not a tenant for one year, but from month to month only, the failure to oust her was the misfortune and loss of plaintiff. The theory upon which the complaint was drawn, and upon which plaintiff's case was tried, was that Mrs. Kaiser was in possession under a lease for one year from June 1, 1906, and was not a tenant from month to month. In harmony with this theory the court instructed the jury "that the plaintiff cannot recover unless he has proved, by a preponderance of evidence, that L. Kaiser was a tenant of the premises No. 955 Golden Gate avenue for a term of one year from the 1st day of June, 1906, to the 1st day of June, 1907, at a monthly rental." The case was tried prior to the amendment of 1909 to section 625 of the Code of Civil Procedure; and, at the request of the defendants, the court submitted to the jury, among others, the following question: "Was L. Kaiser, on the 27th day of July, 1906, in possession of the flat No. 955 Golden Gate avenue, in the city and county of San Francisco, under a lease from the defendants for a term of one year from the 1st day of June, 1906, to the 1st day of June, 1907, at a monthly rental?" To this interrogatory the jury answered, "No."

Defendants contend that the general verdict in favor of the plaintiff and the special verdict are inconsistent, and that the court should have granted the motion to direct the entry of judgment for the defendants. We agree with this contention. It will be observed that the interrogatory just mentioned went only to the duration of Mrs. Kaiser's lease, and did not embrace the question of the amount of the monthly rent, whether it was $37.50 or $42.50. But no evidence was introduced to sustain this issue, and it is wholly immaterial, and so conceded by defendants. The gravamen of the action was whether Mrs. Kaiser was a tenant from month to month only, or under a lease for one year. There is no merit in the suggestion of plaintiff that, notwithstanding that the jury found specially that Mrs. Kaiser was not a tenant under a lease for a year at a monthly rental, they may have believed she was a tenant for the term mentioned at a yearly rental, because it is admitted by the pleadings that she was in possession under a monthly rental. There is no escape from the conclusion that the special findings are inconsistent with the general verdict in favor of the plaintiff, and therefore judgment should have been entered in favor of the defendants. "Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." Section 625, Code Civ. Proc. See, also, McAulay v. Moody, 128 Cal. 202, 60 Pac. 778.

This point disposing, as it does, of the case, it will be unnecessary to review the many other points discussed in the briefs.

The judgment is reversed and the court below directed to enter judgment upon the special finding referred to in favor of the defendants and against the plaintiff.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 207

FUJISE et al. v. LOS ANGELES RY. CO.

(Civ. 730.)

(Court of Appeal, Second District, California. Dec. 16, 1909. Rehearing Denied by Supreme Court Feb. 14, 1910.)

1. Negligence (§ 65*)—Personal Injury—Contributory Negligence.

The contributory negligence which will prevent recovery of damages for a personal injury must be that of the injured person or some one he controlled.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 83, 94; Dec. Dig. § 65.*]

2. Negligence (§ 65*)—Contributory Negligence—Relief from Liability—Reason for Rule.

The reason for the rule relieving one from payment of damages for negligence, where the injured party is guilty of contributory negligence, is based on the impossibility of successfully apportioning the damages, and not merely because the injured party contributed to the result by his own negligence or wrongful act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 83, 94; Dec. Dig. § 65.*]

3. Negligence (§§ 92, 93*)—Imputed Negligence—Carrier and Passenger—Driver and Occupant of Private Vehicle.

The rule of imputed contributory negligence does not apply to a passenger in a public conveyance, or to one invited to ride in a private conveyance; and neither is chargeable with the negligence of the driver.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 142–150; Dec. Dig. §§ 92, 93.*]

4. Negligence (§ 92*)—Imputed Negligence—Carrier and Passenger.

There is no distinction in principle whether a passenger be on a public conveyance, like a railroad train, or on an omnibus, or be on a hack hired from the public stand on the street for a drive, and those on the hack do not become responsible for the driver's negligence, if they exercise no control further than to indicate the route they wish to travel, or the places to which they wish to go.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 142–146; Dec. Dig. § 92.*]

5. Carriers (§ 325*)—Contributory Negligence—Care Required Against Negligence of Another.

The rule against imputed contributory negligence does not absolve a passenger or guest against using ordinary care for his own safety, as no one can be allowed to shut his eyes to danger in blind reliance on the unaided care of another, without assuming the consequences.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1348; Dec. Dig. § 325.*]

6. Negligence (§ 136*)—Contributory Negligence—Question for Jury.

Whether a person injured in a conveyance has been guilty of contributory negligence in a case wherein there was contributory negligence by the driver not imputable to him is chiefly a question of fact, and whether the injured party used ordinary care must be determined by the jury from the circumstances of each case.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333–346; Dec. Dig. § 136.*]

7. Street Railroads (§ 117*) — Collision With Car — Contributory Negligence — Matter of Law.

In an action for death of woman riding with an expressman, and killed in collision with a car which overtook them from the rear, it cannot be said as matter of law that her failure to ascertain the car's position before turning across the track was contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 255–257; Dec. Dig. § 117.*]

8. Street Railroads (§ 119*) — Collision with Car — Action for Death — Special Finding — Consistency with General Verdict.

In an action for the death of a woman killed while riding with an expressman in collision with a car which overtook them from the rear, a finding that she failed to look was not inconsistent with implied finding of the general verdict for plaintiff that it was unnecessary for her to look in exercising ordinary care for her own safety amid the circumstances in which she was placed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 270; Dec. Dig. § 119.*]

9. Street Railroads (§ 119*) — Collision with Car — Action for Death—Special Finding — Consistency with General Verdict.

A finding that she did not exercise any care or caution whatever in ascertaining the approach of the car, or to avoid the collision, was not inconsistent with the implied finding in the general verdict that she was not required to exercise any care prior to the collision, her negative reliance on the driver being sufficient.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 270; Dec. Dig. § 119.*]

10. Trial (§ 365*)—Special Finding—Construction.

In construing a special finding, the entire answer must be construed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871–874; Dec. Dig. § 365.*]

11. Negligence (§§ 122, 142*)—Special Finding—Inconsistency with General Verdict—Absence of Evidence.

The burden of showing contributory negligence rests on defendant, and a finding that there is an absence of evidence on this issue cannot be regarded as inconsistent with the general verdict in plaintiff's favor.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 229; Dec. Dig. §§ 122, 142.*]

12. Trial (§ 351*)—Verdict—Special Interrogatories—Time for Requesting.

The analogy between a request for instructions and a request for submission of special interrogatories is not so close as to justify application of the rule of practice, adopted in connection with the former, as to the time for presenting instructions.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 351.*]

13. Trial (§ 349*)—Verdict—Special Issues—Submission—Discretion of Court.

Submission of special issues to the jury rests largely in the discretion of the trial judge, where there is neither rule of practice nor statute relating to it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 824; Dec. Dig. § 349.*]

14. Trial (§ 359*)—Verdict—Special Finding—Nature Under Code.

Special findings by the jury, which parties are entitled to have under Code Civ. Proc. § 625, and which by that section control the general verdict, when inconsistent therewith, are not the special verdict of common-law practice, which must be sufficient to support a judgment, but their primary purpose is to determine whether the general verdict is against the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857–860; Dec. Dig. § 359.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

15. Trial (§ 352*)—Verdict—Special Findings—Form of Interrogatories.

Special findings are addressed to matters relevant to the issues impliedly found in the general verdict, and are subject to the conditions that the questions shall be so framed as to admit of a plain and direct answer, and that answers favorable to the party preferring the request would be inconsistent with the general verdict for his adversary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840–842, 844, 845; Dec. Dig. § 352.*]

16. Street Railroads (§ 119*) — Special Questions—Questions Proper for Submission.

In an action for death of a woman killed while riding with an expressman in collision with a car which overtook them from the rear, the court refused to submit questions for special findings as to the motorman's care, requested by defendant, asking whether he sounded his bell and slowed down on approaching the wagon, at what speed he was moving when he first noticed it; whether the driver turned off the track when the car approached, and, if he did, whether he drove far enough to one side to enable it to pass without striking the wagon; whether the motorman was justified in increasing the speed in passing; whether, assuming that the wagon passed far enough to the right to pass the car, the motorman supposed he would be allowed to pass; whether the motorman sounded his gong to give warning that he was about to pass; whether the wagon after leaving the track, turned back across the track in such close proximity with the car that the collision could not have been avoided; and, finally, whether the motorman threw off his current and reversed his car and applied his brakes and tried to stop it. *Held*, that answers favorable to defendant would have been inconsistent with a general verdict for plaintiff, and hence failure to submit them was error.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 119.*]

17. Street Railroads (§ 85*)—Operation of Cars—Right to Use Street.

Street cars and citizens traveling in vehicles drawn by horses or other animals both have a right to use the street, but neither has the exclusive right.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193–195; Dec. Dig. § 85.*]

18. Street Railroads (§ 90*)—Operation of Cars — Collisions with Vehicles — Duty of Motorman.

A motorman is not bound to stop when he sees a man driving in a vehicle along the line ahead of the car, but may continue to run it in a proper manner till he discovers that the driver is unaware or heedless of his danger, when he must use all reasonable care to avoid a collision.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 90.*]

19. Street Railroads (§ 90*)—Operation of Cars — Collisions with Vehicles—Duty of Motorman.

Seeing one driving along the track ahead, a motorman may assume he will turn aside and out of the way, but cannot rest on the assumption till the car reaches a point where it will be impossible for him to control it, or give warning in time to prevent injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190–192; Dec. Dig. § 90.*]

20. Street Railroads (§ 112*)—Action for Negligence — Collision with Vehicle — Burden of Proof.

Where a motorman's alleged negligence consists of an omission of duty unexpectedly arising, as in case of a vehicle suddenly driven on the track, plaintiff must show that the motorman had an opportunity to become conscious of facts giving rise to the duty, and reasonable opportunity to perform it, before the company can be held liable for negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227–228; Dec. Dig. § 112.*]

21. Appeal and Error (§ 995*)—Review—Weight of Evidence.

An appellate court will not pass on the weight of evidence to reach a conclusion that uncontradicted evidence establishes a defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. § 995.*]

22. Trial (§ 260*)—Instructions—Request.

A party's instructions should not be refused, though the same legal propositions are practically covered by instructions given, but stated from the view point of his opponent, and lacking the directness of statement of his theory of the case shown in the instructions refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

23. Negligence (§ 92*) — Imputed Negligence—Driver of Express Wagon.

Where a public expressman drove one along an indicated route to a fixed place, to which she directed him to go, she did not assume such control over him that his negligence could be imputed to her.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 142–146; Dec. Dig. § 92.*]

24. Street Railroads (§ 118*)—Collision with Car — Action for Death—Instructions—Contributory Negligence.

In an action for the death of a woman killed while riding with an expressman in a collision with a car which overtook them from the rear, defendant was entitled to an instruction that she was required to use ordinary care for her own safety under the circumstances, but not that she must necessarily look or listen, or direct or attempt to control the driver, after having selected one whom she had a right to assume would be competent and prudent, and whom she had not found to be otherwise.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Savoro Fujise and another, by guardian ad litem and another, against the Los Angeles Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Gibson, Trask, Dunn & Crutcher, for appellant. Ernest E. Wood, for respondents.

TAGGART, J. Action brought by heirs of a deceased person to recover damages for her death alleged to have been caused by the negligence of defendant's employés in operating one of its street cars. Judgment was for plaintiffs for $2,000, and defendant appeals from the judgment and an order denying its motion for a new trial.

Plaintiffs are the husband and children, respectively, of Hideno Fujise, who, while riding in an express wagon on Central avenue in the city of Los Angeles, was thrown from the wagon by a collision between it and one of the defendant's street cars, which was operated upon a track along said street or avenue. The car approached and overtook the wagon from the rear. At the point where the collision occurred market wagons were ranged along either side of the street, engaged in loading with produce, and for this purpose were backed against the curb so that the heads of the horses extended out into the street, and the teams and wagons together occupied a large portion of the roadway between the curb and defendant's double tracks along the middle of the street.

The errors upon which appellant relies for a reversal of the judgment are: That the court erred in refusing to enter up judgment in its favor on the special verdict because it appeared therefrom that the decedent was guilty of contributory negligence, in refusing to submit to the jury certain special interrogatories requested by the defendant, and in giving and refusing to give certain instructions. It is also contended that the evidence fails to show negligence upon defendant's part, and does show contributory negligence upon the part of the decedent and the driver of the express wagon. Plaintiffs' cause of action rests upon the view that at all times after the motorman sounded his gong and the driver of the wagon discovered that he was in the way of the car it was impossible for him to turn out at the right side, and that, as soon as he found he would not be able to reach a place at which he could do this before the car overtook him, he attempted to turn off to the left and the wagon was struck. The driver, S. Igarashi, testified as follows: "I am in the express business for everybody who hires me. On the 8th day of August, 1907, I was taking Mrs. Fujise and her children to the train. I was driving a single wagon of ordinary size. * * * I was driving towards the south on the south side, on the right-hand side. The car came from behind in the rear. When I first saw the car, it was about 150 feet in the rear. I tried to turn on the right-hand side, but found so many wagons that I could not do that, and I turned on the left. The car hit the wagon pretty hard. It hit the rear of the wagon. When the car struck the wagon the position of Mrs. Fujise was turned, you know, turned like this (indicating), and then on that moment she was knocked down on the ground. She afterwards died. * * * When the car struck the wagon, Mrs. Fujise was sitting on the left and that boy (her little boy) was sitting on the right." On cross-examination he testified that the wheel which was struck was the one at the left side of the wagon in the rear, and that he heard the bell and looked back and saw the car. It was running pretty fast. The testimony of the other witnesses for plaintiffs sustained that of the driver of the wagon in substantially every particular.

The motorman's testimony discloses the defendant's theory of the accident. He said: "My car was going south on Central avenue. I saw this wagon driving ahead of me. It was on my track. The car would have hit it, if it had overtaken it. When I first noticed it, * * * the wagon was quite a ways up. I came up close to the wagon. When I got to what I thought a proper distance, I began sounding my gong, sounded it quite often, and threw off the power. I slowed my car down. * * * I rang my gong and applied my brakes. * * * The wagon pulled off to the right. I judged that it was clear of the track. There were a few wagons there on that side, not many. When he pulled off, I fed up again, expecting to go by, expecting him to give me the right of way. If he had stayed where he was, I would certainly have gone by, I am sure of that. When he pulled off down quite a ways, he came up to where there was another team backed up against the curb. I supposed he was going to give me the right of way, but he pulled his horse in a diagonal angle across my track. * * * When I saw him pull his horse's head toward the track, I throwed off again. * * * When he turned off (the first time), I fed up to five points (half speed). * * * I never had it at more than five points along there. When I saw him turn (to the left), I throwed off the power and put on the air. There was nothing else I could have done to stop. * * * I did everything I could as soon as I saw him turn. My car ran about three feet ahead after it hit the wagon. I then backed up. It did not do any damage to the wagon. Right-hand ride of fender hit the left hind wheel, between the felloe and the hub." As the testimony of the driver of the express wagon was corroborated by a number of witnesses who were standing near the scene on the ground, so that of the motorman was corroborated by quite a number of persons who were on the car, by all the passengers who testified at the trial, and it must be conceded that if their testimony had been believed by the jury, they would have found that the wagon was safe and clear from interfering with the car while on the right-hand side of the track, and that the motorman exercised due care in the management of his car when the wagon was turned suddenly across the track.

Defendant requested the trial judge to submit to the jury 27 special issues or questions, numbered consecutively from 1 to 21 and 2a, 14a, 14b, 14c, 14d, and 14e. The request was granted as to Nos. 1, 12, 13, 14, 14b, and 14d, and denied as to the others. The failure to give all of these was excepted to by appellant, who also contends that the answers given to questions 14 and 14b which were submitted entitle it to judgment on the verdict. These two questions were addressed to matters relating to the issue of contributory negligence on the part of the deceased.

In order that contributory negligence shall prevent the recovery of damages for a personal injury, it must appear that the negligence is that of the injured person or of some one over whom he exercised some control.

The foundation of the doctrine is said to rest in the civil law maxim: "The harm I bring upon myself I must bear myself." 1 Beven, Negligence in Law, p. 149. The reason for the rule which so relieves the defendant from the payment of damages for his negligence where the plaintiff has contributed to the injury by his own negligence, as it is applied in this state, is based upon an argument of convenience, to wit, the impossibility of successfully apportioning the damages between the parties, and not for the reason that the law relieves the defendant from responsibility merely because the injured party has contributed to the result by his own negligence or wrongful act. Needham v. San Francisco, 37 Cal. 409, 419. It is only the contributory fault of the injured party, or of some one whose fault is imputable to him, that can excuse the defendant. 1 Shearman & Redfield on the Law of Negligence (5th Ed.) § 65. In the jurisdictions in which this view of imputed contributory negligence has been adopted, it is held that the rule has no application to a passenger in a public conveyance, or to a person riding by invitation in a private conveyance, and that such passenger or person is not chargeable with the negligence of the driver of the conveyance in either case. 1 Thompson on Negligence, §§ 500, 501, 502; Shearman & Redfield, supra, § 57; 7 Am. & Eng. Ency. of Law, p. 447. There is no distinction in principle whether the passenger be on a public conveyance like a railroad train, or on an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on the hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel, or the places to which they wish to go. Little v. Hackett, 116 U. S. 366, 379, 6 Sup. Ct. 391, 29 L. Ed. 652. On the other hand, the rule does not absolve the passenger or guest from the duty of using ordinary care for his own safety. 1 Thompson on Negligence, § 503; Beach on Contributory Negligence (3d Ed.) § 115. No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care. Shearman & Redfield on Negligence, § 66a. Whether the injured person has been guilty of contributory negligence in a case of this kind is, as in other cases, one chiefly of fact, and whether or not he used ordinary care must be determined by the jury from the circumstances of each particular case. Of course, the acts to be done in the exercise of ordinary care in cases of this character are such as are peculiar to, and which may arise only in connection with, such cases, but the rule as to ordinary care is not changed or different on this account. Bresee v. Los Angeles Traction Co., 149 Cal. 131, 136, 85 Pac. 152, 5 L. R. A. (N. S.) 1059.

It cannot be said in this case as a matter of law that the failure of the deceased to look to ascertain the position of the car "before turning across the track," as found in answer to special interrogatory No. 14, was contributory negligence. As said by the Washington court in the case of Wilson v. Puget Sound Co., 52 Wash. 522, 101 Pac. 53, in relation to the driver of an automobile: "The deceased had a right to assume that the driver was competent, that he knew the capacity of his machine, and that he would not put it in a perilous position." The deceased must be presumed from her residence in Oxnard to have been less familiar with the congested condition of the business streets of Los Angeles, and of the effect thereof, than a public express driver, and in the absence of some unusual peril, apparent to her and not to him, or to which they were equal strangers, it will be presumed that she pursued the safer plan in letting the driver take care of his own horse. It may be stated as a truism that ordinarily two persons cannot drive or control the same horse, team, or vehicle at the same time. The finding that Hideno Fujise failed to look was not inconsistent with the implied finding of the general verdict that it was not necessary for her to look in exercising ordinary care for her own safety amid the surroundings in which she was placed. The finding in answer to special interrogatory No. 14b, "Prior to the collision between the said wagon and the said car, did the said Hideno Fujise exercise any care or caution whatever to ascertain the approach of said car or to avoid the collision?" to wit, "No, no evidence submitted," may be measured by the same rule; that is, that by the implied finding in the general verdict neither care nor caution was required to be exercised by her prior to the time the wagon was struck by the car. In other words, it may be said that the general verdict implied a counter finding that under the circumstances of the case she was not required to exercise any affirmative acts of caution prior to the collision; her negative reliance upon the driver being all that was necessary to constitute ordinary care. However, in construing this finding, we must consider the entire answer, which was, in effect "that there was no evidence of any acts upon her part tending to establish either care or want of care." The burden of showing contributory negligence rested upon the defendant, and a finding that there was an absence of evidence upon this issue cannot be regarded as inconsistent with a general verdict in favor of the plaintiff.

We do not regard the analogy between a request for instructions and a request for the submission of special interrogatories so close as to justify the application to the latter of a rule of practice adopted in connection with the former. Neither does the reason underlying the general rule of practice relating to the time for presenting instructions appear to us to apply with the same force to the matter of requesting special issues to be submitted. While we agree with respondents' position that this is a matter resting largely in the discretion of the trial judge where there is neither rule of practice nor statute relating to it, we are not prepared to say that under the circumstances of this case the trial judge was justified in refusing to submit these issues solely upon the ground that the request for submission was not made in time. It has been held that in the matter of presenting instructions for the jury where there is no rule in regard to the matter a party would have a right to submit his instructions at any time before the jury leaves the box. People v. Williams, 32 Cal. 280, 286. And even rules applying to such matters should be framed and applied in the furtherance of justice and not strictly adhered to where such adherence would work the opposite result. Page 287.

The special findings which the parties were entitled to have made by the jury under the provisions of section 625, Code Civ. Proc., as that section read and was interpreted when this case was tried, were not the special verdict of the common-law practice which must be sufficient to support a judgment, but their primary purpose was to determine whether the general verdict was or was not against law. Larsen v. Leonardt, 8 Cal. App. 226, 228, 96 Pac. 395. They were addressed to matters relevant to the essential issues impliedly found by the jury in reaching a general verdict, and were subject to two conditions: "(1) Is the question so framed as to admit of a plain and direct answer? (2) Would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary?" Plyler v. Pac. Cem. Co., 152 Cal. 125, 134, 92 Pac. 56, 60.

The questions which the court refused to give were intended to elicit from the jury findings of fact relating to the care exercised by the motorman. No. 2 related to his sounding the bell and slowing down his car upon approaching the wagon. There was no conflict in the evidence as to the ringing of the bell, the driver admitting that he heard the gong, and there was no denial of the motorman's statement that he slowed down his car. No. 3 asked at what speed the car was moving when the motorman first noticed the wagon. There was no substantial conflict in the evidence as to this. No. 4 inquired whether or not the driver of the wagon turned off the track to the right when the car approached. If the answer to this had been that "he did," then No. 5 was a request that the jury find whether he drove far enough to one side of the track to enable the car to pass without striking the wagon. If the answers to the last two questions justified the motorman in passing the wagon, then No. 6 requested the jury to answer whether he increased the speed of the car. Again, if the preceding question had been so answered that it might be assumed that the wagon passed far enough to the right to escape the car, No. 7 asked: "Did the motorman suppose that he would be given the right of way and allowed to pass the wagon?" Presupposing all these matters except the last to be answered in accordance with defendant's theory, No. 8 inquired: "Did the motorman sound his gong to give warning of the fact that he was about to pass said wagon?" No. 9, presupposing the same answers to the preceding questions, asked: "Was the said wagon turned back across the defendant's said track in such close proximity to the defendant's car that a collision could not have been avoided?" Based upon the assumption that all the preceding matters had been found in accordance with the evidence on behalf of defendant, No. 16 inquired: "State whether the motorman in charge of the defendant's car threw off his current and reversed his car and applied his brakes and tried to stop the same." Taken with the context—that is, with the series of questions and answers preceding them successively—we are of opinion that all of these questions were so framed as to admit of a plain and direct answer. While the answer to two or three of them taken alone might be immaterial, yet, if the whole series had been answered in favor of defendant, it is apparent that such answers would have been inconsistent with a general verdict in favor of the plaintiff. Considered together, they cover the entire defense of the defendant upon the issue of its own negligence. If all of these questions had been answered favorable to the defendant, and such answers were sustained by uncontradicted evidence, then the defense of "no negligence" would have been established as a matter of law. This rule is declared in substance by instruction Xa as given by the trial court.

The sum of the adjudicated cases bearing upon the relative rights of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but neither has the exclusive right. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of a railway ahead of the car; but he may continue to run the car in a proper manner until he is conscious of the fact that the driver is unaware or heedless of his danger. When he is thus conscious, it is his duty to use all reasonable care and diligence to avoid running the car into the vehicle. Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car, but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle. Galveston City R. R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Birmingham v. Bowers, 110 Ala. 328, 20 South. 345; Schneider v. Mobile Light Co., 146 Ala. 344, 40 South. 761. The law seems to be well settled that, where the alleged negligence of a motorman consists of an omission of duty suddenly and unexpectedly arising, such as driving a vehicle suddenly upon the track in front of the car without warning, it is incumbent upon the plaintiff to show that the circumstances were such that the motorman had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it before the railway can be held liable on the ground of negligence. Chicago, etc., v. Browdy, 206 Ill. 615, 69 N. E. 571; Hot Springs v. Hildreth, 72 Ark. 572, 82 S. W. 245, 247; Kessler v. Citizens' R. Co., 20 Ind. App. 427, 50 N. E. 891. While of the opinion that the defendant had a right to have the special interrogatories mentioned submitted to the jury, and the failure to do so was error, yet the inferences from the law and record leading to this conclusion do not necessarily sustain appellant's further contention that uncontradicted evidence establishes the defense of no negligence. To reach this conclusion it would be necessary for us to pass upon the weight of the evidence for the respective parties, and this an appellate court will not do.

The refusal of the trial court to give the other special interrogatories, which were addressed to the matter of the contributory negligence or want of care upon the part of the deceased and the driver, has not been especially urged, and so this matter is not passed upon; but, if any interrogatories of this kind are presented upon a new trial being had, it is important that they be addressed to the want of care peculiar to the facts of the case and conform to the doctrine of imputed negligence as hereinabove declared.

The giving of instruction No. 13, if given in the form in which it appears in the record, could not have prejudiced the defendant in any manner, but it is apparent from the language of the instruction itself that it was not given to the jury as printed. The absence of intelligent meaning justifies us in assuming that the learned judge who tried the cause never delivered to the jury such a medley of words, and so we accept the corrected version given by the respondents in their brief as the true instruction delivered. This was not erroneous.

Instruction 3, requested by the defendant, correctly declared the law in accordance with the authorities heretofore cited in discussing the right of the defendant to have certain special interrogatories submitted to the jury. If the jury believed the statement of the motorman, then their verdict should have been for defendant, and instruction 3 is but a request that the law to this effect be given. Instruction 8, requested by defendant, was but a repetition of 3 in a more succinct form. One only need have been given. The same legal propositions were practically covered by two instructions given by the court, but they were stated from the view point of the plaintiff and lacked the directness of statement of defendant's theory that was shown in the instructions refused. While the judgment would not be reversed for this reason alone, we are of opinion that the defendant was entitled to have had one or the other of these instructions given to the jury.

There was no error in the instructions of the trial judge in respect to contributory negligence which was to defendant's prejudice. These instructions were more favorable to the defendant than they should have been. The trial court framed its instructions in this respect upon the theory that the negligence of the driver was to be imputed to the deceased. Being a public expressman driving the deceased along an indicated route to a fixed place to which she directed him to go (the train), she did not exercise such control over him that his negligence could be imputed to her. Little v. Hackett, supra. The defendant was entitled to have the jury instructed that the deceased was required to use ordinary care for her own safety under the circumstances, but not that she must necessarily look or listen, or direct or attempt to control the driver after having selected one whom she had a right to assume to be competent, careful, and prudent, and whom she had not found to be otherwise. Bresee v. L. A. Traction Co., supra.

Judgment and order reversed, and cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

12 Cal. App. 335

FIRST NAT. BANK OF AUBURN v. SUPERIOR COURT OF LASSEN COUNTY et al. (Civ. 688.)

(Court of Appeal, Third District, California. Dec. 31, 1909.)

1. PARTNERSHIP (§ 210*) — RECEIVER — APPOINTMENT—GROUNDS—LEGAL RIGHTS.

Under Code Civ. Proc. § 564, subd. 6, providing for the appointment of receivers in all other cases where receivers have been appointed by usages of courts of equity, a receiver may not be appointed for a partnership in an action involving merely legal, as distinguished from equitable, rights, on a showing that the defendants were largely indebted, that their property was subject to labor liens, and would be better conserved by the appointment of receivers, etc.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 403; Dec. Dig. § 210.*]

2. RECEIVERS (§ 2*)—AUTHORITY TO APPOINT —STATUTES.

Code Civ. Proc. § 564, affords the sole authority for the appointment of receivers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. RECEIVERS (§ 31*) — APPOINTMENT — AUTHORITY—STIPULATION.

Where the court has no statutory jurisdiction to appoint a receiver, authority to do so cannot be conferred by consent or a stipulation of parties.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 44; Dec. Dig. § 31.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. PROHIBITION (§ 13*)—RECEIVERS—PROCEEDINGS—VACATION—RIGHT TO WRIT.

Where receivers, though illegally appointed for a partnership, had served for nearly a year without objection, and petitioner during that time, with knowledge of all the facts, took no steps to question either the legality or expediency of their appointment, and petitioner did not question either the good faith, conduct, or business ability of the receivers, and to vacate the proceedings would result in a dissipation and waste of the assets, petitioner was not entitled to a writ of prohibition for that purpose.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 62; Dec. Dig. § 13.*]

5. PROHIBITION (§ 10*) — RECEIVERS — VACATION OF PROCEEDINGS—WANT OF JURISDICTION.

Where irreparable injury is resulting from the unauthorized appointment of a receiver, and the injury is a continuing one, and there is no plain, speedy, and adequate remedy at law, a writ of prohibition, when seasonably sought, may be had as a writ of right to compel the vacation of the proceedings.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 48; Dec. Dig. § 10.*]

6. PROHIBITION (§ 13*)—RIGHT TO WRIT—NATURE OF REMEDY.

While a writ of prohibition is a legal remedy, it is somewhat similar to the equitable remedy by injunction against proceedings at law, and, being an extraordinary remedy, will not be issued for the purpose of being made an instrument of oppression or injustice or where it will cause a reckless waste of property.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 62; Dec. Dig. § 13.*]

7. RECEIVERS (§ 34*) — APPLICATION — INTERVENTION.

Where a receiver is applied for, other creditors of the debtor may intervene and oppose the appointment and appeal from an order erroneously granting it, as authorized by Code Civ. Proc. § 963.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 52; Dec. Dig. § 34.*]

8. CONTEMPT (§ 10*)—IMPROPER LANGUAGE IN BRIEFS.

A brief filed in the Supreme Court containing matter disrespectful to the trial judge is a contempt of the Supreme Court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 19–22; Dec. Dig. § 10.*]

9. CONTEMPT (§ 10*)—BRIEFS—STRICTURES ON TRIAL COURT.

Petitioner applied for a writ of prohibition to vacate receivership proceedings. The receivers were appointed by the predecessor of the judge who was sitting at the time the writ of prohibition was applied for; the latter having only been called on from time to time without objection to direct the receivers in the discharge of their duties. Petitioner's counsel referred to an order of the judge directing the receivers to deposit certain moneys as conditional security for plaintiff's judgment as without precedent in judicial annals and an original creation of the Lassen county court, and opera bouffe, and also stated that the court's administration through the receivers was a "most covetous and wholly unwarranted usurpation of power." Petitioner, with full knowledge of the receivership proceedings, had undertaken to levy an execution on property in the receivers' hands without notice to or permission of the court, having declined to act on the court's order for a deposit. *Held*, that such statements were improper, though counsel was permitted to purge himself by a frank disavowal of any intent to be disrespectful to the court or trial judge.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 19–22; Dec. Dig. § 10.*]

Application for a writ of prohibition to compel the vacation of an order appointing receivers for a corporation and setting aside the proceedings had thereunder. Writ denied.

J. D. Meredith and J. B. Landis, for appellant. Pardee & Pardee, for respondent. Cheney, Massey & Price, amici curiæ.

CHIPMAN, P. J. Prohibition. Plaintiff seeks the writ of this court restraining defendant from obstructing or nullifying the levy of execution issued out of the superior court of Placer county in an action entitled "The First National Bank of Auburn, Plaintiff, v. A. Shadboldt and E. L. Morse, Copartners, Defendants, upon the property of said defendant last named situated in Lassen county, or from a sale thereunder, or from any proceedings under said execution; also, that the order of said court commanding the release of the levy of said execution, and forbidding the sale of any of said defendant's property, be vacated and set aside.

It is set forth in the petition that plaintiff obtained judgment against said Shadboldt & Morse, in the superior court of Placer county, for the sum of $711.50, on June 28, 1909, and on September 28, 1909, execution duly issued out of said court, directed to the sheriff of Lassen county, commanding him to satisfy said judgment out of the property of the defendants in said Lassen county; that thereafter, to wit, on October 20, 1909, the said sheriff levied said execution upon the property named therein in accordance with instructions given him and gave notice that he would sell said property on October 29, 1909. It appears further that, prior to the commencement of said action by plaintiff, to wit, on November 27, 1908, one T. P. Crowder commenced an action in the superior court of Lassen county against the said Shadboldt & Morse for merchandise sold and delivered and for money loaned, amounting in all to $672; that in the complaint in said action, as ground for the appointment of a receiver therein, it was alleged as follows:

"(3) That said defendants are also largely indebted to numerous other persons, including a large number of laborers, on account of labor done and supplies furnished. That the claims of said laborers are all now due and payable, and the claims of nearly all other creditors are also past due. That the said defendants are the owners of a large quantity of lumber; and also own certain accounts against divers and sundry persons and corporations for lumber sold and delivered. That the lumber owned by the defendants is not in condition to be marketed at present, nor is there an immediate market for the same at a fair price. That the outstanding accounts owned by defendants for lumber sold are not yet due and collectible. That said defendants are not able at this time to pay and discharge their said indebtedness, nor are they able to carry on their business and meet their said obligations within a reasonable time. That various of their creditors, particularly the laborers, are in need of the moneys due to them; and it is probable that if some provision is not made for their payment liens will be filed and suits instituted by said laborers, and other creditors will be forced to bring actions for the sums due them. That a multiplicity of suits will result, and the assets of defendants will be wasted and the proceeds dissipated in costs and expenses of litigation. That it is for the best interests of all the parties in interest and of all of the creditors of said defendants that the said business and property should be placed in the hands and under the control of some competent person or persons to act as receivers or receiver, to take charge of said business and manage the same, and to convert the assets of said defendants into money and pay and discharge the claims of all creditors ratably and in conformity with the provisions of law.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"(4) That all of the persons having claims against said defendants for labor and services performed and rendered have agreed in writing that they will waive all their rights to file liens against the lumber belonging to said defendants, and assent to the appointment of O. M. Doyle and T. P. Crowder as receivers for said 'Long Valley Sawmill Company.' That it is the expressed desire of nearly all other creditors of defendants that said persons act as receivers in said matter. That said O. M. Doyle and T. P. Crowder are experienced in the sawmill business, having heretofore been engaged successfully in said business in Long Valley as the owners of the mill and plant now owned by defendants. That the defendants have signified in writing their consent that said O. M. Doyle and T. P. Crowder be appointed as such receivers, and this plaintiff hereby consents to such appointment."

And praying that O. M. Doyle and T. P. Crowder, plaintiff in said action, be appointed receivers therein, "with all the powers given to receivers by statute and the usual course and procedure of courts in equity, and that said receivers be required to apply all the moneys which shall come to their hands as such to the payment of legal claims against said defendants, ratably, and in accordance with law, giving preference to creditors whose claims are by law preferred."

On the same day, to wit, November 27, 1908, the court made the following order:

"In the Superior Court, County of Lassen, State of California. T. P. Crowder, Plaintiff, v. Alexander Shadboldt and Edward L. Morse, Copartners Doing Business Under the Firm Name and Style of the Long Valley Sawmill Co., Defendants. In the above-entitled action the plaintiff having made application to me as judge of said superior court for the appointment of O. M. Doyle and T. P. Crowder as receivers in said action, and it appearing to me from the verified complaint herein, and by other evidence, competent and relevant, submitted in support of said application: That plaintiff is a creditor of defendants, and that said action is brought to recover judgment against said defendants for the amount of said indebtedness, and to subject the property of defendants to the payment thereof; that said property of said defendants is in danger of being dissipated and lost; that it is for the best interests of the parties to this action and of all the creditors of said defendants that a receiver or receivers should be appointed to take charge of the business and property of defendants; that said O. M. Doyle and T. P. Crowder are fit and proper persons to be appointed such receivers; and that the consent in writing of the parties to this action for the appointment of said persons as such receivers has been filed with the clerk of this court: Now therefore it is hereby ordered that O. M. Doyle and T. P. Crowder, be and they are hereby, appointed receivers in this action, to take charge of all the property of said defendants, upon their taking the proper oath and executing an undertaking according to law in the sum of $2,500 to the said defendants and the creditors of said defendants. Dated this 27th day of November, 1908. F. A. Kelley, Judge."

The receivers duly qualified on December 10, 1908, and entered upon the discharge of their duties as such, took possession of all the property of said defendants and have ever since retained and now have exclusive possession thereof. It is further alleged that said action, in which said receivers were appointed, has never been brought to trial, and that petitioner "did not at any time consent to ratifying or approving the appointment of said receivers." It is further shown that petitioner, on September 24, 1909, applied by motion in said superior court of Lassen county for an order vacating its order appointing said receivers, "upon the ground that the said court had no jurisdiction to appoint said receivers and also for an order discharging said receivers and for other relief." Said motion was noticed to be heard on all the papers and records in the said action brought in Placer county and the records in the case in which the receivers were appointed and upon the affidavit of G. W. Brundage, cashier of the Auburn bank, petitioner here. In addition to facts already set forth, affiant deposes that neither the firm of Shadboldt & Morse nor the members individually have any property except that in Lassen county now in possession of the receivers, that they are solvent, and their assets exceed their liabilities by more than $3,000, and avers that the receivers are not managing the business to the best advantage of the creditors of said Shadboldt & Morse, but not specifying wherein there has been any failure of duty. It is then set forth that the Auburn bank, on July 6, 1909, obtained a judgment of foreclosure of a chattel mortgage against Shadboldt & Morse in the Lassen county court, for the sum of $2,000, that the mortgaged property was sold under execution pursuant to said judgment for $500, and a deficiency judgment docketed for the sum of $1,903.49, and no part of said last-named sum has been paid and is unsecured.

It appears from the answer of defendant that there was another motion made by the Auburn bank and heard at the same time as the motion last above mentioned, to wit, a motion for an order directing execution to issue out of the Lassen county court and directing the sheriff to levy upon the property of Shadboldt & Morse sufficient to satisfy the said judgment obtained in Placer county and the said deficiency judgment. The hearing of both said motions was reopened, on motion of the receivers, to permit them to offer further evidence in resistance thereof. This order of the court was made October 29, 1909, and said motions of petitioner in said matter have not been set down for hearing, for the reason, as is averred by respondent, that the alternative writ in this proceeding was served upon him a few days thereafter, to wit, November 2d, and as it involves a question of jurisdiction, also involved in said motions, it was deemed best to await the decision of this court. It further appears from the petition herein that upon motion of the receivers, after notice and hearing, to wit, on October 28, 1909, the defendant, respondent herein, made an order directing the sheriff to release the property levied upon by him on said Placer county execution and restraining him from levying upon said property or to sell the same or to execute any execution thereon.

Among the facts not already appearing, the answer sets forth the following: That the Auburn bank is not and never was a party to the action in which receivers were appointed, but that it had actual notice and knowledge of the pendency of said action "shortly after the 27th day of November, 1908," the date of the order appointing the receivers. That on the day of the hearing of the citation above mentioned, to wit, on October 28, 1909, directing the sheriff to release the levy made under petitioner's said judgment, the said receivers offered to "deposit with the court a sum of money sufficient to cover the full amount due to said bank under the judgment upon which said execution was issued, said amount to be held by the court as a special fund out of which the amount of said judgment shall be paid in full in case it shall finally be determined that said bank is entitled thereto," but said offer was rejected by counsel for the Auburn bank. That the court nevertheless made such order, and on October 29, 1909, said receivers made such deposit. It further appears that the Auburn bank obtained judgment in the Lassen county superior court for the foreclosure of its mortgage on certain personal property of Shadboldt & Morse, July 6, 1909, for the sum of $2,000, and on that day took out an ordinary execution and placed the same in the hands of the sheriff, who levied said execution upon the property embraced in the mortgage and sold the same, the bank becoming the purchasers thereof, for the sum of $500, and that thereafter, to wit, October 4, 1909, the bank procured the issuance of an order of sale in said foreclosure action and placed the same in the hands of the sheriff, who, on the 3d day of November, 1909, reported the sale of the same property, the bank becoming the purchaser, for the sum of $2,496. The return of the sheriff states: "Although the said party, the First National Bank of Auburn, took possession of the said property and allowed it to be removed from the place of sale, they refuse to pay the amount bid and claim that they hold a previous sale as the legal sale." It is further shown in the answer that between the dates of the two said sales the bank sold the said property for $2,500; that the bank, on September 30, 1909, caused an execution to issue on the deficiency judgment entered after the first sale, for $1,903.49, and placed the same in the hands of the sheriff, and, since the said resale of said property, has given directions to levy the same upon the sum of $800 deposited as aforesaid with the court, and said sheriff, on November 2, 1909, attempted to make such levy. It is also set forth that since their said appointment the receivers have, "under the direction of the court, taken charge of and conducted and carried on the business of the said defendants Shadboldt & Morse; have collected many outstanding accounts; have sold and converted into money considerable quantities of lumber; by authority of said court have paid all preferred labor claims; and under like authority have manufactured a large quantity of lumber, a considerable portion of which was manufactured to fill special orders and has been sold and disposed of, but some of which remains on hand and is of good merchantable quality." Further answer is made showing faithful performance of duty by the receivers; that they have advanced money which has not been repaid; that they have received no compensation thus far; that a considerable quantity of lumber is now piled at the track of the Western Pacific Railroad Company which can soon be moved to market and sold at fair value; "that, if said receivers are permitted to continue to manage the business of said Shadboldt & Morse, they will, in a short time, be able to dispose of all the property now in their hands at a price proportionate to its actual value, and from the proceeds thereof pay ratably to the creditors of said defendants a large percentage, if not the entire amount of their several claims. But defendant believes that if the petitioner herein is permitted to satisfy its alleged claims in full out of the property of said defendants by forced sale, there will be comparatively little, perhaps nothing, left for other creditors. Wherefore, defendant says that it is neither just, fair, nor equitable that said petitioner should be permitted to levy said executions, or either of them, upon any of the property in the hands of said receivers, but that in good conscience the petitioner should be paid ratably with other creditors. And that therefore the writ of prohibition prayed for ought not to be granted. It may be stated that the judge appointing the receivers is not the present judge of the Lassen county superior court.

We have set forth the facts very fully, for the reason that it is only through their just consideration that we are able to reach what appears to us to be a satisfactory conclusion. The only ground upon which the appointment could have originally rested is that the action of Crowder v. Shadboldt & Morse was one in which "receivers have heretofore been appointed by the usages of courts of equity." Subd. 6, § 564, Code Civ. Proc. It was said in San Jose Bank of Savings v. Bank of Madera, 121 Cal. 543, 54 Pac. 83, 270: "In such a case, involving merely legal, as distinguished from equitable, rights, the law does not authorize the appointment of a receiver" —citing Bateman v. Superior Court, 54 Cal. 285; Scott v. Sierra Lumber Co., 67 Cal. 76, 7 Pac. 131. In Smith v. Superior Court, 97 Cal. 348,[1] an action was brought against a railroad company upon its unsecured promissory notes, and the court held the action to be essentially one at law, and is not changed into a suit in equity, in which a receiver may be appointed, merely because the complaint contains allegations to the effect that the company is insolvent, and that other creditors are threatening to sue it, and that it has no property out of which the plaintiff will be able to satisfy any judgment it may obtain, and that the action is brought in behalf of the plaintiff and all other creditors of the company who are willing to come in as plaintiffs. The court held that the appointment of a receiver in such a case is unauthorized and void, and will be annulled on certiorari, if the proceedings are commenced in due time.

In Bateman v. Superior Court, 54 Cal. 288, which was an action in ejectment, the court said that, "if it had been intended to confer the power to appoint an officer of that character (a receiver) in an action at law for the recovery of the possession of real property, it is not credible that the Legislature would not have said so in terms, since it is apparent that it was their purpose to specify all cases, whether at law or equity, in which receivers could be appointed." We must look alone to section 564, Code Civ. Proc., for authority to appoint a receiver. French Bank Case, 53 Cal. 495; White v. White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. Rep. 150. Where the court has no authority to appoint a receiver, such authority cannot be conferred by consent or stipulation of the parties. Baker v. Varney, 129 Cal. 564, 62 Pac. 100, 79 Am. St. Rep. 140. See, also, Scott v. Hotchkiss, 115 Cal. 89, 47 Pac. 45.

If the question had properly come to us at the inception of the proceedings, we should have felt compelled to hold the appointment unauthorized. But there is something more to the case as it now stands than the naked question of power to make the appointment originally. The question now is: Must we, under the circumstances disclosed, order a revocation of the appointment regardless of the probable disastrous consequences to all the other creditors, that petitioner may be preferred to them and be made secure against possible loss? Must we wholly ignore what has happened since the appointment to seriously affect the relation of the creditors generally to the property of Shadboldt & Morse? Plaintiff insists that the matters to which we are about to call attention are immaterial and in no wise affect the question of jurisdiction. But they obtrude themselves upon our consideration, not as affecting that question, but as to whether we should accord the relief sought—whether plaintiff is in a position to demand the writ as matter of right.

It appears that plaintiff had knowledge of the appointment of the receivers shortly after the order was made. For nearly a year it made no objection to the appointment and took no steps to call in question either its legality or expediency. With knowledge of the appointment and of the powers thereby conferred, it must be charged with knowledge of the acts and proceedings of the receivers, and, having failed to oppose or in any way obstruct their action, as such, we must presume consent to and acquiescence therein. Plaintiff, in its brief, says that it does not challenge the good faith or good conduct of the receivers, nor their management, nor business ability. "The fact," says plaintiff, "that the lumber cannot be sold now without being sold at a loss in order to satisfy petitioner's execution, does not furnish light, but only levity, upon the question and the only question in this proceeding involved, i. e., the jurisdiction of the superior court of Lassen county to appoint the receivers." Plaintiff seems to be obsessed with the thought that, where a receiver has been appointed in an action at law, no state of circumstances whatever to which it has itself contributed can ever make prohibition the remedy to nullify the appointment—other than a writ of right, granted ex debito justitiæ, leaving no discretion with the court. Under circumstances where irreparable injury is resulting from the unauthorized appointment of a receiver and the injury is a continuing one, and there is no plain, speedy, or adequate remedy at law, and the writ is sought seasonably, the court should not regard itself as clothed with discretion, but should treat prohibition as a writ of right. Such was the case of Havemeyer v. Superior

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[1] 32 Pac. 322.

Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, where the appointment was stoutly resisted before it was made and its annulment was sought immediately after it issued. In the case giving rise to the writ, the receiver was not appointed so much for the purpose of management and control of the defendant's property and to preserve it for the stockholders and creditors as it was, avowedly, by way of punishment and to so scatter and dissipate the property as to make its further operation as a sugar refinery impossible. In speaking of the writ of prohibition as an appropriate remedy for the removal of a receiver appointed by a void order, when the writ is directed to the court appointing him, the court said in the Havemeyer Case: "If its action is not completed and ended, its further proceedings may be stayed, and, if necessary for the purpose of affording complete and adequate relief, what has been done will be undone." Such is not the case here, for there is no showing made that it is "necessary for the purpose of affording complete and adequate relief" that the acts done should be undone. The receivers in the case here were appointed, admittedly, for the very opposite purpose avowed in the Havemeyer Case and, concededly, have faithfully managed the debtors' property. For nearly a year, without question from plaintiff or any other creditor, they have conducted the debtors' business of manufacturing and selling lumber to the best advantage for the creditors; they have paid numerous perferred labor claims; collected outstanding accounts due the debtors; sold lumber, paid expenses, and have the business now about closed up, with lumber piled at the railroad track (the Western Pacific) ready for shipment to market as soon as traffic on that road opens, sufficient, as respondent shows, to nearly, if not quite, pay all creditors in full. Plaintiff avers that the property exceeds the debts by over $3,000. To annul and declare void the receivership, after this lapse of time of unquestioned administration, upon the theory, now urged by plaintiff, that it has no validity, and that all acts done under it are void, for the sole purpose of enabling plaintiff by its executions to take possession of and sell the remaining property at a time and under conditions which would in all probability lead to a sacrifice of much of its real value, we think would be unconscionable. Furthermore, it is not to be supposed that the other creditors would sit idly by and witness the successful conclusion of plaintiff's efforts, should the writ issue, but would at once resort to the bankrupt court, which would be followed by a receivership not more promising than the one now in operation. Inevitably, litigation would ensue growing out of alleged illegal acts of the receivers, and the wreck of the debtors' assets may well be conceived as the ultimate outcome. The writ of prohibition is classed among legal remedies, but there are points of similarity between the remedy thus afforded and the remedy of courts of equity by injunction against proceedings at law. Being an extraordinary remedy, the writ should not be made the instrument of injustice or oppression or reckless waste of property which it is its office to conserve and protect. Whether or not plaintiff's acquiescence and long delay in challenging the validity of the appointment and the proceedings under it amount to a technical estoppel of which the creditors may avail themselves, we think the facts justify us in refusing aid through the extraordinary remedy of prohibition.

There are other inequitable features of plaintiff's conduct, which, though plaintiff contends they are superfluous and immaterial, if not impertinently thrust into the case, we cannot disregard. Plaintiff took out an ordinary execution on its judgment of foreclosure, sold the mortgaged property under the writ, and bid in the property for $500, and caused a deficiency judgment to be entered for $1,903.49. It later had an order of sale issue in the foreclosure proceeding and sold the same property, itself again becoming the purchaser, for the sum of $2,496. It afterwards sold the same property for $2,500, —a fact not material except to show that plaintiff got full value for its purchase. It now seeks to have execution enforced not only for its Placer county judgment, but the deficiency judgment of $1,903.49. It cannot be pretended that this is just or fair; but it is contended that it may legally be worked out, and must be, because the writ must issue as of right invalidating the appointment of the receiver. After plaintiff had found its levy of its execution on the Placer county judgment ineffective, because the property levied upon was in the custody of the court through the receivers, it appeared in the action of Crowder v. Shadboldt & Morse by motion challenging the validity of the appointment made by the court and demanding its annulment. This motion is still pending. Non constat but it may be granted, and plaintiff thus obtain the relief by the motion prayed for. It is suggested as improbable that it will be granted, and, as there is no appeal from an order refusing to discharge a receiver, the pending motion will furnish no such speedy, plain, or adequate remedy as is contemplated by section 1103, Code Civ. Proc. Let this be granted. There was, however, a plain, speedy, and adequate remedy open to plaintiff when the receivers were applied for or when they were appointed, by intervening as a creditor and making itself a party to the action, thus placing itself in the position to appeal from the order of appointment, from which there is an appeal. Code Civ. Proc. § 963. Plaintiff makes no explanation of its failure or neglect to avail itself of this remedy. Its conduct in this particular, hereinbefore commented upon, would seem to indicate that it held aloof in the belief that the appointment of receivers would be to the advantage of all concerned, itself included, reserving to itself the right at any time to have the proceedings annulled. But, whatever its motive, it had knowledge of the appointment before the receivers had entered actively upon their duties or had taken any steps not easily retraced without causing the embarrassments and complications which must inevitably ensue should the writ now be granted.

It may not be amiss to note that the trial court has in possession a sum sufficient to discharge the Placer county judgment, and to be used for that purpose, paid in by the receivers under order of the court, subject only to the condition that it should finally be determined that "the bank is entitled thereto." The bank refused its consent to this order and subsequently attempted to levy upon this money in satisfaction of its said deficiency judgment.

The case thus stands in this situation: So far as we know, all the creditors, save plaintiff, virtually came into the proceedings, and plaintiff, by its consent and acquiescence, placed itself in like attitude which it maintained for almost a year. After much business had been transacted and the affairs of the debtors closed up to a point where little remains to be done, plaintiff comes in, ignoring its long acquiescence, and would destroy equality and accomplish partiality by the overthrow of everything done on reliance of its implied consent. It seems to us that the maxim, "He who seeks equity must do equity," finds appropriate application.

Counsel for respondent have moved the court to strike the brief of petitioner from the files for its alleged "disrespectful and contemptuous references to and insinuations against the superior court of Lassen county and the judge thereof," which, it is claimed, also constitute contempt of this court. The Supreme Court has held that a brief filed in that court containing matter manifestly disrespectful towards the trial judge is to be deemed contempt of the appellate court. Friedlander v. Sumner G. & S. M. Co., 61 Cal. 116; Sears v. Starbird, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123.

In their brief counsel for plaintiff, referring to the order of the court directing the receivers to deposit certain money as conditional security for plaintiff's Placer county judgment, spoke of the procedure as without "precedent in judicial annals; it is an original creation of the Lassen county court. It is opera bouffe." Again, a portion of respondents' answer is referred to as "a gratuitous recitation of a tale of woe that might elicit sympathy somewhere, somehow, sometime, save in a court of justice." Again, the answer is referred to as containing a "galaxy of grievances" and as "an imposition upon the patience and credulity of a court." Again, "the appointment of the receivers by that court and the tenacious retention of the custody of the defendants' property by the court and the administration of it by and through the receivers, seems, to put it mildly, a most covetous and wholly unwarranted usurpation of power." Upon his admission to the bar, every person is required by law to take an oath to "faithfully discharge the duties of an attorney and counselor." Code Civ. Proc. § 278. And, among such duties, the statute prescribes the following: "To maintain the respect due to the courts of justice and judicial officers." Code Civ. Proc. § 282. Recalling the fact that when the present judge of the Lassen county court took office in January, 1909, he found the receivership in operation, and was, with plaintiff's acquiescence, called upon from time to time, without objection from any one, to direct the receivers in the discharge of their duties for many months; and when it is recalled that plaintiff, with full knowledge of the proceedings, undertook to levy execution on property in the hands of the receivers without notice to or permission of the court—it becomes apparent that the references made by counsel to the action of the court are gratuitous and are without the slightest warrant or justification. Under the circumstances, to say that the action of the court was "a most covetous and wholly unwarranted usurpation of power," and to characterize it also as "opera bouffe," we regard as highly disrespectful to the court and the judge, and, but for the apparently frank disavowal of any intention to be disrespectful and the expressions by counsel of sincere respect for the trial judge, we should feel disinclined to treat the offense as venial. We, however, felt ourselves compelled to take notice of the matter that counsel might not assume this court to be indifferent to the observance of the amenities and courtesies which should characterize the conduct of both bench and bar toward each other.

The writ is denied.

We concur: HART, J.; BURNETT, J.

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12 Cal. App. 360

WILSON v. CRABTREE et al. (Civ. 765.)

(Court of Appeal, First District, California. Jan. 3, 1910.)

PRINCIPAL AND AGENT (§ 69*) — ACTS OF AGENT—ADVERSE CLAIMS.

Decedent, who was the owner of certain corporate stock, being about to go to Europe, appointed his sister his agent, and deposited to her credit $5,000 to pay assessments on the stock, if any. While decedent was abroad the sister paid out of the money so deposited about $3,735 in assessments, collected dividends on other stock owned by decedent, but failed to pay a later assessment, and purchased the stock at a delinquent sale in her own right for $10.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Held, that she could not set up title to the stock in herself as against her brother's estate.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130–145; Dec. Dig. § 69.*]

Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by Edgar M. Wilson against Lotta Crabtree and others and against Sophia C. Livesey, as administratrix with the will annexed of Edwin Fretwell, deceased. From a judgment finding the decedent to be the owner of the property in controversy and from an order denying a motion for a new trial, filed by defendant Livesey, she appeals. Affirmed.

E. B. Martinelli, for appellant. Powell & Dow, for respondent Wilson. John Flournoy, for respondent Crabtree. Barclay, Henley, Perry & Evans, for respondent Fretwell. Jos. K. Hawkins, for respondent Sawyer.

COOPER, P. J. This action was brought to determine the ownership of 747 shares of the capital stock of the Belvedere Land Company, a corporation. The court found the title to the said stock to be in the estate of Edwin Fretwell, deceased, and that the said estate at the times named in the complaint was and is the owner of the said stock, subject to the lien of the plaintiff Wilson thereon for the sum of $9,790, besides interest for moneys advanced by said Wilson upon said stock, the stock being pledged to him as security for said advances. Defendant Sophia C. Livesey has appealed from the judgment and from the order denying her motion for a new trial, upon the sole ground and contention that the evidence is insufficient to support the finding of the court as to the ownership of the stock. We have carefully examined the evidence, and we not only find it sufficient, but we cannot see how the court could have arrived at any different conclusion therefrom.

The appellant, at the time she claims to have purchased the stock for a delinquent assessment in her own right for herself for the sum of $10, had been the agent of her sister, Mrs. Fretwell, and of Edwin Fretwell in his lifetime, while they were abroad during the last illness of Edwin Fretwell. Prior to the departure of deceased and his wife for Europe the evidence shows that deceased was the owner of the stock and deposited over $5,000 to the credit of appellant in a bank in San Francisco, which she drew for her own purposes and for the purpose of paying assessments upon this stock. She paid assessments upon it out of the moneys so deposited amounting to $3,735. She collected the dividends on other stock owned by deceased, and paid a third assessment upon this stock. When Edwin Fretwell died abroad the appellant, at the request of her sister, was appointed administratrix with the will annexed of the estate. It is clear that she had no right under the circumstances to purchase the stock at delinquent sale and set up title in herself.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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12 Cal. App. 313

BETTENS v. HOOVER. (Civ. 678.)

(Court of Appeal, First District, California. Dec. 30, 1909. Rehearing Denied Jan. 27, 1910; Denied by Supreme Court Feb. 28, 1910.)

1. Landlord and Tenant (§ 291*) — Termination of Term—Holding Over—Necessity of Notice.

The three days' notice in writing, required to be given to the tenant by Code Civ. Proc. § 1161, subd. 2, when he continues in possession without the landlord's permission after default in payment of rent, is not necessary, in order to bring unlawful detainer, where the tenant holds over without the landlord's consent after termination of his term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1218; Dec. Dig. § 291.*]

2. Landlord and Tenant (§ 291*)—Unlawful Detainer — Actions — Parties Plaintiff.

In an action for unlawful detainer by the assignee of the lessor against the lessor's tenant for holding over after his term, neither the original lessor nor the assignee's subsequent lessee were necessary parties plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1228, 1229; Dec. Dig. § 291.*]

3. Landlord and Tenant (§ 86*)—Renewal—Exercise of Option—Effect.

Where a lease gives the lessee the option to renew for a stated term at the same rental, timely notice of election to renew extends the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 272; Dec. Dig. § 86.*]

4. Landlord and Tenant (§ 86*)—Renewal—Waiver of Right.

While, where the lease gave the lessee the option to renew, and to pay as high a rent as was offered by other parties, the lessor should, after receiving notice of the exercise of the option, give the lessee notice of any offer from others so that he might make an equal offer, the lessee, by refusing to make an offer equal to that which he was notified was made by another, repudiated his general offer to renew under the option and terminated his rights thereunder.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270–275; Dec. Dig. § 86.*]

5. Landlord and Tenant (§ 291*)—Unlawful Detainer—Actions—Allegations of Complaint.

The complaint, in an action of unlawful detainer, alleged defendant's holding under a lease which gave him the option to renew for a two year period if he paid as high a rent as was offered by others, and further alleged that defendant notified plaintiff of the exercise of his option, and that another offered plaintiff a higher rent, which was the reasonable rental value of the property, of which offer plaintiff notified defendant. *Held*, under the allegations of

the complaint, that it must be assumed that the offer to plaintiff by such other was made in good faith, and not to defeat defendant's option to renew.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 291.*]

6. APPEAL AND ERROR (§ 996*)—FINDINGS—CONCLUSIVENESS.

Where impartial minds may draw different conclusions from the evidence, though it is not conflicting, the trial court's findings therefrom will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908–3911; Dec. Dig. § 996.*]

7. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—SUFFICIENCY OF EVIDENCE.

In an action of unlawful detainer for holding over after the term under a lease which gave the lessee an option to renew upon paying a rent equal to that offered by others, evidence *held* to sustain a finding that an offer made to plaintiff by another, and accepted, was made in good faith, so as to require the lessee to make an equal offer to be entitled to renew.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1248; Dec. Dig. § 291.*]

8. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—BURDEN OF PROOF—AFFIRMATIVE MATTER.

In an action of unlawful detainer for holding over after the term, under a lease which gave defendant the option to renew at a rent equal to that offered by others, a defense that an alleged offer to the lessor by another was not made in good faith, but merely to defeat defendant's right to renew at the old rent, was affirmative matter which defendant must prove.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1246; Dec. Dig. § 291.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Albert Bettens against S. M. Hoover. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Nicholas Bowden, for appellant. C. T. Bird (Charles Clark, of counsel), for respondent.

HALL, J. This is an action in unlawful detainer. Plaintiff recovered judgment for the possession of the premises and damages, and defendant has appealed from the judgment and from the order denying his motion for a new trial.

Defendant is the assignee of the original lessee; and plaintiff, by virtue of a lease (which includes the property sued for) from the owners of the property, to plaintiff, for a term of nine years, has succeeded to the rights of the original lessors. Hereafter in this opinion we shall designate the lease under which defendant claims as the "Hoover lease."

The first point relied upon by appellant is that the complaint does not state facts sufficient to constitute a cause of action. The complaint does not attempt to state a cause of action for unlawful detainer by a lessee after default in the payment of rent, but is framed upon the theory that defendant is holding over, without the consent of the landlord, after the termination of his term. In such a case the three days' notice, provided for in subdivision 2 of section 1161, Code Civ. Proc., is not required. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073. The Hoover lease is set out in the complaint. The original term thereof expired on the last day of February, 1908, but the lease contains this provision: "And it is further agreed by the parties hereto that the parties of the second part are to have the privilege of leasing the within described premises for a period of two years, from the expiration of the present lease, provided that they pay as high a rent as is offered by other parties." It is alleged in the complaint that on the 25th day of February, 1908, defendant served upon plaintiff the following written notice: "Notice is hereby given that the undersigned, S. M. Hoover, wishes and intends to exercise the option and privilege of leasing the premises, real property and improvements thereon, hereinafter particularly described for a period of two years from and after the 29th day of February, 1908, and said S. M. Hoover now elects to exercise, and hereby exercises, said option and privilege, by, under, pursuant to and in accordance with the terms and conditions of that certain lease executed," etc. Here the Hoover lease is identified and the premises described. It further appears from the complaint that on the 27th day of February, 1908, one S. P. Hatcher offered in writing to lease from the plaintiff the premises in suit, for the period of two years from and after the 29th day of February, 1908, at the monthly rental of $250, and that thereafter, on the 28th day of February, plaintiff in writing notified defendant of such offer, and that, unless he (defendant) elect to make an offer equal thereto, plaintiff would accept Hatcher's offer, and execute a lease to him at such rent for said term. Defendant made no other offer or attempt to exercise the option given in his lease. Thereafter, on March 3, 1908, plaintiff leased the premises to Hatcher for two years from the 1st day of March, 1908, at a rental of $250 per month conditioned on possession thereof. Prompt notice of this lease was given defendant, and demand made upon him for possession, which was refused. The monthly value of the rents of said premises is alleged to be $250.

Defendant demurred to the complaint upon the ground that the same does not state facts sufficient to constitute a cause of action, and also upon the ground of defect of parties, in that neither the original lessors nor Hatcher were joined as parties plaintiff. Appellant gives no reason in his brief why the original lessors should have joined in the action, and we see none. Neither does any reason appear why Hatcher was a necessary party plaintiff. The lease to him is conditional upon his being given possession, and the complaint alleges that this has not been done. Appellant contends that it does not appear from the complaint that defendant's term has terminated. This contention is based upon the theory that the notice of election to exercise the option provided for in the Hoover lease had the effect to extend appellant's term for the period of two years. His contention is that the notice of the exercise of the option effected a renewal of the lease for a period of two years, which obligated the appellant to pay the amount of $250 if the offer of Hatcher was bona fide, and, if such offer was not bona fide, that it obligated him to pay the sum provided for in the original term ($80 per month), as no other offers appear to have been made to plaintiff. Where a lease gives to the lessee the option of a renewal for a given term at the same rental, undoubtedly a notice of election given in time is sufficient to extend the term. Andrews v. Marshall Creamery Co., 118 Iowa, 595, 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. Rep. 412; Ewing v. Miles, 12 Tex. Civ. App. 19, 33 S. W. 238; Wiener v. Graff, 7 Cal. App. 580, 95 Pac. 167. But in the Hoover lease the rental was not fixed, but was to be determined by what others might offer. It contemplated the making of a new lease after such offer had been made and the rent agreed upon. The language is: "And it is further agreed by the parties hereto that the parties of the second part are to have the privilege of leasing the within described premises for a period of two years from the expiration of the present lease, provided that they pay as high a rent as is offered by other parties." We think a proper construction of this provision as well as fair dealing required that, after the giving of the general notice of the exercise of the option by the lessee, the landlord should give notice to the lessee of any offer that he had received for the premises, to the end that the lessee might make an equal offer, which, under the provisions of the original lease, would entitle him to a new lease for two years at the rental thus agreed upon. The plaintiff, before the expiration of appellant's original term, gave notice of the offer that he had received, and demanded of the appellant that he make an equal offer, which he refused to do. Assuming the Hatcher offer to be bona fide and made in good faith, the refusal of the appellant to make an equal offer terminated his right under the option. It was in effect a repudiation of his first offer, and terminated his rights thereunder. Main St., etc., v. L. A. Traction Co., 129 Cal. 301, 61 Pac. 937. Upon the face of the complaint we must assume the Hatcher offer to be bona fide and in good faith, especially as it is alleged, and confessed by demurrer, that the amount thus offered is the reasonable value of the rental. The Hoover lease in substance provided that the lessee should have the first refusal of a new lease for two years at such rental as might be offered by others. Notwithstanding the general notice of the exercise of the option, it is plain from the allegations of the complaint that appellant declined to take a new lease at the rental offered by Hatcher. The court did not err in overruling the demurrer.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

As to the action of the court in refusing to strike out certain matter from the complaint, appellant simply states that these matters are surplusage, irrelevant, redundant, and state conclusions of law. As to most of the matters we are unable to determine what they are from the record before us. The motion referred to them by lines and pages of the filed documents. The lines and pages do not appear to be the same in the printed transcript. We are thus with few exceptions unable to identify the matter referred to in the motion. As to such as we can identify, we find no prejudicial error, if error at all, in the action of the court.

Appellant in his answer set up that the offer of Hatcher was not made or accepted in good faith, but was made for the purpose of defrauding defendant. The court, however, found that "the bid of said S. P. Hatcher was not made for the purpose of defrauding the defendant Hoover, but was made and accepted in good faith both by plaintiff and said S. P. Hatcher." This finding, as well as some others depending upon it, are attacked as not supported by the evidence. There is but little, if any, conflict in the evidence. What inferences should the court have drawn from the substantially uncontradicted evidence is really the question presented by the record. We have examined the evidence with care, and are free to say that if the court had found that the offer of Hatcher was not made and accepted in good faith, but for the purpose of defrauding defendant, we would have sustained such finding. But from this it does not follow that we are not obliged to sustain the finding made. Where fair and impartial minds may draw different conclusions from the evidence, though there be no conflict in the testimony, it is a case for the jury or trial court to decide. Kelly v. Brown, 8 Pac. 38.

Bettens and Hatcher were both witnesses, and testified to the offer made by Hatcher to Bettens of $250 per month for the premises in suit. The offer was in writing. Subsequently, after the expiration of the original term of the Hoover lease, Bettens executed to Hatcher a written lease, whereby Hatcher bound himself to pay the rent reserved for the period of two years, and gave his check for the sum of $250 for the first month's rental. No attempt was made upon cross-examination to show that Hatcher had been requested by Bettens or any one else to make the offer. It was only shown upon the cross-examination of Hatcher that before making the written offer he had conferred with Bettens. No question was asked him as to his purpose or object in renting the premises. On the other hand, the court found that the rental value of the premises was but $150 per month. It is clear that Bettens was anxious to get rid of the Hoover lease and the tenancy thereunder, and probably had a strong motive therefor. His lease compelled him to make valuable improvements within one year. He desired and intended to build upon the premises as soon as he could get Hoover out, and made statements to that effect before the expiration of the Hoover lease, and subsequently stated to several persons that he would soon have Hoover out. These facts certainly raise a strong suspicion that the offer by Hatcher was procured by Bettens, and was not made in good faith or with any intent or expectation that the lease made in pursuance thereof would be enforced or carried out. We are not prepared to say, however, that the court upon this evidence was obliged to so find. The matter pleaded was affirmative matter, to be proved by defendant.

The judgment and order must be affirmed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

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12 Cal. App. 299

FISHER v. WESTERN FUSE & EXPLOSIVES CO. (Civ. 672.)

(Court of Appeal, Third District, California. Dec. 27, 1909.)

1. APPEAL AND ERROR (§ 628*)—RECORD—TRANSCRIPT—TIME TO FILE.

Appeal will not be dismissed because the transcript was not filed in time, where it was filed agreeably to stipulation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2756; Dec. Dig. § 628.*]

2. NEW TRIAL (§ 131*)—DESTRUCTION OF BILL OF EXCEPTIONS—STATUTES.

Act March 23, 1907 (St. 1907, c. 537) §§ 1, 2, giving the trial court power in its discretion to grant a new trial, regardless of error, when any proposed bill of exceptions or statement of the case on motion for new trial is destroyed by conflagration or public calamity, and it is deemed impossible by the court to restore the proceedings and settle a bill of exceptions or statement of the case, so the court may review the judgment, has no application where it appears that all the pleadings, papers, records, etc., in the action are in the office of the county clerk, and that the court reporter has made a copy of the transcript, and copies of all these papers and records have been made, so as to enable the party moving for a new trial to prepare a statement of the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 263; Dec. Dig. § 131.*]

3. APPEAL AND ERROR (§ 548*)—RECORD—BILL OF EXCEPTIONS.

An order denying a motion for new trial cannot be reviewed where there is no bill of exceptions bringing up the proceedings, on which the order was made, and, although Act March 23, 1907 (St. 1907, c. 537) § 1, provides that in certain cases no bill of exceptions is necessary in support of a motion for new trial, but the motion may be heard, upon affidavit or otherwise, in order to review on appeal the action of the court on the motion, the proceedings duly authenticated should be brought up under the same rule as in other cases, so that the evidence and proceedings upon which the trial court acted will be before the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2439; Dec. Dig. § 548.*]

4. APPEAL AND ERROR (§ 553*)—REVIEW—BILL OF EXCEPTIONS—SETTLEMENT OF.

An appeal from an order dismissing the proceedings for a settlement of a bill of exceptions will be dismissed where not supported by a bill of exceptions, authenticated as required by rule 29 (78 Pac. xii), but only by the transcript showing that no bill of exceptions was settled, and which does not purport to embrace all the evidence, and, so far as shown by the evidence, it cannot be said that the court abused its discretion in granting the motion to dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2461; Dec. Dig. § 553.*]

5. APPEAL AND ERROR (§ 634*)—RECORD—DISMISSAL OF APPEAL.

Where the record is so faulty that no review of the trial court's action is warranted, a motion to dismiss the appeal is the proper method of disposing of the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2775; Dec. Dig. § 634.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Xavier Fisher against the Western Fuse & Explosives Company. From an order dismissing the proceedings for settlement of the bill of exceptions, defendant appeals. Dismissed.

G. R. Lukens, for appellant. Reed & Nusbaumer, M. C. Chapman, and A. A. Moore, for respondent.

CHIPMAN, P. J. There are three different motions in this case, each taking a separate number. No. 669 (107 Pac. 335) is a motion to dismiss the appeal from the judgment on the ground that no transcript has been filed in time. The transcript, however, was filed agreeably to stipulation, which is a sufficient answer to the first motion. The second motion, No. 671 (107 Pac. 335), is a motion to dismiss defendant's appeal, taken July 29, 1907, from the order of the superior court, made May 31, 1907, denying appellant's motion for a new trial made by it under the act of March 23, 1907 (St. 1907, p. 998), which second motion is, by stipulation, to be considered upon the following grounds: (1) That there exists no record upon which said appeal can be heard or considered; (2) that the papers used and evidence taken on the hearing which resulted in said order are not, and never have been, incorporated in a bill of exceptions. There is a further ground, stated in the notice of motion, to wit, that the proceedings taken by appellant for the settlement of a bill of exceptions were dismissed for want of prosecution February 19, 1909. The third motion, No. 672, is for an order dismissing appellant's appeal from the order of the superior court dismissing the motion of appellant for a new trial, on the grounds: "(1) That there exists no record upon which said appeal can be heard or considered; (2) that the papers used, and evidence taken on the hearing, and which resulted in the making of said order, are not, and never have been, incorporated in a bill of exceptions; (3) that the transcript on file herein contains no bill of exceptions to said order settled, or purporting to be settled, as required by law, or at all; and (4) that said order is a nonappealable order. Said motion will be based upon this notice, upon the transcript on file herein, upon the certificate of John P. Cook, county clerk of said county of Alameda, and upon the affidavit of Stanley Moore, annexed hereto." It was stipulated "that the evidence offered upon the hearing of said motions (the last two), to wit, the certificates of County Clerk Cook, the affidavit of Stanley Moore, and the transcripts, on file in said cause, may be considered upon said motions." There is a transcript on the appeal from the judgment, and a transcript filed in the other two appeals. We discover no difference in them.

The action was for damages to plaintiff's property, resulting from the explosion of defendant's powder magazine in July, 1898. The cause was tried before a jury, and on December 21, 1904, plaintiff had the verdict on which judgment was entered against defendant on December 22, 1904. Defendant served notice of intention to move for a new trial December 30, 1904, and on June 20, 1905, served notice of appeal from the judgment. It appears from the affidavit of defendant's attorney that the statement of the case on motion for a new trial was duly and regularly settled and ordered engrossed. Some delay occurred in the work of engrossment, and the draft statement was destroyed by fire in the office of defendant's attorney in the city of San Francisco during the conflagration of April 18, 1906. On May 22, 1907, defendant filed notice of motion for a new trial under the act of March 23, 1907 (St. 1907, p. 998). This motion purported to be "based upon the annexed affidavit of G. R. Lukens (defendant's attorney), and all the documents, papers, and records now on file in this court in the above-entitled action." On May 27, 1907, Stanley Moore, one of plaintiff's attorneys, filed a counter affidavit, to which Mr. Lukens replied May 31, 1907, and on that day, to wit, May 31, 1907, the court made an order denying "the motion for a new trial under section (chapter) 537 of the statute approved March 23, 1907," and "20 days are allowed by the court in which to prepare a bill of exceptions, and a motion for a new trial on merits is by this court ordered dropped from the calendar, to be reset on five days' notice."

At this point it becomes necessary to examine the provisions of the act of March 23, 1907, under which defendant's motion for a new trial was made. It reads as follows: "Section 1. When any proposed bill of exceptions or statement of the case on motion for a new trial, in action (s) or proceedings, is lost or destroyed by reason of conflagration or other public calamity, and no record of the proceedings upon the trial thereof can be obtained, and such action or proceeding is subject to review by motion for a new trial, pending at the time of such loss or destruction, and it is by the court in which such action or proceeding is pending deemed impossible or impracticable to restore such proceedings (and to settle a bill of exceptions or statement of the case containing such proceedings) so as to enable the court to review the judgment or order therein by motion for a new trial, the court may grant a new trial of such action or proceeding if at the time of such loss or destruction a motion for a new trial be pending therein, and such action or proceeding shall thereupon be tried anew. In order to grant such new trial, it shall be unnecessary to have any bill of exceptions or statement of the case settled, but upon the facts above recited being shown to the satisfaction of the court by affidavit or otherwise, the court shall have power in its discretion to grant such new trial.

"Sec. 2. Pending the hearing of a motion under the preceding section to grant such new trial, the time within which a bill of exceptions might be prepared, served or presented for settlement, shall be extended, and shall not commence to run until the decision upon such motion. (The motion provided for by this act must be made within thirty days after the loss or destruction of such records; provided that in any case now pending such motion may be made at any time within sixty days after the passage of this act.)"

The constitutionality of this act is challenged by respondent (citing Johnson v. Gebhauer, 159 Ind. 271, 64 N. E. 855), but we do not find it necessary to decide the point.

As we understand the act, the trial court is given the power to grant a new trial regardless of any errors which may have occurred at the trial, but this power is discretionary with the court when any proposed bill of exceptions or statement of the case on motion for a new trial is lost or destroyed, by the means mentioned, and no record of the proceedings upon the trial thereof can be obtained, and it is by the court "deemed impossible or impracticable to restore such proceedings (and to settle a bill of exceptions or statement of the case containing such proceedings) so as to enable the court to review the judgment or order therein by motion for a new trial, the court may grant a new trial * * * and such action or proceeding shall thereupon be tried anew." Without stating the facts shown in the affidavits used at the hearing of defendant's motion for a new trial, it appeared, not, however, without some conflict between the statements of counsel, that the trial was held in Alameda county, and that "all the pleadings, papers, records, and files pertaining to said action were and are in the office of the county clerk and clerk of said court in the city of Oakland." It also appeared that the official court reporter had made a copy of the transcript of the proceedings taken in the case, and copies of the above-named papers and records had been made for the purpose of enabling appellant to prepare the statement of the case on its motion. Under this state of facts the court was fully justified in denying the motion, which, had it been granted, would have had the effect to order the case tried de novo in plain violation of the statute. The court, however, allowed defendant 20 days in which to prepare a bill of exceptions, and directed the motion for a new trial to be dropped from the calendar, "to be reset on 5 days' notice." The court appears to have regarded section 2 as giving it authority to set the matter of preparing the bill of exceptions at large with the right to the defendant to proceed with its preparation. It is the motion to dismiss this order denying defendant's motion for a new trial we are first to consider.

There is no bill of exceptions bringing up the proceeding upon which this order was made, and the court dismissed all proceedings looking to that end. It appears, without contradiction, from the moving papers that such is the fact. We have referred to the affidavits and evidence submitted on the hearing of the motion for a new trial as printed in the transcript, but it may be doubted whether, on the present condition of the record, we were authorized even to do that, except for the limited purpose of showing that no bill of exceptions is before us. We are quite convinced that we cannot review the order denying the motion for a new trial except upon a record brought up agreeably to rules 5 and 6 (78 Pac. viii, ix) of the Supreme Court, and authenticated under rule 29 (Id xii), which are rules governing this court, for there is no bill of exceptions in support of the motion. Melde v. Reynolds, 120 Cal. 237, 52 Pac. 491; San Diego Savings Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; Skinner v. Horn, 144 Cal. 279, 77 Pac. 904; Muzzy v. McEwen, etc., Co., 154 Cal. 685, 98 Pac. 1062; Manuel v. Flynn, 5 Cal. App. 319, 90 Pac. 463; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344.

Appellant contends that under the act of March 23, 1907, no bill of exceptions is necessary. It is true that by the act no bill of exceptions is necessary in support of the motion when made to the trial court, as the act provides that the motion may be heard upon "affidavits or otherwise," but to review the action of the court on such motion we think the proceedings, duly authenticated, should be brought up under the same rule as in other cases, and it should appear, as in other cases, that all the evidence and proceedings upon which the trial court acted when making the order should be before the appellate tribunal. The parties have stipulated that, not only the certificate of the clerk and the affidavit of Stanley Moore may be considered upon the motion, but also the transcript. We take this to mean that we may consider whatever we find in the transcript which appears to have been used at the hearing of the motion. So understanding the stipulation, we fail to discover anything which would have warranted the court in granting a trial de novo, and, besides, it does not appear therefrom that all the evidence or records then before the court appear in the transcript.

What has already been said applies to considerable extent to the third motion, next to be considered, to wit, to dismiss the appeal from the order dismissing the proceedings for a settlement of a bill of exceptions. Following the order denying the motion for a new trial, there appears in the transcript what purports to be "Defendant's draft bill of exceptions upon the order denying defendant's motion for a new trial, under and by virtue of the provisions of act of the Legislature entitled 'An act' (giving its title) approved March 23, 1907." This document is a skeleton merely, with here and there spaces to be filled in by copying the documents noted. It was served on plaintiff's attorneys July 19, 1907, who, on July 24, 1907, served certain proposed amendments, subject, however, to the following: "Now comes the plaintiff, and, without waiving its rights to object to defendant's proposed bill of exceptions, or to the settling of any bill of exceptions upon the order referred to, and reserving to itself all ground of legal objection to the sufficiency of said proposed bill of exceptions, proposes the following amendments."

On December 7, 1908, Stanley Moore filed with the clerk an affidavit setting forth at much length the various steps taken in the matter. On December 10, 1908, the clerk served notice on the parties, stating "that the defendant's draft bill of exceptions on the order denying defendant's motion for a new trial, * * * and the plaintiff's proposed amendments thereto, which were heretofore delivered to the clerk of said superior court for the judge in the manner required by law, have been received from the clerk aforesaid by the judge, and upon the application of defendant, the judge this day designated Friday, the 18th day of December, 1908, * * * the time and place at which he will settle the said bill." On December 12, 1908, plaintiff served and filed his motion that on Friday, December 18, 1908, counsel "will move the above-entitled court for an order dismissing the proceedings for the settlement of a bill of exceptions upon the order heretofore made by said court denying defendant's motion for a new trial under the act of March 23, 1907, upon the ground that the defendant has failed to prosecute said proceeding for the settlement of said bill of exceptions with ordinary diligence, and has neglected and abandoned the same. Upon the hearing of this motion, plaintiff will rely upon and use the pleadings, papers, records, and files in the above-entitled action, together with the affidavit of Stanley Moore, which is served herewith and made part hereof, together with the proposed bill of exceptions and amendments thereto upon said order." Mr. Moore's affidavit is a history of the proceedings taken to have the bill of exceptions perfected, and closes with the statement that: "Since said 1st day of August, 1907, no steps whatever have been taken or attempted by the defendant in the matter of said proceeding to settle said bill of exceptions."

On December 17, 1908, Mr. Lukens made an affidavit, appearing in the transcript, marked: "Read into evidence. J. Woolsey, Deputy County Clerk"—in which he sets forth some of the vicissitudes through which the proceedings have passed, but not controverting the statement of Mr. Moore as to there having been no steps taken by defendant since August 1, 1907, to settle the bill of exceptions. On February 19, 1909, the court made the following order: "The motion to dismiss bill of exceptions, and the motion to dismiss defendant's motion for a new trial, coming on regularly this day at 2 o'clock p. m. for further hearing, come now into court [naming counsel]. * * * Certain affidavits are read into evidence by G. R. Lukens, Esq., and both motions are argued by the respective counsel, and submitted to the court for decision. And the court, having considered the argument, and being fully advised in the premises, orders that the motion to dismiss bill of exceptions be granted, to which order defendant excepts. And it is further ordered by the court that the motion to dismiss defendant's motion for a new trial be granted, to which order defendant excepts." Upon the appeal from this order no bill of exceptions, authenticated as required by rule 29, is before us, and nothing in support thereof, except as appears from the transcript, which we have assumed may, under the stipulation, be considered, but which shows conclusively that no bill of exceptions was ever settled. This transcript does not purport to embrace all the evidence before the court at the hearing of the motion, and so far as the evidence shows we cannot say that the court abused the discretion with which it was clothed in granting the motion. There is much in the record before us which shows unnecessary delay in the attempts at settling the statement or bill of exceptions on which the motion for a new trial was to be based. The motion to dismiss the appeal was a proper method by which to dispose of the matter. Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; Linott v. Rowland, 119 Cal. 452, 51 Pac. 687; Miller v. Thomas, 78 Cal. 509, 21 Pac. 11.

The motion to dismiss the appeal from the order dismissing the proceedings for the settlement of bill of exceptions and dismissing defendant's motion for a new trial is granted.

We concur: HART, J.; BURNETT, J.

12 Cal. App. 308

FISHER v. WESTERN FUSE & EXPLOSIVES CO. (Civ. 671.)

(Court of Appeal, Third District, California. Dec. 27, 1909.)

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Xavier Fisher against the Western Fuse & Explosives Company. From an order denying defendant's motion for a new trial, it appeals. Dismissed.

G. R. Lukens, for appellant. Reed & Nusbaumer, M. C. Chapman, and A. A. Moore, for respondent.

CHIPMAN, P. J. For the reasons given in the opinion in the above-entitled case, in No. 672 (107 Pac. 332), this day decided, the motion to dismiss the appeal from the order denying defendant's motion for a new trial is granted.

We concur: HART, J.; BURNETT, J.

12 Cal. App. 307

FISHER v. WESTERN FUSE & EXPLOSIVES CO. (Civ. 669).

(Court of Appeal, Third District, California. Dec. 27, 1909.)

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Xavier Fisher against the Western Fuse & Explosives Company. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal denied.

G. R. Lukens, for appellant. Reed & Nusbaumer, M. C. Chapman, and A. A. Moore, for respondent.

CHIPMAN, P. J. For the reasons set forth in the opinion in No. 672 (107 Pac. 332), the motion to dismiss the appeal from the judgment is denied.

We concur: HART, J.; BURNETT, J.

12 Cal. App. 350

HANNON et al. v. SOUTHERN PAC. R. CO. et al. (Civ. 740.)

(Court of Appeal, Second District, California. Dec. 31, 1909.)

1. STATUTES (§ 206*)—CONSTRUCTION.

The Legislature is not supposed to have used words in vain; and, if possible some effect must be given to all the words of a statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

2. DESCENT AND DISTRIBUTION (§ 1*)—NATURE OF "DESCENT"—"HEREDITARY SUCCESSION."

"Descent" or "hereditary succession" is the title whereby a man, on the death of his ancestor, acquires his ancestor's estate by right of representation as his heir at law.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 3, pp. 2017–2019; vol. 4, p. 3281.]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. HUSBAND AND WIFE (§ 14*)—ESTATE BY ENTIRETY—ABOLITION.

The common-law species of joint tenancy between husband and wife, known as tenancy by entireties, was abolished by Civ. Code, §§ 682, 683, by excluding it from the enumeration of the kinds of ownership.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 73; Dec. Dig. § 14.*]

4. HOMESTEAD (§ 139*)—RIGHTS OF SURVIVING HUSBAND OR WIFE—STATUTORY PROVISIONS.

In Civ. Code 1872, § 1265, providing that after a wife's declaration of homestead on land "the spouses held in joint tenancy and on the death of either, * * * it descends to" the survivor, the term "joint tenancy" was used merely to describe, as nearly as possible, the nature of the estate during the lifetime of both spouses, leaving its devolution on the death of either to be fixed by the succeeding clause, providing for its descent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 254–258; Dec. Dig. § 139.*]

5. HOMESTEAD (§ 1*)—PURPOSE OF RIGHT.

The primary purpose of the homestead right is to preserve a home for the protection of the family.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 1; Dec. Dig. § 1.*]

6. HOMESTEAD (§ 139*)—RIGHTS OF SURVIVING SPOUSE.

The homestead statute being chiefly to provide an abiding place for the family so long as it continues as such, and not for the purpose of defining the character of estates or the general qualities of ownership, it should be construed to mean that, on the death of one spouse, the land descends to the other, and in that respect it is a statute of descent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 254–258; Dec. Dig. § 139.*]

7. CONSTITUTIONAL LAW (§ 99*) — VESTED RIGHTS—HOMESTEAD.

The homestead statute, being a statute of descent, is subject to legislative control, and may be changed or abolished at will, as the right of descent is a mere expectancy, and not a vested right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 205; Dec. Dig. § 99.*]

8. HOMESTEAD (§ 135*)—RIGHTS OF SURVIVORSHIP—STATUTORY PROVISIONS.

Under the law in force at the time a wife recorded a declaration of homestead on the land of her husband's separate property (Civ. Code 1872, § 1265; Code Civ. Proc. 1872, § 1474), the homestead, on the death of one of the spouses, vested absolutely in the survivor. Under the law in force at the time of the husband's death, the homestead in land which had been his separate property would go to his heirs, and not entirely to his surviving wife. *Held*, that the law in force at the death, and not that in force at the time of the declaration, controls the subject of homestead and rights of survivorship.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 247; Dec. Dig. § 135.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Mary A. Hannon and others, minors, by Catherine Hannon, guardian, against the Southern Pacific Railroad Company and the Southern Pacific Company. Plaintiffs had judgment, and defendants appeal. Affirmed.

J. W. McKinley, for appellants. Works & Lee, John D. Works, and Bradner W. Lee, for respondents.

PER CURIAM. The question of law involved on this appeal was submitted to the trial court upon stipulation, and Justice Lucien Shaw, now of the Supreme Court, then on the superior bench, filed a written decision and opinion, which is quoted in the brief of respondents. It is as follows:

"This is an action to recover the possession of the undivided two-thirds of a tract of real estate. The land in question was the separate property of Patrick Hannon, the father of the plaintiffs, at the time of his marriage to Catherine Hannon, the mother of plaintiffs, on June 8, 1874. On June 19, 1874, Catherine Hannon made and recorded a declaration of homestead upon the land in accordance with the provisions of the Civil Code, as then existing; the family then residing thereon. Patrick Hannon died on October 29, 1885, leaving surviving the plaintiffs and Catherine Hannon, his wife. The defendants claim right to the possession of the land under Catherine Hannon, and the plaintiffs claim as the children and heirs at law of said Patrick Hannon. The decision of the case depends upon the decision of the question whether the law governing succession to the homestead is the law in force at the time the homestead declaration was filed, or the law in force at the time of the death of Patrick Hannon. And this question again depends on the effect of the law relating to homesteads in force at the time of the filing of the declaration of homestead. This law consisted of section 1265 of the Civil Code, and section 1474 of the Code of Civil Procedure as enacted in 1872. These two sections were amended in 1874 [St. 1873–74, c. 43], so as to leave them in their present form, substantially, but the amendments did not take effect until July 1, 1874, 12 days after the homestead was filed. The original section (1265) was as follows: 'From and after the declaration is filed for record the land therein described is a homestead; and if the declaration was made by a married person, the land is thereafter by the spouses held in joint tenancy and on the death of either of the spouses, * * * it descends to and the title at once vests in the survivor.' And section 1474, Code Civ. Proc., was as follows: 'The homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both are living, on the death of the husband or wife vests absolutely in the survivor.'

"By the law in force at the time of the death of Patrick Hannon, the land, being his separate property, would go to his heirs, and not entirely to the surviving wife. If, therefore, the provisions of the Codes as they existed in June, 1874, had the effect of giving to Catherine Hannon, at once upon the filing of the homestead declaration, a vested interest in the land constituting the homestead, as a joint tenant with her husband, of such character that it became at that instant a vested right beyond subsequent legislative control, then, of course, the subsequent amendment of the Codes did not affect that right, and upon the death of Patrick in 1885, she, as survivor, became at once vested with the whole estate, or, to use the technical language of common law, the other joint tenant having ceased to exist, she was thenceforth the only person entitled to any part of the estate in the land, and the defendants as her successors are now entitled to possession. And this is the question in the case.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"The Supreme Court of this state has decided the question both ways. In Estate of Headen, 52 Cal. 295, it was held that these provisions of the Code, prior to the amendment of July 1, 1874, were not statutes of descent, but that, on the contrary, their effect was such that a joint estate in the homestead became vested in the husband and wife, which was not affected by the subsequent amendment. In Gruwell v. Seybolt, 82 Cal. 7 [22 Pac. 938], the exact contrary was decided, and it was said that 'the law in force at the time of the death, and not that which was in force at the time of the declaration, controls on the subject of homestead and the rights of survivors.' The latter case, being the latest decision, would ordinarily be considered as the proper rule of decision for the superior courts, but in disparagement of this decision it is correctly said that it does not refer at all to the former decision in Estate of Headen, and that the point was not necessary to the decision of the case. It was involved in the case, however, and it cannot in strictness be called an obiter dictum. But this condition of the decision makes it proper to consider more carefully the previous decisions and the state of the law, and also the reasoning on which the conflicting theories are founded.

"Prior to 1860 the statute did not attempt to state the effect of a homestead upon the title of the land. No declaration was required. The homestead was constituted by residence and selection merely. It was provided that no alienation could be made, or lien placed thereon, without the signature of the wife, and that on the death of the 'head of the family' the homestead should 'be set apart by the probate court for the benefit of the surviving wife and his own legitimate children,' or, failing them, to his heirs. Stats. 1851, 296. Under this law the Supreme Court, in a rather loose manner in several decisions, described the interest of the husband and wife in the homestead as a 'sort of joint tenancy.' Taylor v. Hargous, 4 Cal. 273 [60 Am. Dec. 606]; Cook v. McChristian, 4 Cal. 23; Poole v. Gerrard, 6 Cal. [71, 65 Am. Dec. 481]; Revalk v. Kraemer, 8 Cal. 66 [68 Am. Dec. 304]. In Gee v. Moore, 14 Cal. 472, decided in 1859, Field, C. J., criticises these decisions; says they have not met the approval of the profession and that: 'There is nothing in the nature of the homestead right or privilege which justified its designation as such an estate,' and that 'it is not warranted by any language of the Constitution or the statute.' At the next session of the Legislature this statute was amended, apparently with reference to this decision, for it is provided by the amendment that 'from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants,' and that 'upon the death of either husband or wife the homestead should be set apart by the probate court for the benefit of the surviving husband or wife, and his or her legitimate children.' St. 1860, p. 311. Under this statute it was held that, although section 1 standing alone might create a joint tenancy in the homestead between the husband and wife, with the right of survivorship, yet as modified by section 4 of the same amendment, the children took an interest as successors, and therefore it was a statute of descent, and did not create any joint tenancy. Rich v. Tubbs, 41 Cal. 36; Levens v. Rovegno, 71 Cal. 282 [12 Pac. 161].

"In 1862 [Laws 1862, c. 396] section 4 of the original homestead act was again amended so as to read as follows: 'The homestead property selected by the husband and wife, or either of them, * * * shall upon the death of the husband or wife, vest absolutely in the survivor and be held by the survivor as fully and amply as the same was held by them, or either of them, immediately preceding the death of the deceased.' The effect of the statute after this amendment was under consideration by the Supreme Court in Barber v. Babel, 36 Cal. 11, with reference to the power of the husband alone during the lifetime of both to affect the homestead property by his contracts or conveyances. The opinion does not hold that the statute creates a joint tenancy in the homestead, but it declares that it is not perceived why the right established does 'not approach substantially very near a joint tenancy, although not created in precisely the same way, even if not a technical joint tenancy at common law,' and that 'there is a joint interest in the homestead—a joint holding if not a technical joint tenancy.' And it was held that the interest of each in the homestead could only be divested by the concurrent act of both.

"With the law in this condition the Codes were adopted embracing the provisions first above quoted. The first case construing the Code provisions upon the point here under consideration was Estate of Headen, supra. Although that case gives a much more extended discussion of the point than the later case of Gruwell v. Seybolt, yet I find myself unable to agree with the conclusion reached, or with the reasoning on which it is founded. Speaking with reference to the clause in section 1265 of the original Civil Code that 'the land is thereafter held by the spouses in joint tenancy,' the court in that case says: 'One of the necessary incidents of a joint tenancy is the right of survivorship—the jus accrescendi—and the provision that upon the death of one of the spouses "the title at once vests in the survivor" adds nothing to the legal quality of the estate held by the spouses, but simply declares the result which must necessarily ensue upon the death of one of the joint tenants.' There is a rule of statutory construction which is here ignored, namely, that the Legislature is not to be supposed to have used words in vain, and that, if possible, some effect must be given to all the words. The fact that the words 'it descends to and at once vests in the survivor' were used indicates that some meaning was intended to be expressed by them, and that some purpose was intended to be effected thereby, and if the purpose can be ascertained and the meaning discerned, effect must be given to the statute accordingly. The writer of the paragraph quoted misconceived the precise nature of a joint tenancy at common law. By the well-established rules of the common law, upon the death of one joint tenant, the title did not 'vest in the survivor.' The notion of the nature of a joint tenancy entertained by the ancient law writers and jurists was a very peculiar one. The title did not vest or descend upon the death of one tenant. In contemplation of the law each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his co-tenant. It simply 'remained' to him. He did not derive the title or estate or any part or interest therein from his co-tenant, but wholly from the original grant. Thus in Coke on Littleton, § 286, it is said: 'He which surviveth claimeth and hath the land by the survivor, nor can he claim anything by descent from his companion.' So far Lord Littleton. And upon this Lord Coke says: 'Here again Littleton sheweth the reason; and the cause wherefore the survivor shall not hold the land charged is for that he claymeth the land from the first feoffor, and not by his companion, which is Littleton's meaning when he saith (that he claymeth by survivor) for the surviving feofee may plead a feoffment to himselfe without any mention of his joint feofee.'

"And Blackstone, speaking concerning the effect of the death of one joint tenant, says: 'As therefore the survivor's original interest in the whole still remains, and as no person can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.' And in Washburn on Real Property (volume 1, p. 646, par. 14) it is said: 'The interest which a joint tenant has as survivor is not a new one acquired by him from his co-tenant upon the latter's death; for his own interest is not changed in amount, but only his co-tenant's is extinguished.'

"It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the co-tenant, or that it descends to him from his co-tenant; for it had already vested in him by, and at the time of, the original grant. And if the Legislature by these words meant to give the effect which the words import that upon the death of one spouse there should really be a vesting of the title at that instant in the other, and a descent from one to the other, then this must be held to be a different effect from that which was intended by the provision that during their lives the land was to be held in joint tenancy; for if it were so held, the title would not vest in the survivor at the death of the other, but previously at the time of the declaration of homestead was filed for record. And these words do change the quality of the estate held by the spouses, and they do not 'simply declare the result which must necessarily ensue upon the death of one of the joint tenants.' For the title of the surviving joint tenant exists from the beginning, and does not vest upon the death of his co-tenant, and if in this case it does, then the title is something different from a joint tenancy.

"And with reference to the words 'descends to,' used in section 1265 heretofore quoted, the opinion in Estate of Headen says: 'We are of the opinion that both phrases "descend to" and "vest in" merely express the operation of the rule of survivorship which is necessarily incident to a joint tenancy, and that they do not furnish any other different mode for the transmission of the same.' This is directly contrary to all the common-law authorities, both as to the time when the estate vests in the survivor, and as to the source from which he derives title to the whole estate. It is also contrary to the rule of construction prescribed by the Code itself. The word 'descend' has always had a well-known, certain, technical, legal meaning. 'Descent or hereditary succession is the title whereby a man on the death of his ancestor, acquires his (the ancestor's) estate by right of representation as his heir at law.' 2 Bl. Com. 201; Estate of Donahue, 36 Cal. 332. It is true, as stated in Estate of Headen, that the Code does not use the word 'descent' to express this idea, but substitutes the word 'succession.' But this does not change the meaning of the word 'descent,' nor deprive it of the meaning it has always possessed. It is a technical word having a peculiar and appropriate meaning in law, and by the rule laid down in section 13 of the same Code, it is to be construed accordingly. We, therefore, have this condition: That the part of the section declaring that the spouses during their lives hold in joint tenancy is inconsistent with that which provides that upon the death of one the homestead shall descend to the other, if both phrases are given their technical meaning. It is necessary either to reconcile this inconsistency, or, if that cannot be done, to determine which of the two inconsistent provisions shall prevail in construing and giving effect to the section. From a consideration of other statutes on the same subject it is evident that the provision that the spouses are to hold as joint tenants must be taken with important qualifications. By section 683 of the same Code a joint estate must be created by a single will or transfer. And this was also necessary at common law. By section 752 of the Code of Civil Procedure joint tenants may have a partition of the joint estate and a sale thereof, if necessary to effect the partition. A homestead is not created either by will or transfer, and there can be no partition of a homestead by either party. To this extent, therefore, the estate of husband and wife in a homestead is different from a joint tenancy, and the declaration that they hold as joint tenants cannot be given full effect.

"There was at common law a species of joint tenancy which could only exist between husband and wife, which was denominated a tenancy by entireties, and which could not be alienated by either party alone, nor partitioned, and which therefore bore a closer resemblance to the right of homestead under this statute; but that species of joint tenancy must be considered as abolished by the provisions of sections 682 and 683 of the Civil Code, which exclude it from the enumeration of the different kinds of ownership. Under these circumstances the reasonable construction of section 1265 of the Civil Code, as originally enacted, requires that the clause declaring that on the death of either spouse the land 'descends' to the survivor shall be construed as intended to still further qualify the character of the joint tenancy, or rather to show wherein the estate differed from a technical joint tenancy, by in effect declaring that the survivor did not take by virtue of the original grant or declaration, as would be the case if it were a joint tenancy, but by descent. The term 'joint tenancy' was evidently used merely to describe, as near as possible, the nature of the estate during the lifetime of both spouses, leaving its devolution upon the death of either to be fixed by the succeeding clause providing for its descent. This harmonizes the seeming inconsistency of the two parts of the section, and between the section and section 1474 of the Code of Civil Procedure. And it is also in harmony with the general idea upon which the homestead right is founded. The primary purpose of the homestead right is to preserve a home for the protection of the family. Waples on Homesteads, p. 3; Smyth on Homesteads, §§ 1–14. It was chiefly to provide an abiding place for the family, so long as the family, as such, continues, that the statute was enacted, and not for the purpose of defining the character of estates or the general qualities of ownership. The statute should therefore be construed to mean that on the death of one spouse the land descends to the other, and in that respect it is a statute of descent. Such laws are always subject to legislative control, and may be changed or abolished at will, because the right of descent, being a mere expectancy, is not a vested right. Civ. Code, § 700.

"In addition to all this there is the general proposition that the right of homestead, though secured by the Constitution, requires legislation to make it effectual; that it is a creature of the statute, and subject to change at any time; that it is not the primary purpose of such statutes to create vested rights in the land affected; and that the homestead right is not such a vested right that it cannot be taken away by legislation. While it is the duty of the Legislature to provide for the protection of the family by protecting the home from forced sale, yet the mode of protection, and the character and quality of the right of the respective members of the family, and their interests in the land of which the homestead is composed, may be changed from time to time during the occupancy by the family of the homestead, or during the continuance of the general homestead right, as the Legislature may see fit. The Constitution vests power over the subject in the Legislature. Art. 17, § 1. These principles are recognized in the following cases: Estate of Delaney, 37 Cal. 176; Rich v. Tubbs, 41 Cal. 34; Herrold v. Reen, 58 Cal. 446; Tyrrel v. Baldwin, 78 Cal. 473 [21 Pac. 116]; Gruwell v. Seybolt, supra. I think, therefore, that it is clear from all these considerations that the purpose of inserting the declaration that the land should descend to the survivor was to make it sure that the power to change still remained in the Legislature, and that the so-called joint estate was not to be considered a vested estate, nor a technical joint tenancy. This being the case, it follows that the statute governing the rights of plaintiffs here is the statute in force in 1885, at the time of the death of Patrick Hannon. This law gave the children, as his heirs, two-thirds of the estate."

Later cases decided by the Supreme Court since the foregoing opinion was rendered approve the rule that it is immaterial when the homestead was selected, as the statute in force at the time of the death of the spouse whose property was impressed with homestead character controls the descent and devolution of the title. Estate of Fath, 132 Cal. 612, 64 Pac. 995; Saddlemire v. Stockton Savings Soc., 144 Cal. 650, 653, 79 Pac. 381.

Accepting the foregoing opinion of Judge Shaw as the opinion of this court, for the reasons therein stated, the judgment appealed from is affirmed.

12 Cal. App. 623

SANGUINETTI v. ROSSEN et al. (Civ. 148.)

(Court of Appeal, Third District, California. April 11, 1906.)

1. Ejectment (§ 69*) — Pleadings — Sufficiency.

In an action for the possession of land, described as in township 1 N., the fact that the general description in the answer mistakenly spoke of the land as in township 1 S., was not fatal to the defense where the land was otherwise clearly alleged to be that described in the complaint.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 69.*]

2. Trusts (§ 95*)—"Constructive Trusts."

A "constructive trust" is a creature of equity, and takes form whenever title is obtained by fraud, actual or constructive; in such cases mere form will be disregarded, and equity will ascertain and act on the substance, regarding that as done which should have been done.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145–147; Dec. Dig. § 95.*

For other definitions, see Words and Phrases, vol. 2, pp. 1476–1479; vol. 8, p. 7614.]

3. Trusts (§ 92½*)—Constructive Trusts—Statute of Frauds.

After the foreclosure of a mortgage on an undivided interest, and pending an action to foreclose another mortgage on another undivided interest, the attorney of the undivided owners advised that they convey all their interest to a third person, who should convey to the attorney, who should procure a loan to pay the outstanding mortgages and to procure a reconveyance under the mortgage foreclosed. The attorney promised to execute a writing reciting the terms of the trust as soon as the deed to him was executed. The deeds were executed, but the attorney failed to execute a declaration of the trust, but conveyed an undivided part of the premises to a stranger. *Held*, that a constructive trust was created by operation of law, and the attorney took only the naked legal title in trust for the undivided owners, which trust equity would enforce notwithstanding the statute of frauds, which could not be invoked by the attorney.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141; Dec. Dig. § 92½.*]

4. Equity (§ 57*)—Maxims.

Equity regards that as done which ought to be done.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 179; Dec. Dig. § 57.*]

5. Trusts (§ 102*)—"Involuntary Trust"—Statutes.

Under Civ. Code, §§ 2217, 2219, 2223, 2224, 2228, 2235, 3529, defining an "involuntary trust" as one created by operation of law, etc., a person occupying fiduciary relations will be held to the strictest good faith, and trusts will arise in vindication of right, not only in the absence of a valid declaration, but even against the desires and intention of the involuntary trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. § 102.*

For other definitions, see Words and Phrases, vol. 4, p. 3765.]

6. Attorney and Client (§ 123*)—Relation Between Parties.

An attorney must deal with fairness and honor toward a client, and cannot profit by withholding the benefit of his special knowledge or by giving false counsel during the continuance of the relation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 239; Dec. Dig. § 123.*]

7. Trusts (§ 348*)—Involuntary Trustee.

Under Civ. Code, § 2243, providing that every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, etc., one taking under an attorney holding the legal title to the property of his client, with notice of the relation or knowledge of the facts, has no greater right than the attorney possessed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 513; Dec. Dig. § 348.*]

8. Attorney and Client (§ 64*)—Relation.

Where one assumed to act as the hired attorney of another, and the client had many consultations with the former as such attorney, the technical relation of attorney and client existed, though the former had not been admitted to practice before the relation was assumed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 86, 87, 150; Dec. Dig. § 64.*]

9. Principal and Agent (§ 8*)—Existence of Relation.

The mere fact that one had had at various times business dealings with another, and had stated that he wanted to buy more land, did not make the latter an agent for the purchase of a particular tract.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 8.*]

10. Vendor and Purchaser (§ 232*)—Bona Fide Purchaser—Notice.

The doctrine that possession of the grantor is constructive notice of any right claimed in hostility to the deed cannot be extended to a case where the grantor has expressly relinquished all equitable claims in his deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–562; Dec. Dig. § 232.*]

11. Vendor and Purchaser (§ 232*)—Bona Fide Purchaser—Notice.

When possession is consistent with the record title, the possession is not constructive notice of any different title or interest to a purchaser who has relied on the record, and has had no actual notice beyond what is thereby disclosed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 232.*]

12. HOMESTEAD (§ 145*)—FORFEITURE.

The rights conferred by a probate homestead, set apart for the benefit of the widow and minor children of a decedent, cannot be surrendered by one or more of the beneficiaries to the detriment of an infant child.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 268, 277, 280, 285; Dec. Dig. § 145.*]

13. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—NOTICE.

Land was set apart as a probate homestead for the benefit of the widow and minor children of the deceased owner. A minor child also owned an interest in the property, and the widow continued in possession. She held possession as a licensee of adult children, but she did not claim any interest hostile to a title conveyed. *Held*, that her possession was not constructive notice of secret equities claimed by the grantors as beneficiaries of a constructive trust at variance with the terms of their conveyance, absolute in form, purporting to convey all equitable claims and interests.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–562; Dec. Dig. § 232.*]

14. EVIDENCE (§ 272*) — DECLARATIONS AGAINST INTEREST.

Oral declarations which do not clearly appear to be against the interest of the party making them should be excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1105–1107; Dec. Dig. § 272.*]

Appeal from Superior Court, San Joaquin County; E. N. Rector, Judge Presiding.

Action by Angelo Sanguinetti against Hannette J. Rossen and others. From a judgment for defendants, plaintiff appeals. Reversed.

Nicol & Orr, for appellant. Loutitt & Middlecoff and W. P. Netherton, for respondents.

McLAUGHLIN, J. Action to recover possession of a small parcel of land in San Joaquin county, described as being in sections 4 and 5, in township 1 N., range 8 E. M. D. M. The averments of ownership and right of possession in the complaint are denied in the answer, which also contains affirmative allegations of ownership in Alta Durham and Mrs. Louise Place, who were made parties defendant by order of the court. The general averment of title in these defendants, under whom the other defendants claim the right to remain in possession of the premises, is followed by voluminous allegations detailing the facts and circumstances upon which such claim of title rests. A summary of the recitals will suffice to indicate and explain the legal propositions presented for decision. John J. Durham died intestate in 1882, and in due course of administration three-ninths of his estate was distributed to his widow, the defendant Hannette J. Rossen, two-ninths each to his daughters, the defendants Alta Durham and Mrs. Place, and the remaining two-ninths to a son, who is not a party to this action. It is specifically and repeatedly alleged that a tract of land so distributed included the lot here in dispute, but the general description of such tract locates it in township 1 S., whereas the lot described in the complaint is in township 1 N..

After distribution, the widow mortgaged her interest to George B. Sperry, the daughter Alta hers to Mary Duffy, and the remaining four-ninths owned by Louisa Place and her brother, who were minors, was mortgaged by their mother, as guardian, to T. Lesnini. The Sperry mortgage was foreclosed, and on September 25, 1900, the interest of the widow, embracing three-ninths of the property, passed to the mortgagee, who three days later conveyed the same to the Sperry Flour Company. An action was then pending to foreclose the other two mortgages, and Mrs. Rossen and her daughters were endeavoring to save the property, which was worth more than the amount due on the Sperry, Duffy, and Lesnini notes. Negotiations were pending whereby they hoped to satisfy the existing incumbrances and procure a reconveyance of the title held by the flour company. They were not familiar with the effect of conveyances and had little experience in business matters. They had implicit confidence in two friends named Wiggin and Lynch, who advised and counseled with them at this juncture. Lynch acted as their attorney, and they relied upon him, not only as a friend, but as their trusted legal adviser. Through his advice, counsel, and representations, they were led to believe that if the title to the property was vested in one person, a loan could be negotiated, and the cancellation of the mortgages and reconveyance of the outstanding title secured. Acting upon such advice, and without any consideration save the promises made to them, the widow and her daughters, by deed absolute in form, dated October 19, 1900, conveyed all their right, title, and interest in the property to Wiggin, with the distinct understanding that he would convey to Lynch. The latter promised to execute a writing reciting the terms of the agreement or trust, as soon as the deed to him was executed; such terms being that he would procure a loan of $9,000, pay off the mortgages, procure a reconveyance from the Sperry Flour Company, and, this done, reconvey an undivided seven-ninths of the property to Alta Durham and Mrs. Place. Wiggin conveyed to Lynch, on November 16, 1900, and some time thereafter the latter negotiated loans on the property aggregating the sum of $9,000, obtained title to three-ninths of the property from the flour company, and canceled the Duffy and Lesnini mortgages. It will thus be seen that Lynch's title to four-ninths of the property rested on the deed from Wiggin, and that title to three-ninths formerly owned by Mrs. Rossen came to him from her successor in interest, the Sperry Flour Company. It may be added that he succeeded Mrs. Rossen as guardian of the estate of the minor son, and that the estate of his ward was mortgaged to secure a portion of the $9,000 borrowed. Instead of fulfilling the promises made to his clients, Lynch conveyed an undivided seven-ninths of part of the property, including the lot in controversy, to Miller and Kelley and they in turn conveyed to the plaintiff. It is alleged that Miller, Kelley, and the plaintiff had notice of the facts, and that the conveyances to them were made with intent to defraud Mrs. Place and Miss Durham. The agreement between the parties was never reduced to writing in any form, and the deeds through which the title passed to Lynch contained no hint or mention of a trust. The court overruled a demurrer to the answer, based on the ground that the facts therein pleaded constituted no defense to the action, and the first point urged on this appeal is that the court should have sustained the demurrer.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In view of the distinct averment that the land in controversy was included in the tract distributed to the Durham heirs, we are of the opinion that the mistake in the general description was not fatal to the defense pleaded. The other proposition involved is more serious. Appellant argues that, as the agreement under which the deeds to Wiggin and Lynch were executed was not reduced to writing, there was and could be no valid trust defeating the express terms of a conveyance absolute in form. In this connection it is earnestly contended that the trust agreement was wholly abortive and void, because neither an agreement to convey, nor an express trust in land, is enforceable unless the same is evidenced by some note or memorandum in writing. This contention is met by the argument that the facts and circumstances set forth in the answer are sufficient to show an implied trust created by operation of law. A valid trust in relation to real property can only be created or declared by an instrument in writing, or by operation of law. Civ. Code, § 852; Code Civ. Proc. § 1971. As no instrument in writing declaring the trust was executed, no express trust was created, and it only remains to inquire whether the facts set forth in the answer are sufficient to bring the case within the rule governing implied trusts, resulting or constructive. Such trusts are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive. In such cases mere forms will be disregarded, and equity, as handmaid of the law, will ascertain and act upon the substance of things, regarding that as done which should have been done. Devious and intricate methods may be employed, but the mind-searching, far-reaching vision of equity cannot be obscured by any pretense, however ingenious, subtle, or specious it may be. Equity abhors fraud in all of its guises, and renders abortive its shrewdest intrigues and machinations. Looking at the substance of this transaction, we find that Lynch was not only the trusted confidant and friend, but the legal adviser and counselor of these women. His relation to them was fiduciary, and every rule of equity and law commanded the utmost fairness and good faith in all his dealings with them. Through his advice and representations the legal title to four-ninths of this property was transferred to him, for a specific purpose, without any intention that any beneficial interest in the property would pass or vest with the legal title thus conveyed. We say transferred to him because the conveyance to Wiggin was made with the express understanding that he would convey to Lynch, and the moment this agreement was executed, the latter took the title subject to all the equities arising in favor of the clients who conveyed. Under these circumstances a constructive trust was created, by operation of law, and Lynch took the bare, naked legal title to four-ninths of the property, as conveyed by the owners, Alta Durham and Mrs. Place, in trust for their use and benefit. But this is not all, for if the averments of the answer are true, he also took title to the Sperry interest, in trust for the benefit of the same parties. But for his disregard of duty the trust would have been properly and fully created and declared, for even in the absence of an express promise to that effect, it was his duty to his clients to execute a writing reciting the terms of his trust. This being true, he could not invoke the statute of frauds, and thus make his violated duty and promise the shield under cover of which he could take advantage of his fiduciary relation and profit by his own wrong. Equity regards that as done which ought to be done, and never allows a statute designed to prevent fraud to be used as an instrument for the accomplishment of fraud. It holds persons occupying fiduciary relations to the strictest good faith, and never allows them to escape the performance of a duty through their own neglect, fraud, or wrong. Under its wholesome rules injustice resulting from fraud can always be prevented, and trusts will arise in vindication of right, not only in the absence of a valid declaration, but against the desires and intention of the involuntary trustee. Civ. Code, §§ 3529, 2217, 2219, 2223, 2224, 2228, 2235; Pomeroy, Eq. Jur. §§ 921, 960, 965, 966, 103, 155, 363–381, 858, 1044, 1053, 1055, 1056, 1297, 1409; Story, Eq. Jur. §§ 1195, 307, 308, 310, 311, 312, 330, 331; Brison v. Brison, 75 Cal. 528, 17 Pac. 689, 7 Am. St. Rep. 189; De Mallagh v. De Mallagh, 77 Cal. 128, 19 Pac. 256; Nordholt v. Nordholt, 87 Cal. 555, 26 Pac. 599, 22 Am. St. Rep. 268; Hays v. Gloster, 88 Cal. 565, 26 Pac. 367; Hayne v. Hermann, 97 Cal. 261, 32 Pac. 171;

Kimball v. Tripp, 136 Cal. 634, 69 Pac. 428; Jones v. Jones, 140 Cal. 590, 74 Pac. 143; Becker v. Schwerdtle, 141 Cal. 390, 74 Pac. 1029; Smith v. Goethe, 147 Cal. 732, 82 Pac. 384.

An attorney at law should be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times, and under all circumstances, be held to the full measure of what he ought to be. Equity would indeed be impotent if a trusted legal adviser could profit by withholding the benefit of his special knowledge and skill, or by giving false counsel during the continuance of a relation in the highest sense confidential and fiduciary. It was Lynch's duty to protect his clients in every possible way, and it was a gross violation of that duty for him to mislead or deceive them. Had he retained the legal title obtained in the manner described in the answer, the most adventurous sophist would hardly assert that he could be protected by his breach of duty, and allowed to retain that which was obtained through his guile. And under well-settled rules those who took title under him with notice of his relation, or knowledge of the facts, stand in his shoes, and have no greater modicum of right than he possessed. Civ. Code, § 2243; Jones v. Jones, 140 Cal. 591, 74 Pac. 143; Smith v. Goethe, 147 Cal. 733, 82 Pac. 384; Pomeroy, Eq. Jur. §§ 688, 364, 664, 692, 754, 770, 918, 1048. It results from the foregoing that the demurrer was properly overruled.

The court adopted the findings returned by the jury, and also made and signed findings of fact covering the issues in the case. These findings are in substantial accord with most of the averments of the answer. It is found, however, that Lynch was not a licensed attorney at the inception of the negotiations and transactions above narrated, but that he was at all times their trusted adviser and intimate friend. Touching plaintiff's knowledge and notice of the equitable claim of the defendants Durham and Place, the court found that he and his grantors had information and knowledge as to who was in the actual possession of the premises, and of other facts and circumstances sufficient to put a reasonably prudent man upon inquiry as to the title to the premises. In this connection the findings recite that Mrs. Hannette J. Rossen was in possession, by leave and license of her daughters, that Miller and Kelley were the agents of plaintiff in the purchase of the premises, that all three knew of such possession, and that plaintiff purchased for value, but with notice of the trusts and agreements alleged in the answer. Many findings are particularly specified as being unsupported by the evidence, but most of these assaults are groundless. The fiduciary relation existing between Wiggin and Lynch, and each of them, on the one hand, and the three ladies who accepted their assistance on the other, was fully shown. Lynch assumed to act as their hired attorney, and they had many consultations with him as such, in his law office and elsewhere. Under such circumstances the rules governing the technical relation of attorney and client apply as fully and forcibly as if he had been admitted to practice before such relation was assumed. Pomeroy Eq. Jur., § 960.

Findings 1, 13, and 14 by the court, and findings 15 and 16 by the jury, are conflicting and confusing. In two of these findings it is recited that Lynch agreed to reconvey to Alta Durham and Mrs. Place; in another that such agreement was to reconvey to Hannette J. Rossen, Alta Durham, and Mrs. Place, or either of them, and in still another that such reconveyance was to run to the children of Mrs. Rossen, "defendants herein." This latter finding would include Edna Rossen, and exclude John G. Durham, the minor son. To add to the confusion, neither of these findings is sustained by the evidence, which shows, without conflict, that Lynch agreed to reconvey the property acquired by him to Alta Durham, Mrs. Place, and John G. Durham, or the "Durham heirs" in such proportions as the mother might suggest or as might be agreed upon. This being the uncontradicted evidence touching the equitable claims of the defendants, upon no possible view of the evidence can the finding as to the quantum of interest owned by Mrs. Place and Miss Durham be sustained.

After careful examination and analysis we have reached the conclusion that the findings tending to support the theory that plaintiff took title with notice of facts sufficient to put a prudent man upon inquiry must also fall as unsustained by the evidence. We do not think the finding which recites that Miller and Kelley were the agents of plaintiff, acting under his authorization in procuring title from Lynch, finds support in the record. True, he at various times had business dealings with them, and had stated that he wanted to buy more land. But this did not constitute them his agents for the purchase of this or any specific tract of land for him. The evidence shows that they were dealing at "arm's length" in the negotiations preceding the sale of this tract to him. He was entirely free to take the land or refuse to do so, according to his pleasure, and they would have violated no duty owing to him had they sold the land to any other person. This being true, there was no such agency as would charge him with knowledge or notice of all the information they possessed or might with reasonable diligence have acquired.

The fact that Mrs. Rossen was in possession of a very small portion of the land purchased by plaintiff was not, under the conditions disclosed by this record, sufficient to put the plaintiff upon inquiry touching the equitable claims of her daughters. Two deeds conveying all her right, title, and interest in and to this property were of record. In the latest of these deeds she was joined by her daughters, who with her conveyed whatever estate or interest, "as well in law as in equity," they then had, or which they might subsequently acquire. The rule, sustained by the weight of authority in the United States, is to the effect that the possession of the grantor is not constructive notice of any right or interest claimed in hostility to the terms of his deed. Pomeroy, Eq. Jur. § 617. And even if it be conceded that the contrary doctrine announced in Pell v. McElroy, 36 Cal. 271, remains the rule in this state, still we hardly think such doctrine can be extended to a case where the grantor has expressly relinquished all equitable claims in his deed. Be that as it may, however, there is another rule which makes the possession of Mrs. Rossen impotent as far as constructive notice is concerned. It is well settled that when possession is consistent with the record title, "it shall not be constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed." Pomeroy, Eq. Jur. § 616; Schumacher v. Truman, 134 Cal. 432, 66 Pac. 591; McNeil v. Polk, 57 Cal. 323; Smith v. Yule, 31 Cal. 185, 89 Am. Dec. 167; Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463.

The record before us shows that the possession of Mrs. Rossen was perfectly consistent with the title appearing of record. On May 5, 1883, a tract of land, including the dwelling and the lot on which it was situated, was designated and set apart as a probate homestead for the benefit of the widow and minor children of John J. Durham, deceased. This controversy concerns the lot on which the home or dwelling of the Durham family stands. The rights conferred by this probate homestead could not be surrendered by one or more of the beneficiaries, to the detriment of the minor son, who had not reached his majority when the deed to the plaintiff was executed. Moore v. Hoffman, 125 Cal. 93, 57 Pac. 769, 73 Am. St. Rep. 27; Fountain v. Hoppe, 104 Cal. 94, 37 Pac. 894. Therefore the minor son had a right to remain in possession of the homestead, and certainly his mother, as the natural guardian of his person, had a right to remain there with him. Aside from the rights of the minor son under the probate homestead, it must be remembered that he also owned an interest in the property, and the occupancy of Mrs. Rossen was by no means inconsistent with her duty or rights as the natural protector and guardian of her minor son holding such interest. Mrs. Rossen is claiming no equities, and an industrious search has failed to reveal an authority carrying the doctrine of constructive notice to the extent of holding that the possession of a grantor, claiming no interest hostile to the title conveyed, could, under any state of facts, constitute constructive notice of secret equities claimed by other grantors, as beneficiaries of a constructive trust at variance with the terms of their conveyance, absolute in form, which purported to convey all equitable claims and interests. We are not unmindful of the point that Mrs. Rossen held possession as licensee of her daughters. This verbal license could hardly create a distinctive possession separate and apart from the possession which was in accord with the rights and interests of her minor son. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543. And in order to avoid the result of their misplaced confidence in Lynch, it was necessary for Miss Durham and Mrs. Place to show a possession which would be sufficient to put the plaintiff upon inquiry touching their equitable estate or interest in the property antagonistic to their recorded conveyance. We do not think such possession was shown, and are furthermore of the opinion that the finding on this point is not sufficiently definite and certain. There should be a distinct, positive finding as to the party or parties who were in the actual possession of the premises.

As the case must go back for a new trial, it is proper to say that the letter of Lynch to Mrs. Rossen dated February 28, 1902, should have been excluded, and that the notice to vacate the premises, dated March 8, 1902, should have shared the same fate. We do not think the evidence of Mrs. Rossen, relating to conversations had with plaintiff after he had purchased the property, should have been allowed to remain in the case, when a timely motion to have the same stricken from the record was made. Oral declarations of a party should be viewed with caution, and declarations which do not clearly appear to be against the interest of the party making them should be excluded. We cannot see what bearing the deed from Gianelli to Lynch could have on the issues in the case, nor can we divine how the objection of Mrs. Rossen to a confirmation of the sale of her son's interest could be relevant to issues not involving the minor's rights.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

NOTE.—This opinion was sent for publication shortly before the earthquake and fire of April 18–19, 1906, and in the confusion ensuing was never published. The fact of this omission was quite recently called to the attention of the court, and by its order its publication is directed that there may be no break in its published opinions.

12 Cal. App. 370

NEHER v. HANSEN. (Civ. 694.)

(Court of Appeal, Second District, California. Jan. 4, 1910.)

1. TRIAL (§ 252*)—INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

A requested instruction as to the law, under circumstances of which there was no evidence, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596–612; Dec. Dig. § 252.*]

2. FRAUD (§ 23*)—RIGHT TO RELY ON STATEMENT.

One in making a purchase of stock of the president of the corporation may, without any investigation, rely on the representations of the seller, consisting of statements of fact by one presumed to possess peculiar and accurate knowledge of the same.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 20, 23; Dec. Dig. § 23.*]

3. FRAUD (§ 20*)—RELIANCE ON REPRESENTATIONS—CONSULTATION WITH OTHERS.

A purchaser is not precluded from recovery for the fraudulent representations of the seller merely because he consulted with, or received information from, others in regard to the subject-matter; it not following that the information was of a character to influence him in the purchase.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

4. FRAUD (§ 59*)—MEASURE OF DAMAGES.

The measure of damages for fraudulent representations in a sale is not the difference between the price paid and the value of the property when action for the fraud is begun.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. § 59.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

An order denying a motion for new trial for error in instructions will not be reversed, where it clearly appears the verdict would not have been otherwise had the instructions been correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228; Dec. Dig. § 1068.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Frank X. Neher against Homer A. Hansen. From an order denying defendant's motion for new trial, he appeals. Affirmed.

Jones & Weller, for appellant. H. T. Morrow, for respondent.

SHAW, J. Action to recover damages for alleged false representations made to plaintiff by defendant. The complaint charges that in August, 1906, the defendant, who was president of a corporation known as the Humboldt Brewing Company, with intent to cheat and defraud plaintiff, represented to him that said corporation then owned a brewery at Eureka, Cal., together with an ice plant in connection therewith, said property being represented by a picture of a brewery, which defendant then exhibited to plaintiff; that said representations were false and untrue, known by defendant to be false and untrue, and were made for the purpose of deceiving plaintiff and inducing him to purchase shares of the capital stock of said corporation; that plaintiff believed the representations to be true, and, relying upon them, was thereby induced to and did purchase 330 shares of the said capital stock, for which he paid the sum of $1,650; that said corporation did not in fact then own, nor has it ever owned, a brewery or an ice plant at Eureka, Cal., or elsewhere; that at the time of the purchase of the stock by plaintiff the same was and still is, wholly worthless. The prayer of the complaint is to recover damages in the sum of $1,650, being the purchase price paid for the stock. The material allegations of the complaint were denied by the answer. The case was tried before a jury, which returned a verdict in favor of plaintiff, upon which judgment was entered. Defendant's motion for a new trial was denied, and he appeals from the order denying the same.

The court refused to give two instructions requested by defendant, and such refusal is assigned as error. The first of these instructions is as follows: "Plaintiff cannot recover in this action unless he was deceived by the alleged representations, and if the means of knowledge are at hand, equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived." In support of his contention appellant cites Hanscom v. Drullard, 79 Cal. 234, 21 Pac. 736. It is true that a like instruction was requested by the defendant in that case. The court added the words "unless he was induced by the trick or misrepresentations of defendant not to make such inspection," and as thus modified gave the same. The point involved was the action of the court in thus modifying the instruction, and its ruling was sustained on appeal. In no event could the instruction as requested be deemed proper under the circumstances disclosed by the record herein. There is a want of evidence tending, in the slightest degree, to prove that the means of information or knowledge concerning the property, or title thereto, was equally available to both parties, or that the subject of the purchase was equally open to inspection. Moreover, the representations consisted of statements of fact by one presumed to possess peculiar and accurate knowledge of the same. No duty devolved upon plaintiff to make any investigation as to the truth of the statements. As said in Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486: "Even when contracting parties are adverse to each other, either has the right to rely upon an express statement made by the other of an existing fact of which the truth is known to the other and unknown to him." See, also, Willey v. Clements, 146 Cal. 91, 79 Pac. 850, and Morris v. Courtney, 120 Cal. 65, 52 Pac. 130, where it is said: "And the seller cannot escape responsibility by showing that the purchaser might have ascertained that such representations were untrue."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was no error in the court's refusal to instruct the jury to the effect that, if plaintiff consulted with or received information from others in regard to the brewery, such fact of itself precluded plaintiff's recovery. Conceding that plaintiff may have consulted others, or received information from others, it would not follow as a matter of law that such information was of a character to influence him in the purchase. Moreover, the giving of such an instruction would take from the jury the determination of the question as to whether or not plaintiff relied upon the representations made by defendant, and was thereby induced to buy the stock.

Upon the measure of damages the court instructed the jury as follows: "If you find for the plaintiff, the measure of damages is the difference between the price paid by him for the stock purchased and what the stock was actually worth on the 15th day of January, 1908, the date this suit was brought, but not in any case exceeding $1,650, the amount claimed in the complaint." The decisions are at variance as to what constitutes the measure of damages in actions to recover for fraud and deceit. The rule contended for by appellant is that the measure of damages in such cases is the difference between the real value of the property at the time of the purchase and the price paid therefor, together with interest. This rule is supported by the highest authority. Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; Rockefeller v. Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633; Redding v. Godwin, 44 Minn. 355, 46 N. W. 563; Hallam v. Todhunter, 24 Iowa, 166; Hiner v. Richter, 51 Ill. 299; Cawston v. Sturgis, 29 Or. 331, 43 Pac. 656. Our own Supreme Court, in the late case of Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011, appears to have adopted the rule laid down by Mr. Sutherland in his work on Damages (section 1171), as follows: "The measure [of damages] is the difference between the value of the stock as the condition of the company issuing it really was and what it would be if its condition had been as the purchaser was fraudulently induced to believe it to be." Says Mr. Justice Shaw in the case last cited: "One who buys property is lawfully entitled to all the benefit of the purchase—that is, to the full value of the property he buys—regardless of the price he paid." The rule announced by the trial court in the instruction given finds no support in any authority to which our attention has been directed.

An order denying a motion for a new trial will not be reversed, however, for mere error, when it clearly appears that, had the jury been correctly instructed as to the law, their verdict could not have been otherwise. Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386. It appears that the stock had no market value, and we must therefore look to the pecuniary condition of the company to ascertain its real value. Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179. The uncontradicted evidence shows that on August 25, 1906, when plaintiff purchased 200 shares of the stock, there were 23,000 shares of stock outstanding, and the assets of the company were of the apparent value of $14,586. These assets consisted of a small sum of cash, a claim of $3,744 against one J. C. Henderson, bills receivable of $1,400, and real estate valued at $6,000, upon which there was a mortgage securing an indebtedness of $5,000. On December 3d, when plaintiff purchased 130 shares of stock, there had been no material improvement in the company's financial condition. Upon this showing, and assuming that the bills receivable and claim against Henderson were solvent credits, still the amount thereof, to which plaintiff as a holder of 330 shares of stock would be entitled after deducting the cost of liquidation, upon an apportionment of the assets to all the stock, would be so insignificantly small that the jury must of necessity have found the stock to be worthless at the time when it was purchased. It is therefore apparent that, had the jury been instructed that the measure of damages was the difference between the price paid by plaintiff in the purchase and the true value of the stock at the time of the sale, they must, under this evidence, have found it to be the purchase price of $1,650. This was the actual sum with which plaintiff parted, without receiving anything of value in return therefor, and the amount in which the jury found him to have been damaged. In no event, the fraud being established, was he entitled to receive less. While the giving of the instruction constituted error, the rights of the defendant were not prejudiced thereby. Section 475, Code Civ. Proc.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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12 Cal. App. 309

In re GREGORY'S ESTATE.

BUSH v. BLANCHARD.

(Civ. 707.)

(Court of Appeal, First District, California. Dec. 28, 1909.)

1. PERPETUITIES (§ 4*)—CREATION OF REMAINDER—TRUSTS.

Civ. Code, §§ 769, 1344, have no reference to remainder interests in personal property; but such property, provided by will to constitute a trust fund for the benefit of the testator's wife, and, on her death, to be divided between their children, was subject to no statutory restriction, and the trust created was lawful and valid.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–44; Dec. Dig. § 4.*]

2. WILLS (§ 858*)—CONSTRUCTION—INTENTION OF TESTATOR.

A will should, if possible, be construed to prevent intestacy, especially where it evinces an intention of the testator to dispose of his whole estate; and where a testator, after making specific bequests, devised the remainder of his estate, which consisted of personal property, in trust for the benefit of his wife, and directed that the residue of that fund, on the death of his wife, be divided between two grandchildren, the fact that the wife predeceased him, so that the provision as to her lapsed, did not defeat the right of the grandchildren to take the property as provided by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2177; Dec. Dig. § 858.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

In the matter of the estate of Lewis Gregory, deceased. From an order denying a petition for partial distribution of the estate and an order granting a petition for final distribution, Alice E. G. Bush appeals. Affirmed.

Milton T. U'Ren and Edmund Nelson, for appellant. Hiram A. Blanchard, for respondent.

KERRIGAN, J. This is an appeal from an order denying a petition for partial distribution, and also from an order granting a petition for final distribution. The material facts have been agreed upon, and are set forth in a stipulation entered into by the parties interested. Lewis Gregory died July 2, 1907, and left surviving him as his heirs at law the appellant, Alice E. G. Bush, a daughter; Amy L. Gregory Blanchard, a granddaughter; George L. Gregory, a grandson; four children of Mary E. Hauch, a deceased granddaughter; and George P. Hauch. The estate consisted wholly of personal property. The deceased left a will, which was duly admitted to probate on July 19, 1907. After specially disposing therein of portions of his property, the will contained the following provisions in paragraphs 4 and 5 thereof:

"(4) I give and bequeath to my daughter, Alice E. Bush, and to her daughter, Alice Berry, each the sum of five dollars.

"(5) All the rest, residue and remainder of my estate I give, devise and bequeath to Oliver Blanchard, in trust, to have and to hold the same during the life of my said wife, upon the following trusts, to wit: To convert the same into money, invest and reinvest the proceeds thereof safely so that it shall be income producing, and promptly collect and pay over to my wife therefrom for her own use, benefit and disposal, the sum of thirty dollars per month in each and every month during the entire term of her natural life, together with such additional sum or sums, from time to time during her life as said trustee or his successor may from time to time determine that her circumstances require, said payments to be made from the principal of said fund, and upon the death of my wife, to immediately pay over and deliver all of said trust fund and residue of my estate then remaining to my granddaughter, Amy L. Gregory Blanchard, and my grandson, George L. Gregory, to whom, to wit, my said granddaughter and grandson, I hereby give, devise and bequeath all of said residue of said trust fund in equal share, to have and to hold the same unto them and their heirs and assigns forever. No bond shall be required of said trustee."

Prior to the death of the testator, his wife died. Thereafter, the appellant, Alice E. G. Bush, signed a written waiver of the specific bequest to her of the sum of $5, and subsequently she filed a petition for a partial distribution of the estate, on the ground that as the testator's wife had predeceased him the trust clause became inoperative, null, and void; that there was no provision in the will for the disposition of the residue of the estate except the one attempted to be set out in the aforesaid trust clause, which was for the residuum, not of the estate, but of the trust fund; that by reason thereof the deceased died intestate as to the residue of his estate. The petition of appellant for partial distribution was denied, and the petition of the executor for final distribution was granted, and by this order the residue of the estate was distributed to the two grandchildren named in the fifth paragraph of the will set out above.

The residue of the testator's estate consists entirely of personal property, and appellant contends that sections 769 and 1344 of the Civil Code deal with real or immovable property exclusively, and that therefore the grandchildren did not upon the death of the testator have a vested remainder in the residue of his estate. Yet, on the other hand, to support her position that the provisions of the trust are void, she calls our attention to a number of cases, in each of which the trust concerned real property, and was either to convey, or suspended the power of alienation for an unlawful period, and was therefore invalid. Neither the sections of the Civil Code cited nor the cases referred to are in point. The property involved here is personal property, which is subject to no statutory restriction (Est. of Wakerly, 108 Cal. 656, 41 Pac. 772, 49 Am. St. Rep. 97), and the trust created by the will was not unlawful nor invalid. It merely, by reason of the death of the beneficiary before the will took effect, became inoperative and failed. The real question in the case is: Did the testator intend to dispose of the whole of his estate, and is his will susceptible to such construction? We think so, and that it is plain from the provisions of the fifth paragraph of his will, above quoted, that the testator constituted the residue of his estate into a trust fund, and provided that upon the death of his wife whatever was left of this trust fund should go to the two grandchildren named. The fact that the wife never lived to become the beneficiary of the trust created in her favor is no reason for holding that the subsequent provision of the will directing the disposition of the fund should be defeated. "In the interpretation of wills, constructions which lead to intestacy, total or partial, are not favored; and such an interpretation should, if possible, be placed upon the provisions of the will as will prevent intestacy, especially where the will evinces an intention on the part of the testator to dispose of his whole estate." Le Breton v. Cook, 107 Cal. 410, 40 Pac. 552; Est. of Granniss, 142 Cal. 1, 75 Pac. 324; Est. of Lux, 149 Cal. 205, 85 Pac. 147.

In paragraph fifth of the will, as we have seen, the testator gave, devised, and bequeathed all the rest, residue, and remainder of his estate to the trustee in trust for the benefit of his wife, and the residue of that fund, which would be the residue of the estate, he directed to be delivered and paid over to his two grandchildren in equal shares, and in the same paragraph he directed that all the trust fund and the residue of his estate be paid over and delivered to his said grandchildren. The testator's wife having died before him, she never became entitled to the trust fund. The provision as to her lapsed; but, as there were residuary legatees designated in the will, the property out of which the trust fund was to be constituted must go to them, and not descend to the heirs.

The orders appealed from are affirmed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 421

STEHLIN v. SUPERIOR COURT OF SANTA CRUZ COUNTY. (Civ. 780.)

(Court of Appeal, First District, California. Jan. 7, 1910.)

CERTIORARI (§ 36*)—APPEAL FROM JUSTICE'S COURT—REVIEW OF PROCEEDINGS—QUESTIONS NOT RAISED BELOW.

Where plaintiff, nonsuited by a justice of the peace, appealed to the superior court, and consented to a trial of the case anew, he cannot for the first time, on application for a writ of review, urge that, because he had not settled any statement on the appeal from the justice's court, the superior court had no jurisdiction to determine anything but the question of law whether the nonsuit was properly granted.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 36.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Application for a writ of review by Jacob Stehlin against the Superior Court of Santa Cruz County. Writ denied.

Wyckoff & Gardner, for petitioner.

PER CURIAM. This is an application for a writ of review to annul a judgment of the superior court of Santa Cruz county given and made upon an appeal from the justice's court.

It appears that, upon the trial in the justice's court, the justice of the peace, upon motion of the defendant in the case, granted a nonsuit. The plaintiff appealed to the superior court on questions of both law and fact, but did not prepare or have settled any statement of the case. The claim is now made that the superior court had no jurisdiction except to try a simple question of law, as to whether or not the justice's court erred in granting the nonsuit. It may be conceded that this is true, provided the petitioner had properly raised the question and insisted upon his right in the trial court. However, instead of doing so, he appeared in said court, and consented to the case being set down for trial, and at the trial he appeared with his witnesses, and the case was tried anew in the superior court. Petitioner in no way even suggested the question he now attempts to raise to the trial court. Such court had jurisdiction of the parties and of the subject-matter. As to the questions of law that might have been raised, and the proper rulings thereon, or as to the failure of the appellant to prepare and have settled a statement, they cannot be considered in this collateral proceeding. The petitioner voluntarily appeared and submitted the whole controversy to the superior court, and after such submission, and after a decision against him, he will not now for the first time be heard to question the power of the trial court to determine the very question which he had invited the court to determine. De Jarnett v. Marquez, 132 Cal. 700, 64 Pac. 1090, and cases cited; Hart v. Carnell-Hopkins Co., 103 Cal. 133, 37 Pac. 196. To allow the writ to issue under the circumstances of this case would be to encourage an utter disregard of the due and orderly proceedings in courts of justice.

The writ is denied.

12 Cal. App. 426

FARNUM v. KERN VALLEY BANK et al. (Civ. 739.)

(Court of Appeal, Second District, California. Jan. 8, 1910.)

1. HUSBAND AND WIFE (§ 131*)—CONVEYANCE TO WIFE—PRESUMPTIONS.

Where land is conveyed to a married woman by a writing, the presumption is that it vests in her as her separate estate, under the express provisions of Civ. Code, § 164.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 471; Dec. Dig. § 131.*]

2. PROPERTY (§ 7*)—RIGHT TO POSSESSION AS INCIDENT OF OWNERSHIP.

Proof of the vesting of the legal title of land in plaintiff carries with it the right of possession.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 9; Dec. Dig. § 7.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. Trial (§ 46*)—Exclusion of Testimony—Showing Grounds of Admissibility.

Where the materiality of proffered evidence is not apparent upon its face, there is no error in excluding it, in the absence of a statement of counsel as to what he expects to prove thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115–117; Dec. Dig. § 46.*]

4. Husband and Wife (§ 138*)—Wife's Separate Estate—Acts of Husband.

That a husband had borrowed money from a bank upon the representation that he owned property, which in fact was the separate property of his wife, or that he had purchased materials out of which improvements upon the premises were constructed, would not affect the separate character of the estate of the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 537; Dec. Dig. § 138.*]

5. Trial (§ 4*)—Separate Issues—Order of Trial.

In an action by a wife to recover her alleged separate property from those holding it under a sheriff's deed, given pursuant to an execution sale upon a judgment against the husband, where the answer was not in the nature of a plea in abatement, but went to the merits of plaintiff's claim, and, if true, was a bar to her action, and the only evidence in the case was that which tended to show the separate character of her property, and therefore her right to maintain the action, the court did not err in not first determining her right to sue before hearing the cause upon its merits.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 8–10; Dec. Dig. § 4.*]

6. Appeal and Error (§ 1050*)—Harmless Error—Admission of Evidence.

In an action by a wife to recover her alleged separate property from those holding it under a sheriff's deed, given pursuant to an execution sale upon a judgment against the husband, where it appeared that the property was plaintiff's separate estate, so that defendant acquired no interest therein by virtue of its execution sale, the admission in evidence of plaintiff's declaration of homestead after acquirement of the property, if error, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Mattie S. Farnum against the Kern Valley Bank and others. From an order and a judgment for plaintiff, the mentioned defendant appeals. Affirmed.

Matthew S. Platz, for appellant. F. D. McClure and Fred E. Borton, for respondent.

ALLEN, P. J. The complaint was in the usual and ordinary form in an action for determining conflicting claims to real property. The defendants by their answers denied plaintiff's ownership and possession of the property, and alleged that she was a married woman, the wife of one N. C. Farnum, that the premises described were property of the community, and that defendants had acquired title thereto by virtue of a sheriff's deed, executed pursuant to sale upon execution based upon a judgment in favor of defendants and against the husband. The court found in favor of plaintiff upon all of the issues. The sufficiency of the evidence to support the findings is not questioned; at least there are no specifications of error in relation thereto. In any event, the findings have ample support.

Upon the trial, plaintiff introduced in evidence a deed, dated in 1902, which conveyed to her the premises described. It was admitted that she was a married woman at the time, and the wife of N. C. Farnum. The presumption that the premises so conveyed were her separate estate attached under section 164, Civ. Code. Proof of the vesting of the legal title carried with it the right of possession. There is no evidence in the record tending to overcome the presumption of the separate character of the estate.

It is claimed by appellant that the court erred in sustaining an objection to the testimony of a witness, who said he had examined the records of the defendant bank as to moneys had by N. C. Farnum from the bank, and in connection with which he was asked to state what the aggregate amount of that was. We see no error in this action of the court. It was not claimed by defendant in its pleadings that the money borrowed from the bank was used in the purchase of the property, nor was the materiality of such proffered evidence apparent upon its face. We find no statement of counsel as to what he expected to prove by the question; and, in the absence of any statement apprising the court that the same was intended as a basis of proof material to the action, the court was warranted in sustaining the objection. The mere fact that the husband had borrowed money from the bank upon the representation that he owned the property, or that he had purchased materials out of which the improvements upon the premises were constructed, in no degree tended to affect the separate character of the estate presumptively conveyed by the deed.

We are unable to appreciate the force of appellant's contention that the court erred in not first determining the right of plaintiff to sue before hearing the cause upon its merits. The only evidence offered in the case was that which tended to show the separate character of the property, and therefore the right of plaintiff to maintain the action. The answer was not in the nature of a plea in abatement, but went to the merits of plaintiff's claim, and, if true, was a bar to her action.

The specifications of error relative to the admission of the declaration of homestead declared by plaintiff after the acquirement of the property are of no consequence. The property being the separate property of the wife, defendant, having acquired no interest therein by virtue of its execution sale, could in no wise be prejudiced by any regularity or irregularity in connection with the homestead declaration.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

We perceive no error in the record prejudicial to appellant, nor any merit in the appeal. The judgment and order are therefore affirmed.

We concur: SHAW, J.; TAGGART, J.

12 Cal. App. 416

BURKET v. BURLAND et al. (Civ. 671.)

(Court of Appeal, First District, California. Jan. 7, 1910.)

PARTNERSHIP (§ 328*)—ACCOUNTING—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for a partnership accounting, evidence *held* not to sustain a finding as to respective amounts defendants and plaintiff's husband invested in the partnership business.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 328.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Julia E. Burket against Fred Grant Burland and another. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appeal. Reversed.

Zabala & Wyatt and Sheehy & Hudson, for appellants. Cassin & Lucas, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff, and from an order denying defendants' motion for a new trial. The plaintiff in the action succeeded to the interest of her husband, J. E. Burket, and brought this action for the purpose of settling the accounts and business of a partnership concern. The partnership was composed of J. E. Burket and the two defendants, and its business was the conducting of an undertaking establishment and dealing in furniture. It is admitted by the pleadings that J. E. Burket owned a one-half interest in said partnership business, and that the two defendants owned jointly the other one-half interest therein. The question in the case is as to the amounts contributed by J. E. Burket and the defendants to the joint venture. Plaintiff claims that J. E. Burket had invested $5,549.48 in the partnership, and that the defendants had invested but $2,527.04, and she sued for the difference—$3,022. The defendants, on the other hand, insist that the amount contributed by them was $3,794.08, and that Burket's contribution was a like amount. The court found for the plaintiff. The contention of the defendants on this appeal is that the findings are not supported by the evidence, and we are constrained to agree with this view.

Edward G. Burland, a witness for the plaintiff (and being himself one of the defendants) testified: "On November 1, 1904, the time the partnership was formed, the undertaking business inventoried $5,549.08. That was the value of the stock which Mr. Burket had on hand at the time. That stock went into the partnership. When the partnership was formed, Mr. Burket was owing us for 21 months' labor at $50 a month, making $1,050; also $55 for a canopy and draperies which we had sold him. He also allowed us a bonus of $650 as an inducement for entering into partnership with him, which made a total of $1,755 owing to Burland Bros. from Mr. Burket. The undertaking business inventoried $5,549.08, and in this we purchased a one-half interest for $2,774.50, and paid for that, first, by crediting Mr. Burket with the amount due us, to wit, $1,755, and by paying him the balance of $1,019.54. We had agreed to add to the undertaking business a furniture business, and we paid Mr. Burket the $1,019.54, which was the balance due him for one-half of his undertaking business, by putting a like amount with it and investing the whole, or $2,039.08, in a stock of furniture." The testimony of this witness was corroborated by his codefendant, testifying for the defense. Prior to the trial J. E. Burket had died, and the facts just narrated were undisputed. Upon this testimony the court found that there is due from the defendants to the plaintiff the sum of $877.50, on account of their purchase of their one-half interest in the business.

It may be that the trial judge disbelieved the correctness of the position taken by the defendants. It is certain that the venture was not a profitable one for Burket. The Burlands had, prior to February 3, 1903, carried on this undertaking business under the firm name of Burland Bros., and on that date, in consideration of $5,800, they sold it to Burket, and 21 months later they purchase a half interest therein for $2,774.54; the largest item going to make up that sum being $1,050, which the defendants say was due E. G. Burland for salary, at the rate of $50 a month for the time Burket owned and ran the business, no part of which during that time had been paid, or even demanded. Another substantial item of the purchase price was the bonus of $650, which the Burlands testify was credited them for consenting to go into business with Burket. During the existence of the copartnership Burket, on account of sickness, was absent most of the time from its place of business. No books of account were kept until about nine months after the copartnership was established, and it was dissolved about one month after they were opened. Burket died without ever having seen these books. The case was tried after Burket's death, and the plaintiff, knowing nothing concerning the conduct of the business, was compelled to submit her cause on the testimony of one of the defendants.

In no view of the evidence, however, can the findings of the court be sustained. If the evidence be true, the findings of the court are against it; on the other hand, if the court disbelieved the testimony given by the defendants, the plaintiff is in no better position, for in that event there is no evidence to support the findings. The plaintiff received over $4,000 for her one-half interest in the stock, fixtures, and net credits of the co-partnership, and the testimony introduced by the plaintiff herself shows that each half interest contributed the same amount, to wit, Burket, one-half of the undertaking business, $2,774.54, and one-half of the furniture business, $1,019.54, making a total of $3,794.08, and Burland Bros., one-half of the undertaking business and one-half of the furniture business, of the same value respectively.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

From the foregoing, it follows that the judgment and order must be reversed; and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 407

SCHMITT v. GIBSON. (Civ. 726.)

(Court of Appeal, Second District, California. Jan. 6, 1910. Rehearing Denied by Supreme Court March 7, 1910.)

1. CONTRACTS (§ 138*)—PUBLIC POLICY—MONEY OBTAINED UNDER ILLEGAL AGREEMENT—DENIAL OF RELIEF.

Where a party entered into an illegal agreement with defendant and M. to swindle others, and pursuant to this agreement, and for the forwarding of its purpose, plaintiff gave his money to M., the failure of M. and defendant to keep the agreement and return the money gave him no right to recover against defendant, since, where both parties are equally in fault, the condition of the defendant is preferable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 688; Dec. Dig. § 138.*]

2. CONTRACTS (§ 138*)—PUBLIC POLICY—MONEY OBTAINED UNDER ILLEGAL AGREEMENT—PARI DELICTO.

Where plaintiff deliberately joined with defendant and others for the purpose of swindling third persons, and was himself swindled by his associates, he cannot obtain relief by a claim that he was not in pari delicto, where it does not appear that he was not their equal in intelligence, general knowledge, and experience, or that his participation in the scheme was in a legal sense due to imposition, duress, or undue advantage practiced upon him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. § 138.*]

3. CONTRACTS (§ 138*)—PUBLIC POLICY—MONEY OBTAINED UNDER ILLEGAL AGREEMENT—PARI DELICTO.

Where a party entered into a contract to swindle others, and was himself swindled by his associates, the fact that he did not engage in a gambling transaction, did not lose his money on a wager, and did not engage in a conspiracy to defraud others, but only thought he was doing so, while he in fact was the victim of the scheme, did not strengthen his right to recover the money lost.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. § 138.*]

4. CONTRACTS (§ 138*)—ILLEGAL CONTRACTS—RIGHT OF PARTY TO RECOVER ON RESCISSION.

While where so long as an illegal contract remains executory relief may be accorded to one who repudiates it because of its invalidity, where a party, supposing that he was conspiring with others to swindle third persons, became himself the victim, he cannot recover on the ground that he repudiated the contract, where he did not attempt to do so until the money was declared lost.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 687; Dec. Dig. § 138.*]

5. CONTRACTS (§ 138*)—PUBLIC POLICY—RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT—GROUNDS OF RELIEF.

Where a party, believing that he was conspiring with defendant and others to defraud third persons, was himself swindled out of money by his associates, in his action in assumpsit to recover the money received by defendant, the fact that defendant subsequently engaged in a similar transaction to defraud another would not justify according plaintiff relief on grounds of public policy, based upon the fact that defendant and the others were engaged in a general scheme to defraud, since the action was not one for conspiracy to defraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 688; Dec. Dig. § 138.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Eugene Schmitt against W. S. Gibson. From a judgment for defendant, plaintiff appeals. Affirmed.

Clement L. Shinn and Wesley H. Beach, for appellant. Earl Rogers, Paul W. Schenck, and W. H. Dehm, for respondent.

SHAW, J. Plaintiff appeals on the judgment roll from a judgment rendered in favor of defendant. The complaint states an action in assumpsit for money had and received to the use and benefit of plaintiff by defendant, Gibson, John Doe, Jane Doe, and Richard Doe. No service was had and no appearance made by the defendants sued under the fictitious names inserted in the complaint. Gibson, answering for himself alone, denied the allegations of the complaint. The findings are voluminous and consist of a narration of facts connected with a fake pugilistic encounter which one Maxwell, a cousin of Gibson, had arranged between two gentlemen, one of whom was known as Mr. Casey and the other as Mr. McCormick. Plaintiff was made the dupe of his pretended co-conspirators with whom he knowingly joined in an undertaking to swindle others, all of whom were in fact parties in a conspiracy with Gibson to separate plaintiff from $13,000 cash which he had derived from a sale of property. Plaintiff's effort to "get rich quick" failed, and with an awakening conscience which enabled him to distinguish between right and wrong, and firmly believing that he had been wronged, he brought this action to recover the money lost.

Briefly stated, the facts are that plaintiff and Gibson were partners in the hotel business in Los Angeles. The latter, learning that plaintiff was about to sell some property, informed him that his cousin, George Maxwell, had fixed a fight in Denver, and that a good deal of money, could be obtained on this fake fight; that Maxwell had trained both the fighters and was to be stakeholder and referee of the fight and would bet his own money on the result. Plaintiff and defendant went to Denver and were there informed by Maxwell that he (Maxwell) had for 10 years been in the employ of Barnes and Pomeroy, two wealthy Pittsburg men, who would bet heavily on McCormick, one of the pugilists; that he (Maxwell) had never had a chance to make any money on the side and never made anything but his salary; and it was then arranged that plaintiff would bet Maxwell's money on Casey for the reason that Maxwell, being both stakeholder and referee, could not bet. Plaintiff's money was in St. Louis, and he was informed that as a condition of his betting for them he must transfer his money to Denver in order to make an exhibition of his responsibility to Barnes and Pomeroy. Plaintiff did so, and thereupon, in a suite of rooms occupied by plaintiff and Gibson, the betting commenced. There were present plaintiff, Gibson, Maxwell, Barnes, Casey, McCormick, and one unknown person. As the money was bet, Gibson took it to Maxwell, who remained in an adjoining room. Plaintiff did not bet any of his money on the first day, but used that put up by Maxwell, a part of which was money already used and held by him as stakeholder, and which was by Gibson returned from Maxwell to plaintiff to bet against Barnes and Pomeroy. On the second day Gibson and Maxwell advised plaintiff to bet his own money, assuring him that it was fixed for Casey to win the fight. He did so, and also continued to put up money furnished by Maxwell and Gibson, most of which was that already bet and placed in the hands of Maxwell as stakeholder. Plaintiff bet his own money because Maxwell was to be the stakeholder and referee and was betting his own money on Casey, and because he had been told by Maxwell and Gibson that the fight was fixed for Casey to win; and all the time he was betting he thought he was swindling Barnes and Pomeroy, with whom he was betting, and he went into the scheme for that purpose. The truth was, however, that all of the parties, including Gibson, were in a conspiracy to swindle the plaintiff, and the money that was bet against plaintiff never actually changed hands, but was simply used for the benefit of the conspirators to induce the plaintiff to bet his own money. In all, plaintiff bet $13,000 of his own money, all of which was placed in the hands of Maxwell as stakeholder. Thereupon they all went to a vacant house provided by the conspirators, and Casey and McCormick began the fight. In the first two rounds Casey appeared to have the best of it; in the third round, however, Casey stepped into a hole in the floor, left for a heating register, and which had been covered up by a carpet, by reason of which he fell, and Maxwell counted him out. This hole was known to all the parties except plaintiff, and Casey stepped into it designedly. Thereupon plaintiff demanded the return of his money, but did not claim any fraud. Maxwell told him he could not return the money, as it had been bet on the fight. After a conference between Maxwell, Barnes, and Pomeroy, it was stated that on account of the accident to Casey the fight could be had over again, provided plaintiff would put up an additional $10,000 on Casey, which, together with what he had theretofore bet, should constitute the total stakes on the proposed fight; and they generously gave plaintiff 10 days from that date to put up $2,500, and until the 10th of June to put up the remaining $7,500. Plaintiff and Gibson returned to Los Angeles, where Gibson borrowed of plaintiff $1,900, to which he added $600 of his own money and procured a certified check which he pretended to plaintiff he had sent to Maxwell as part of the $10,000; but, in truth, however, the same was not sent at all, and it was not intended that any further fight should take place. On May 23, 1907, Maxwell telegraphed that Barnes had forced the keys of the safe-deposit box from him, and that Maxwell was on the way to Mexico. Other conspirators notified plaintiff that Maxwell was running away with the money, and, before June 10th, a letter was received from Maxwell, stating that Barnes had taken the money away from Maxwell, and that he (Maxwell) was going to Central America.

The court further finds as follows: "The truth is that the conspirators appropriated the money of plaintiff to themselves and divided it between themselves; but there is no evidence that Gibson, personally, got any of it, and the finding will be that he did not get any of plaintiff's money." There are other findings to the effect that no fight was in fact had and no money paid to Barnes and Pomeroy upon the claim that they had won the same as a result of the fight, but was appropriated by them as above stated; that all of the representations, pretenses, acts, and statements of the parties were false and untrue, and at all times known to be false and untrue; that Barnes, Pomeroy, and Maxwell did not in fact bet their money on any contest, but only pretended to bet for the purpose of inducing plaintiff to part with his money and as a part of their scheme to defraud him; that plaintiff believed in the truth of the representations, pretenses, and statements of the defendant and relied thereon, and believed that he was going to swindle those with whom he was betting and went into it wholly for that purpose; that in attempting to swindle others plaintiff was the victim of defendant and the others mentioned who swindled him. There is a further finding that the same parties, about a month later, perpetrated a similar swindle upon one Dr. Vanderbeck, by arranging a wrestling match between Casey and McCormick in the city of Omaha. As conclusions of law, the court finds that the plaintiff has no standing in a court of law, and rendered judgment accordingly.

The conclusion of the court is fully sustained by the case of Abbe v. Marr, 14 Cal. 210, wherein the facts were almost identical with those in the case at bar. In that case the means whereby the swindle was perpetrated was a horse race, the victim being assured by the conspirators that it had been fixed for his horse to win, and upon such representations, and believing them to be true, he was thereby induced to bet his property. He brought an action to recover, and in disposing of the case on appeal the court said: "No court of justice can listen to such a case. When the plaintiff asserts his own turpitude in this way, he sends his case out of court. If, in attempting * * * to swindle another, he becomes the victim of his own arts, it may become a question in morals or in honor which party is the more culpable; courts of law entertain no discussion on the subject, but terminate the controversy by shutting their doors in the face of the intruder."

Waiving the finding to the contrary, and conceding that Gibson did receive plaintiff's money, it nevertheless, devolved upon plaintiff to establish facts showing that it was obtained in a manner that imposed upon Gibson the duty of returning it. Plaintiff seeks to do this by showing that as a means of accomplishing the robbery of Barnes and Pomeroy it was placed in the hands of Maxwell under an illegal agreement made between Maxwell, Gibson, and himself, to the effect that they should and would join with him in swindling Barnes and Pomeroy. Had they kept their agreement, there would have been no cause for complaint on his part. Failing to do this, he brings an action based upon the breach of this unholy agreement, to which he deliberately and knowingly became a party. The principle applicable to relief in such cases is embodied in the two maxims, "Ex pacto illicito non oritur actio," and, "Ex dolo malo non oritur actio," in the application of which the court must, upon plaintiff's own statement, deny him its aid in the pursuit of that which he has lost. This is not out of consideration for the defendant, but due to the fact that, "where both parties are equally in fault, the condition of the defendant is preferable."

Appellant insists, however, that, while he was in delicto, he was not in pari delicto. There is nothing in the findings which indicates that in point of intelligence, general knowledge, and experience plaintiff was not the equal of Gibson. It does not appear that his participation was, in a legal sense, due to imposition, duress, or undue advantage practiced upon him by Gibson or his associates. He deliberately joined with Gibson and others with the avowed intent and purpose of robbing the others, and his only cause for complaint is that there was wanting on Gibson's part the "proverbial honesty among thieves." In some slight degree, plaintiff may be less culpable than defendant; but, in the absence of some practice which gave the latter an undue advantage, the courts, as said in the Abbe Case, will entertain no discussion as to the degree of culpability.

Appellant further insists that he did not engage in a gambling transaction, that he did not lose his money on a wager, and that he did not engage in a conspiracy to defraud others. It is true, he says, that he thought he was doing all these fraudulent and wicked things whereby he intended to and supposed he was assisting in the robbery of Barnes and Pomeroy, believing they were the wealthy dupes of himself and associates. The ground upon which courts withhold relief in such cases is the moral turpitude of the party seeking it. Can it be said that the turpitude attending the act of theft is less because the supposed jewels stolen were in fact worthless paste?

Appellant has cited a number of authorities wherein the courts, under facts somewhat similar, have sustained the right of relief to the one defrauded. An examination of these cases, however, shows that the decisions therein were all based upon facts wanting in the case at bar. It is true that the opinions contain dictum which supports the position of appellant, but it was unnecessary in disposing of the appeals.

In the case of Wright v. Stewart (C. C.) 130 Fed. 905, plaintiff's money was not placed in the hands of a stakeholder as a wager, but in connection with a matter wholly collateral thereto. Moreover, the plaintiff stated that he was not betting it on the race, and before the simulated race occurred he demanded the return of his money, which demand was refused by the conspirators. Says the learned judge in distinguishing that case from the Abbe-Marr Case: "With their own consent they put up their property as a wager, ran the race out, and after it was lost brought suit, and in the petition averred their own turpitude; whereas, here the plaintiff never consented to put up his $5,000 on the foot race, and demanded it back before the simulated race was run. * * * The law accorded to him his locus penitentiæ, and, when he demanded back his money prior to the proposed race, the law should respect his withdrawal." On appeal to the Circuit Court of Appeal, this decision was affirmed by a divided court; Judge Sanborn dissenting. 147 Fed. 321, 77 C. C. A. 499.

So in the case of Falkenberg v. Allen, 18 Okl. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494, the plaintiff, upon representations that the result of a foot race was prearranged, placed his money in the hands of a stakeholder, who was one of the conspirators. Before the proposed race occurred, he demanded the return of his money, which was refused. Relief was granted him because of his repentance and repudiation of the transaction before it was fully executed.

It is true that, so long as the illegal contract remains, executory relief should be accorded to one who repudiates the contract because of its illegality. Appellant seeks to bring himself within this doctrine, and argues that, "as long as the light holds out to burn, the vilest sinner may return." It appears from the findings, however, he did not attempt to retrace his steps until the light was extinguished—after the condition under which he should be declared loser or winner was fully executed. Not until Casey was counted out and McCormick declared the victor—and just how long does not appear—did he ask for the return of his money. Conceding such request, if made before the condition was executed, to constitute a sufficient repudiation, nevertheless plaintiff did not withdraw, nor attempt to withdraw, from the transaction until after his money was declared lost. Under these circumstances, the law does not accord one a locus penitentiæ.

In Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709, the facts were almost identical with those in the case of Wright v. Stewart, supra. There, as here, the dupe thought he was in a conspiracy to defraud others in a fake foot race, the result of which he understood to be prearranged. He bet $2,000 of his money, while an additional $3,000 was obtained from him by the stakeholder and his confederates by other means wholly collateral to the wager. Recovery was had for the entire sum. The action there was in form for fraud and deceit; it being alleged and proven that defendants had for a number of years engaged in transactions of a like character in different parts of the country. In that case relief was granted upon the ground of public policy. In according the relief the court expressly stated that: "If the case at bar disclosed but one transaction, if we should shut our eyes to other transactions of like character that distinguished history of this Buckfoot gang, if our whole attention was confined to the scheme entered into by the plaintiff with Wasser and Fisher in Oklahoma and the denouement at Webb City, we could not say that one was less guilty than the other; it was a scheme of dishonest purpose and there is no justification or palliation of it, and if there was nothing else in the case to make the offense of one more enormous than the other we would not listen for a moment to plaintiff's prayer for relief." It thus appears that the reasons which actuated the Supreme Court of Missouri in according relief were considerations of public policy based upon the fact that the defendants who had conspired to rob the plaintiff therein had combined for the purpose of engaging in, and were engaged in, the perpetration of similar frauds throughout the country. The action here is not one for conspiracy to defraud, but in assumpsit to compel the defendant Gibson to disgorge that which plaintiff claims he has received. Under this form of action, conceding that evidence of facts connected with the particular transaction whereby the money was lost might be introduced, nevertheless the fact that the defendants engaged in a similar transaction at Omaha about a month later does not justify according relief in this case upon such ground.

In Lockman v. Cobb, 77 Ark. 279, 91 S. W. 546, relief was granted plaintiff, who had lost his money in wagering it upon a fake foot race. The transaction, however, did not involve him in a conspiracy having for its purpose the defrauding of others; on the contrary, he supposed the race was to be an honest test of speed. The ground of recovery in that and the like cases of Webb v. Fulchire, 25 N. C. 485, 40 Am. Dec. 419, and Preston v. Hutchinson, 29 Vt. 144, appears to be based upon the fact that the game was not played "according to Hoyle," but an unfair advantage taken by reason whereof plaintiffs had no chance to win. Clearly, if the gaming, whatever be its character, is conducted according to rule, the one losing money in a wager upon the result would be denied any remedy at law. It is difficult to perceive how he could be entitled to greater consideration if because of cheating the game was conducted unfairly, or the result prearranged. If such facts shall enter into the consideration of one's right to recover money lost in betting, then it inevitably follows that the courts must sit as arbiters of every game upon which money is wagered, act as judge of the race course, and umpire the prize ring. Babcock v. Thompson, 3 Pick. (Mass.) 446, 15 Am. Dec. 235.

To our mind the public welfare is best promoted by adhering to the rule established in this state a half century ago, at which time the doors of the courts were declared closed against one seeking redress under circumstances identical with those presented in the case at bar. Abbe v. Marr, supra.

Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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12 Cal. App. 434

SHANNON et al. v. CAVANAUGH et al.

(Civ. 713.)

(Court of Appeal, Second District, California. Jan. 11, 1910.)

1. Specific Performance (§ 6*)—Mutuality in Remedy.

The implied covenant arising under Civ. Code, § 1927, providing that an agreement to let for hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring against all persons lawfully claiming the same, is that the lessees shall not be evicted by title paramount to that of the lessors who alleged at the time of executing the lease and placing the lessees in possession that the lessors were the owners thereof, and is not a continuing covenant of the lessors for the quiet enjoyment of the leasehold during the whole term thereof against all persons lawfully claiming it, in the nature of a covenant to perform personal service which could not be specifically enforced; and hence, where a lease, by covenants, imposed upon the lessors no obligation other than that of placing the lessees in possession of the premises, which had been performed, and, when the lessors demanded that the lessees perform their covenant to execute a chattel mortgage to secure rent, the lessees were in quiet and peaceful possession, there was no lack of mutuality in remedy which would preclude the lessors' right to enforce specific performance of the lessees' covenant, under Civ. Code, § 3386, providing that neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed or is compellable specifically to perform everything to which the former is entitled under the same obligation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9–11; Dec. Dig. § 6.*]

2. Specific Performance (§ 5*)—Right to Remedy—Adequate Remedy at Law.

As the value of security by chattel mortgage for rent covenanted for in a lease necessarily depends upon contingencies which render it impracticable to fix the value thereof, and as the law furnishes no standard for the measurement of damages for the breach of an obligation, the value of which is unascertainable, the lessors would have no adequate remedy in damages upon refusal of the lessees to execute the mortgage, and would be entitled to enforce performance of the covenant even if Civ. Code, § 3384, as amended in 1874, providing that, except as otherwise provided in the article, specific performance of an obligation can be compelled, denies the right to specific performance of an obligation when the act to be done is such that pecuniary compensation for its nonperformance would afford adequate relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 6; Dec. Dig. § 5.*]

3. Specific Performance (§ 5*)—Right to Relief—Adequate Remedy at Law.

That a lease containing a covenant of the lessees to give chattel mortgage security for rent provided that, if the lessees made default in any of the covenants, the lessors might terminate the lease and possess the premises, would not afford an adequate legal remedy for default in the covenant to give the mortgage.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 6; Dec. Dig. § 5.*]

4. Pleading (§ 214*)—Demurrer—Admissions.

Where there is a general demurrer to a complaint, the allegations of the complaint must be taken as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

5. Landlord and Tenant (§ 251*)—Restraining Removal of Goods by Tenant—Grounds—Irreparable Injury.

If lessees, who refused to perform a covenant to give chattel mortgage security upon certain furniture for the rent, had no property in the state other than the furniture in question, and were legally obligated to mortgage it to the lessors as security for the rent, and threatened to mortgage or otherwise dispose of it, thereby, as well as by other acts, causing irreparable injury to the lessors, the lessors were entitled to a temporary injunction restraining them from disposing of, incumbering, selling, or removing the furniture.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1028; Dec. Dig. § 251.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Nellie Shannon and another against William E. Cavanaugh and another. From a judgment for defendants and orders dissolving a temporary restraining order and denying plaintiffs' application for a temporary injunction, plaintiffs appeal. Reversed.

J. L. Murphey, for appellants. Goldberg & Meily, for respondents.

SHAW, J. Action to enforce the specific performance of a covenant to give a chattel mortgage to secure the rent reserved in a lease of real estate. A general demurrer interposed to the complaint by defendants was sustained. Plaintiffs failed to amend their complaint within the time allowed therefor; whereupon, judgment was rendered against them, from which they prosecute this appeal.

It appears from the complaint that plaintiffs were the owners of a building, the first floor of which consisted of storerooms, and the upper floors of which were divided into rooms and fitted up for rooming house purposes. On March 6, 1908, plaintiffs leased the upper floors of the building to defendants for a period of two years. The express consideration of the lease was the rent reserved therein, which was payable monthly, and numerous covenants and agreements, neglect and failure to perform which on the part of lessees gave the lessors the right to terminate the lease and re-enter and repossess the premises. Among other covenants contained in the lease on the part of the lessees was the following: "And said lessees further covenant and agree that they will pay the said rent in installments when the same become due, and to secure the payment of same to lessors, they hereby agree that the lessors shall have a lien for the security of the payment of said rent upon all furniture brought into the house by the said lessees, and that, after the said lessees install their furniture therein, that, upon demand of lessors, lessees will execute to the lessors a chattel mortgage, or such other instrument as they may deem necessary, upon the said furniture to secure the rent aforesaid." It is alleged: That defendants entered into possession of the premises and "purchased a certain lot of furniture and furnishings and placed the same in said building for the purpose of conducting a rooming house therein, and that the said furniture and furnishings consisted of carpets, beds, bedding, curtains, chairs, and general hall, parlor, bedroom, and kitchen furniture; the exact amount and the exact kinds thereof being unknown to plaintiffs." That thereafter plaintiffs made demand upon defendants that they execute a chattel mortgage upon said furniture to secure the payment of the rent in accordance with their covenant so to do, but that defendants refused to execute such mortgage, and declared that if they could not make the house pay they would take the furniture away and leave the house. It is further alleged that defendants have no other property in this state out of which plaintiffs could collect any judgment that they might obtain for the failure to pay the said rent when the same becomes due, and that defendants threaten to mortgage or otherwise dispose of the said furniture, or remove the same from the said premises, so as to prevent these plaintiffs from obtaining any security therefrom or thereby. The complaint further alleges irreparable injury and want of an adequate remedy at law.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We think the trial court erred in sustaining the demurrer. Respondents undertake to justify the ruling upon the ground that the complaint shows a want of mutuality in remedy. This contention is based upon the provisions of section 3386, Civ. Code, which provides that: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation," etc. As regards the express covenants of the lease, plaintiffs have fully performed everything which defendants were entitled to have performed under the terms thereof. By the express covenants, no obligation was imposed upon plaintiffs other than that of placing the defendants in possession of the leased premises. This duty had been performed, and at the time of the demand that defendants perform their covenant to execute the chattel mortgage defendants were in the quiet and peaceable possession of the leased premises. Respondents insist, however, that the law implies a covenant on the part of the lessors for the quiet enjoyment of the leasehold during the whole term thereof against all persons lawfully claiming the same (section 1927, Civ. Code); that this implied covenant is a continuing one in the nature of a covenant to perform personal services, and hence not one which could be specifically enforced. There is no merit in this contention. The purport of the implied covenant is that the lessees shall not be evicted bv title paramount to that of the lessors, who allege that, at the time of executing the lease and the placing of lessees in possession of the property, plaintiffs were the owners thereof. Inasmuch therefore, as the lessors were the owners of the property, the use and enjoyment of which they had conveyed to defendants for a term of two years, the latter's possession and enjoyment could not be disturbed by any holder of the title lawfully claiming the same other than plaintiffs themselves. Plaintiffs could not lawfully disturb them, other than by the exercise of the rights reserved under the terms and provisions of the lease under which defendants held possession. For plaintiffs to otherwise interfere with defendants' possession and enjoyment would constitute an unlawful act, the remedy for which, if such wrong was threatened, would in its nature be preventive rather than by decree for specific performance. It appears that defendants are in the quiet and peaceable possession of the premises described in the lease; that there is no title thereto paramount to that held by the lessors; and that the complaint shows that plaintiffs have performed everything which the defendants were entitled to have performed as a condition of executing the chattel mortgage. Respondents also insist that plaintiffs are precluded from the benefit of the relief by reason of the fact that the complaint shows they have an adequate remedy at law. In Senter v. Davis, 38 Cal. 450, it is said: "The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity, which will grant full redress by compelling specific performance on the part of the defendant." When announced, this statement was in full accord with the general equitable principle declared in section 3384, Civ. Code, which, as it stood prior to the amendment of 1874, expressly denied the right to specific performance of an obligation when the act to be done was such that pecuniary compensation for its nonperformance would afford adequate relief. In 1874 this section was amended by striking out, among other clauses, the subdivision which denied the remedy in those cases wherein the law afforded adequate relief. The section as it now stands reads as follows: "Except as otherwise provided in this article, the specific performance of an obligation may be compelled." As thus amended it would seem that every obligation may be specifically enforced, unless it be an obligation as to which the remedy is denied by other provisions of the article. There appears to be no provision in the article entitled "Specific Performance of Obligations" which limits the remedy to those cases wherein an adequate remedy at law is wanting.

Conceding, however, that the amendment effected no change in the law, we are clearly of the opinion that the breach of the obligation to give the mortgage cannot be adequately compensated in damages, for the reason that from the nature of the obligation it is impracticable to ascertain the extent to which plaintiffs would be damaged by the breach. Security for the payment of the rent during the entire term of the lease must be deemed a thing of value to the parties so indemnified. Inasmuch, however, as the value of such security necessarily depends upon contingencies which render it impracticable to fix the value thereof, and as the law furnishes no standard for the measurement of damages for the breach of an obligation the value of which is unascertainable, it is clear that the parties have no adequate remedy in damages. Section 8, Pomeroy, Spec. Perf. of Contracts.

The lease provided that, in case the lessees made default in any of the covenants therein, the lessors might terminate the lease and re-enter and possess the leased premises. Says counsel for respondents: "Plaintiffs, on defendants' refusal to give the mortgage in question, might have immediately re-entered the premises, and might have had the aid of a court of law in effecting such re-entry." This, it is contended, constituted an adequate legal remedy for default in the covenant to give the mortgage. The exercise of such right on the part of the lessors would in our judgment, fall far short of an adequate remedy; indeed, we fail to perceive how such termination of the lease would constitute any remedy at all. Such act would deprive the lessors of the rental and income to which they were entitled under the terms of the lease, the receipt of which might be, and presumably was, of far more consequence to them than possession of the estate. It is no answer to say that they might make a new lease to other parties. The case of Woodruff v. Water Power Co., 10 N. J. Eq. 489, cited by respondents, bears no analogy to the facts in the case at bar. In that case there was no covenant on the part of the defendant to do the act; but the deed contained a condition, the failure to perform which gave the grantor the right to forfeit the estate. It was there held that, in the absence of any covenant on the part of defendant, there was no obligation upon which to base an action for specific performance, and plaintiff must be content with the right of forfeiture, which was the exclusive remedy provided in the contract.

Upon the filing of the complaint the court, upon plaintiffs' application, made an order directing defendants, at a time and place therein specified, to show cause why a temporary injunction should not be issued, restraining them from disposing of, incumbering, selling, or removing the furniture which they had agreed to mortgage to plaintiffs, and that upon the hearing of such application an order be made restraining defendants from so doing. At the hearing of said application, had upon the complaint and the general demurrer of defendants' interposed thereto, the court dissolved the restraining order and denied the plaintiffs' application for a temporary injunction. Plaintiffs appeal from these orders. As against the general demurrer, we must accept the allegations of the complaint as true. Thus accepted, it appears that defendants have no property in this state, other than the furniture in question; that they are legally obligated to mortgage the same to plaintiffs as security for the payment of the rent reserved in the lease; that defendants threaten to mortgage or otherwise dispose of the same, thereby, as well as by other alleged acts, causing irreparable injury to plaintiffs. It is apparent from the record that the making of the orders was due to an erroneous conception of the law upon which the court held the complaint wanting in facts sufficient to state a cause of action.

The judgment and orders are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

12 Cal. App. 420

CONLAN v. SUPERIOR COURT et al.

(Civ. 779.)

(Court of Appeal, First District, California. Jan. 7, 1910.)

1. ELECTIONS (§ 280*)—CONTESTS—PROCESS—SERVICE OF CITATION.

Service of citation in an election contest, made as provided by Code Civ. Proc. § 1119, by leaving a copy at the house where a party, who cannot be found, last resided, is constitutional and valid.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 264; Dec. Dig. § 280.*]

2. PROHIBITION (§ 28*)—SCOPE OF INQUIRY—QUESTIONS OF FACT IN LOWER COURT—ELECTION CONTEST.

A determination by the trial court that a party cannot be found so that citation may be served on him by leaving a copy at the house where he last resided, as provided by Code Civ. Proc. § 1119, is conclusive on the Supreme Court in prohibition proceedings, based on the claim that the trial court had no jurisdiction to proceed with an election contest for the reason that the citation was not served on petitioner.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 28.*]

3. PROHIBITION (§ 1*)—USE OF WRIT—SCOPE OF REMEDY.

The writ cannot be used as a writ of error to determine a question of fact which it was the province of the trial court to determine, but its sole province is to determine whether the superior court is proceeding in excess of its jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Petition by Charles T. Conlan for prohibition against the Superior Court in and for the City and County of San Francisco, and Frank J. Murasky, judge thereof. Writ denied.

Edward Lande, for petitioner.

PER CURIAM. It is sought by the petitioner herein to obtain a writ of prohibition against the superior court of the city and county of San Francisco, in an election contest pending in said court, against the petitioner, who has been declared elected to the office of police judge of said city.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is claimed that the superior court has no jurisdiction to proceed with the contest for the reason that the citation was not served upon petitioner. The Code provides (Code Civ. Proc. § 1119) that the citation may be served upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided. The service may be made by leaving a copy as provided in the section under the circumstances therein mentioned, and such service is constitutional and valid. Chatham v. Mansfield, 1 Cal. App. 298, 82 Pac. 343. The petitioner fails to state in his petition that such service was not made by leaving a copy as provided in the section. If the question was determined by the trial court that the petitioner could not be found, such determination of that question is conclusive upon us in this proceeding. We cannot try the question collaterally. We must presume in favor of the determination of the judge of original jurisdiction. The writ of prohibition cannot be used as a writ of error to determine a question of fact which it was the province of the trial court to determine. Its sole province is to determine as to whether or not the superior court is proceeding in excess of its jurisdiction.

The writ is denied.

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12 Cal. App. 327

THOMAS v. HAWKINS, Judge of Superior Court, et al. (Civ. 692.)

(Court of Appeal, Third District, California. Dec. 30, 1909.)

1. Certiorari (§ 46*)—Service of Writ.

Under Code Civ. Proc. § 1070, providing that the writ of review may be directed to an inferior tribunal, board, or officer, or to any other person having the custody of the proceedings to be certified, etc., a writ of review or order to show cause need only be served on the officer or tribunal to whom it is directed.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 118; Dec. Dig. § 46.*]

2. Certiorari (§ 5*)—Existence of Remedy by Appeal or Writ of Error.

A writ of review cannot be made to perform the office of a writ of error for the correction of errors of law or fact.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

3. Certiorari (§ 28*)—Grounds—Want of Jurisdiction—Determination of Question Whether Jurisdiction Exists.

Under Code Civ. Proc. § 1068, providing that a writ of review may be granted when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, and there is no appeal nor any adequate remedy, a writ of review lies to determine whether an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred where there is no appeal nor any adequate remedy.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. § 28.*]

4. Certiorari (§ 15*)—Grounds—Subject-Matter.

A writ of review lies to review the refusal of the superior court to dismiss an appeal from a justice's court because of the failure to give an undertaking for the payment of costs on appeal, as required by Code Civ. Proc. § 978.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 27; Dec. Dig. § 15.*]

5. Justices of the Peace (§ 159*)—Municipal Corporations (§ 642*)—Police Court—Appeal—Undertaking—Necessity.

The undertaking for the payment of costs on appeal from a justice's or police court, required by Code Civ. Proc. § 978, is an essential requisite to the conferring of jurisdiction of appeals on the superior court; and, where no undertaking is filed, the superior court is without jurisdiction to try the case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 550; Dec. Dig. § 159;* Municipal Corporations, Cent. Dig. § 1414; Dec. Dig. § 642.*]

6. Certiorari (§ 68*)—Jurisdiction—Findings—Review.

A finding of the superior court on conflicting evidence, on a motion to dismiss an appeal from a justice's court on the ground that it had not been perfected by the filing of an undertaking prescribed by Code Civ. Proc. § 978, that a cash deposit made by appellant was made in lieu of the undertaking is conclusive on the court, on a writ of review to review the refusal of the superior court to dismiss the appeal for want of a sufficient undertaking; and it cannot declare that the finding is erroneous, or that the superior court is without jurisdiction to entertain the appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180-182; Dec. Dig. § 68.*]

7. Justices of the Peace (§ 159*)—Appeal—Perfecting Appeal—Cash Deposit in Lieu of Undertaking.

Where a cash deposit, made with a justice of the peace by the appellant appealing from the justice's judgment, was made for the purpose and in lieu of the undertaking on appeal required by Code Civ. Proc. § 978, the appeal was perfected, and the superior court was thereby vested with jurisdiction, though the sum deposited exceeded the amount required for that purpose.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550, 556; Dec. Dig. § 159.*]

8. Certiorari (§ 64*)—Jurisdiction—Findings—Conclusiveness.

Where the question of jurisdiction is determined by an inferior tribunal, board, or officer whose jurisdiction of a proceeding is challenged through a writ of review, on evidence aliunde the record, and on evidence justifying a conclusion for or against such jurisdiction, the court entertaining the proceedings on writ of review cannot interfere with the conclusion reached; it being the result of the exercise of a necessary discretion vested in all tribunals, boards, and officers exercising judicial functions.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 175; Dec. Dig. § 64.*]

9. Certiorari (§ 57*)—Review—Evidence.

Evidence may be taken to determine a jurisdictional fact, and such evidence must be certified up with the record on certiorari in order to review such question.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 145; Dec. Dig. § 57.*]

Application for a writ of review by Charles W. Thomas, Jr., against N. A. Hawkins, as

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judge of the Superior Court in and for the County of Yolo, and others. Order to show cause discharged.

Charles W. Thomas, for petitioner. Elmer W. Armfield, for respondents.

HART, J. This is an application for a writ of review.

Before disposing of the proceeding upon the merits, we shall notice some preliminary points suggested by the respondents.

1. The motion to quash the order to show cause and the proceedings herein is denied. The grounds of this motion are that the order to show cause granted by this court was not served upon the real party in interest, and (rather in the nature of a demurrer) that the allegations of the petition on which said order was issued are subject to some extremely technical objections, to which it is not necessary to make special reference. The writ or order to show cause was served upon the officer and tribunal to whom it was directed, and this is all that is required by the statute. Section 1070, Code Civ. Proc.

2. But counsel for the respondents insists, with apparent earnestness, that a writ of review "is not the proper remedy in this matter, and that this court cannot determine the issue involved." In support of this position counsel declares that: "If the superior court had jurisdiction to hear the motion (motion to dismiss), then there can be no question that its ruling upon the motion was simply an exercise of that jurisdiction, and, however erroneous such ruling might be, it would only be an error of law, and in no manner be subject to review by an original proceeding in this court"—citing Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8, and Sherer v. Superior Court, 96 Cal. 654, 31 Pac. 565, as sustaining the view thus suggested. It is only elementary to declare that the writ of review cannot be made to perform the office of a writ of error for the correction of errors of law or of fact. The full scope of the remedy is as is described by section 1068 of the Code of Civil Procedure, to wit, to determine whether an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, where there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

But the position here of counsel for the respondents is without the slightest foundation, either in principle or precedent, upon which it may rest. In both the cases in 96 Cal. and 31 Pac., cited by counsel, the appeals had been regularly taken to the superior court, and the "excess of jurisdiction" alleged therein consisted of rulings of the courts after the latter had acquired jurisdiction of the cases. Here the question goes to the very root of the court's power to pass upon any proposition affecting the merits of the cause, or any other matter pertinent thereto, except to pass upon the motion to dismiss the appeal for want of jurisdiction to entertain the same. No better authority than the statute itself need be sought to show the obvious and utter untenableness of counsel's position. It (section 978, Code Civ. Proc.) plainly says: "An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on appeal." If counsel's argument were maintainable, that section could be rendered absolutely nugatory in those appeals where, notwithstanding the fact that no appeal bond was filed, the court decided that it nevertheless had acquired jurisdiction to entertain such appeals. The undertaking for the payment of costs on appeal is obviously the essential and indispensable prerequisite to the conferring of jurisdiction of appeals from justice's or police courts on the superior court; and, where in such cases that necessary formality is not complied with, the superior court is as powerless to hear or try the cause as it would be to try and determine one within its own jurisdiction on oral pleadings, or to try and decide and conclude the rights of a party where summons had not been served and returned by any of the methods authorized by law. But we are not without direct authority in our own state upon this subject. The case of Swem v. Monroe, 148 Cal. 741, 83 Pac. 1074, was where a writ of prohibition was granted to restrain further proceedings in the superior court in a cause appealed from the justice's court to the first-mentioned court on the ground that no bond had been given for costs on appeal; the superior court having refused to grant a motion to dismiss the appeal for that reason. The appellant (in the superior court) had deposited with the justice of the peace the sum of $86.30, which was the amount of the judgment rendered and entered against her. The Supreme Court says: "In the present case the deposit of money was less than $100, which was insufficient to perfect the appeal. The superior court was without jurisdiction, and should have dismissed the appeal." The order of the court was that the writ of prohibition issue "commanding the respondent to refrain from further proceedings in the case," amounting practically and substantially to a dismissal of the appeal.

3. The petition alleges, among other things: That on the 1st day of September, 1909, E. T. Lampton, as justice of the peace of Woodland township, in the county of Yolo, in a certain action wherein petitioner was plaintiff and one Chas. J. Groh was defendant, rendered judgment against said Groh and in favor of said petitioner in the sum of $163.11, which sum includes costs taxed at $22.89; that, on the 16th day of September, 1909, "the said justice issued and delivered to the constable of said Woodland township an ex-

ecution in the said action against the property of the defendant for the said sum of $163.11, and on the same day said constable levied the execution on the property of said Groh, and took the same into his possession, and retained possession thereof until the said justice, upon deposit by defendant of the sum of $163.11, as a stay of proceedings, directed him, the said constable, to stay proceedings, whereupon the said constable stayed all proceedings, and relinquished the said property to said Chas. J. Groh." It is further alleged that on said 16th day of September, 1909, a notice of appeal was filed with the justice by the attorney for said Groh, said notice stating that the appeal was from the judgment on questions of both law and fact, and thereafter said attorney deposited with said justice in cash the sum of $163.11, equal in amount to the judgment and the costs awarded to petitioner; that thereupon the justice transmitted to the clerk of the superior court of Yolo county a certified copy of his docket, the pleadings, notices, and other papers appertaining to and filed in said cause, together with the notice of appeal and the money deposit of $163.11. No bond for costs on appeal was filed, nor any deposit of cash made by the defendant in said action, after the appeal was taken, except the said sum of $163.11. On the 19th day of October, 1909, petitioner gave notice that on the 25th day of October, 1909, he would move to dismiss the appeal, on the ground that the same had not been perfected by the filing of the undertaking prescribed by section 978 of the Code of Civil Procedure. On the 8th day of November, 1909, the respondents made an order refusing to grant the motion to dismiss the appeal, "upon the ground that said deposit of $163.11 was a sufficient undertaking on appeal for the payment of costs."

The controversy here arises from the conflicting views between petitioner and the attorney for the defendant Groh with regard to the purpose for which the deposit of $163.11 in cash was made with the justice of the peace. Petitioner declares in his affidavit, upon which, with others, the motion to dismiss the appeal was pressed before the respondents, that the attorney for the defendant distinctly and unequivocally agreed to deposit with the justice a sufficient sum to cover the judgment and costs if he (petitioner) would cause the execution to be withdrawn, and no further proceedings had thereunder, and the property levied upon surrendered to said defendant; that with this understanding the justice directed the constable to release the property and to take no further steps under the execution; that the attorney for Groh deposited said sum with the justice in pursuance of his promise made to the petitioner. The statement of petitioner is corroborated in many particulars by the affidavit of the justice of the peace and that of C. W. Thomas, Sr., associated with petitioner as counsel for the latter.

The return to the order to show cause certifies to this court the record in the case of Petitioner v. Groh, together with all the proceedings had before respondents on the motion to dismiss the appeal. Said return discloses that, in rebuttal of the evidence produced by the petitioner in the form of the affidavits to which we have referred, the testimony of the attorney for the defendant Groh was received; the substance of said testimony being set out in the return and certified to by the judge of the superior court. The attorney for Groh denied that the property of his client had been seized by the constable under the execution issued on the judgment rendered and entered against Groh, but declared that the constable, on the 16th day of September, appeared at Groh's place of business and threatened to levy upon his property; that, having been informed of this act of the constable, he (attorney for Groh) arranged with petitioner to have the constable to cease further proceedings on the execution, promising to immediately file his notice of appeal and the bond or undertaking for costs on said appeal; that on said 16th day of September, he filed his notice of appeal and deposited with the justice the sum of $163.11. The attorney further testified: "No levy of the execution was ever made; the officer did not take possession of the store, nor did he close it up; the execution was not recalled by the justice of the peace at any time, or at all, but was recalled by Mr. Thomas himself, and said justice court made no order in the premises. I did not deposit said sum of $163.11, or any other sum, with said justice as a bond to stay proceedings, but did deposit the same as a bond on appeal." Thus it appears that the respondents decided the motion to dismiss the appeal adversely to the contention of the petitioner upon evidence presenting a conflict upon the vital point involved, and this court is in no position to declare that the decision is erroneous, or that the respondents are without jurisdiction to entertain the appeal.

It will not be disputed that, if the cash deposit, made with the justice of the peace by the appellant in the case involved here, was so made for the purpose and in lieu of the undertaking on appeal required by section 978 of the Code of Civil Procedure, the appellant thus perfected his appeal, and the superior court was thereby vested with jurisdiction thereof, notwithstanding the fact that the sum deposited greatly exceeds the amount required for that purpose. Mokelumne Hill Canal & M. Co. v. Woodbury, 10 Cal. 186; Ward v. Superior Court, 58 Cal. 519; Pacific Window Glass Co. v. Smith, 8 Cal. App. 767, 97 Pac. 898; Swen v. Monroe, 148 Cal. 741, 83 Pac. 1074. The attorney for Groh positively testified that his purpose in making the deposit was to render his appeal effectual under the terms of section 978 of the Code of Civil Procedure; and, while the fact that the sum deposited was the exact equivalent of the amount of the judgment and costs awarded to the petitioner, and much in excess of the amount required in lieu of the undertaking on appeal, might be regarded as a circumstance tending to show that the real and original purpose of the deposit was to stay proceedings, yet, as stated, we cannot say that the conclusion of the respondents from all the evidence is not justified. It is no doubt true that the respondents, in considering the testimony, concluded that the attorney for Groh would not engage in the perfectly futile proceeding of taking an appeal without perfecting the same in the manner imperatively required by the statute, and thus arrived at the conclusion that the statement of said attorney that the purpose of the deposit was to render the appeal effectual was true.

It must be conceded that, where the question of jurisdiction is determined by an inferior tribunal, board, or officer, whose jurisdiction of a certain matter or proceeding is challenged through the writ of review, upon evidence aliunde the record itself, and upon evidence justifying a conclusion either for or against such jurisdiction, the court entertaining the proceedings on review cannot interfere with the conclusion thus reached, for such conclusion is the result of the exercise of the necessary discretion vested in all tribunals, boards, and officers exercising judicial functions. And that evidence may be taken to determine a jurisdictional fact, and that it is not only proper, but necessary, to certify such evidence up, with the record, on certiorari is fully established by the following cases: People v. Board of Delegates, 14 Cal. 479; Lowe v. Alexander, 15 Cal. 301; Blair v. Hamilton, 32 Cal. 49; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; People v. Goodwin, 5 N. Y. 568.

For the reasons ventured herein, the order herein to show cause is discharged.

We concur: CHIPMAN, P. J.; BURNETT, J.

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12 Cal. App. 290

Ex parte COLE et al. (Cr. 123.)

(Court of Appeal, Third District, California. Dec. 24, 1909.)

CONSTITUTIONAL LAW (§ 24*)—COUNTY ORDINANCES—REPEAL.

Const. art. 22, § 1, provides that all laws in force at the adoption of the Constitution not inconsistent therewith shall remain in full force until altered or repealed by the Legislature, and that all rights, actions, prosecutions, claims, etc., not inconsistent therewith, shall continue to be as valid as if the Constitution had not been adopted. *Held*, that article 4, § 25½, adopted as an amendment in 1902, providing that the Legislature might provide for the division of the state into fish and game districts, and might enact such laws for the protection of fish and game therein as it deemed appropriate, was prospective only in operation, and, not being self-executing, did not repeal an ordinance of the supervisors of S. county prohibiting the seining of fish therein so long as the Legislature had not seen fit to adopt legislation under such authority.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21–29; Dec. Dig. § 24.*]

Application for a writ of habeas corpus by Ray Cole and Joe Ruise. Petitioners remanded.

Ross Campbell, for petitioners. Clarence Lea, Dist. Atty., and G. W. Hoyle, for respondent.

BURNETT, J. Petitioners were charged with the violation of an ordinance entitled "An ordinance prohibiting the casting, extending or setting of any seine or net of any kind for the catching of any fish in any river, stream or slough in the county of Sonoma," and passed by the board of supervisors of said county on the 14th day of February, 1899.

The authority of the board to enact said ordinance, its validity when enacted, the sufficiency of the complaint charging the offense, and the regularity of the proceedings culminating in the arrest of petitioners are all unchallenged. Petitioners' only contention is that said ordinance has been abrogated by section 25½ of article 4 of the Constitution of the state, adopted as an amendment in 1902. Said amendment is as follows: "The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate for the respective districts."

It is admitted that the Legislature has taken no action in pursuance of said amendment, and, as the provision itself is not self-operative, it is impossible to hold that by the terms of said amendment the ordinance involved herein has been repealed. The most that could be urged by petitioners is that the power to regulate the pursuit of fish and game has been taken away from the board of supervisors and given exclusively to the Legislature. But, conceding without deciding this, it is manifest that the said amendment is prospective, and not retrospective, in its operation, and it does not expressly, nor can it be held by implication to, affect any prior legislation by the board of supervisors valid at the time of its enactment. Article 22 of the Constitution provides: "That no inconvenience may arise from the alterations and amendments in the Constitution of the state, and to carry the same into complete effect, it is hereby ordained and declared: Sec. 1. That all laws in force at the adoption of the Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims and contracts of the state, counties, individuals, or bodies corporate not inconsistent therewith shall continue to be as valid as if the Constitution had not been adopted." The same rule must, of course, apply to amendments to the Constitution and the principle is indorsed in many decisions, and, indeed, hardly needs authority in its support.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In Gurnee v. Superior Court, 58 Cal. 91, it is said: "It is a well-settled rule of construction, applicable alike to Constitutions and statutes, that they are to be considered prospective and not retrospective in their operation, unless a contrary intention clearly appears." In Ex parte Burke, 59 Cal. 8 (43 Am. Rep. 231), in reference to a similar condition, it is said: "At the time the law in question was passed, there was no constitutional objection to special and local legislation. This was held by the Supreme Court in the very early case of Ryan v. Johnson, 5 Cal. 87, and the same doctrine was again laid down in the case of People v. C. P. R. R. Co., 43 Cal. 398. When the act was passed, it was a valid act, even conceding for the purposes of the argument that it was a special law, as is claimed in this case. The question therefore arises: Was the act abrogated by the provisions of the new Constitution referred to above? The language of section 25, art. 4, is that 'the Legislature shall not pass local or special laws.' The constitutional inhibition manifestly applies to future, and not to past, legislation. The provision is purely and simply prospective in its operation, and the words will not justify any other construction. It did not, therefore, operate as a repeal of acts passed by the Legislature years before the Constitution went into effect, but merely put a stop to all future legislation of that objectionable character. If authority were required in support of this view, it will be found in the following cases: State v. Barbee, 3 Ind. 258; Hingle v. State, 24 Ind. 28; Cooley's Const. Lim. 76."

We see no necessity for further quotation in support of a proposition that seems so plain. None of the cases cited by petitioners afford any support to their contention.

The petitioners are remanded.

We concur: CHIPMAN, P. J.; HART, J.

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12 Cal. App. 423

HENTIG v. JOHNSON et al. (Civ. 667.)

(Court of Appeal, Second District, California. Jan. 7, 1910. Rehearing Denied by Supreme Court March 7, 1910.)

APPEAL AND ERROR (913*)—PRESUMPTIONS—PARTIES.

Code Civ. Proc. § 385, authorizes the action to be continued in the name of the original party in case of a transfer of any interest therein, or permits the court to allow the transferee to be substituted in the action. Upon a motion for judgment against sureties on an undertaking for appeal from a money judgment, it appeared that respondent assigned all his interest in the original judgment before the remittitur from the appellate court, affirming the original judgment, was filed, but it was not shown that in moving for judgment on the undertaking, respondent was not acting for the real party in interest. Respondent acted as his own attorney in the original action, and continued to act as attorney in making the motion. *Held*, that in support of the judgment on the undertaking, it would be presumed on appeal that respondent acted for the person entitled to move for judgment thereon, whether for himself or the assignee of the judgment, and a contention that payment of a judgment on respondent's motion would not bar another judgment on the assignee's motion was not available to prevent judgment on respondent's motion; the assignee not seeking judgment against the sureties for herself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3690–3692; Dec. Dig. § 913.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by F. G. Hentig against Frances E. Johnson, W. L. Williams, and another. From a judgment for plaintiff, upon a motion for judgment against sureties on an appeal bond, Williams appeals. Affirmed.

W. L. Williams (E. C. Bower, of counsel), for appellant. F. G. Hentig, for respondent.

TAGGART, J. Appeal from a judgment entered upon motion against sureties on an undertaking to perfect an appeal from a money judgment, and to stay execution thereon. 8 Cal. App. 221, 96 Pac. 390. The motion was regularly noticed and heard upon a showing by the respondent that more than 30 days had elapsed since the filing in the office of the clerk of the superior court of the remittitur of this court affirming the judgment of the trial court, that $50 additional costs had been incurred by respondent, and that no part of the judgment appealed from had been paid. It was also made to appear to the court that, subsequent to the date of the original judgment, and prior to the filing of the remittitur from this court as aforesaid, the respondent Hentig assigned all his right, title, and interest in and to the original judgment to one Alice P. Haney, who is still the owner of said judgment, but that respondent did not sell or assign to said assignee of the judgment any interest in either the undertaking on appeal or the undertaking for stay of execution.

Appellant here contends that the assignment of the judgment constituted an equitable assignment of the interests of Hentig in the undertaking, and that the court had no authority under the showing made to enter judgment in favor of anybody but the assignee of the judgment, Alice P. Haney. Section 385, Code Civ. Proc., authorizes the action or proceeding to be continued in the name of the original party, and it is only by permission of the court that the name of the assignee can be substituted. There is nothing in the record to show that in his motion for judgment against the sureties on the undertaking Hentig was not acting on behalf of the real party in interest. He continued to act as the attorney in the case in making the motion. This he might do whether for himself or his assignee, and in support of the judgment it will be presumed that he was acting for the one entitled to make the motion, whichever this was. It is unnecessary that we should pass upon the question whether Heisen v. Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39, overrules or merely distinguishes Chilstrom v. Eppinger, 127 Cal. 326, 59 Pac. 696, 78 Am. St. Rep. 46.

We see nothing in the contention that the payment of a judgment, entered on motion of a respondent under section 942, Code Civ. Proc., would not estop the assignee of the respondent from entering up another judgment and collecting a second time from the sureties on the original undertaking. The assignee is not here either objecting to the enforcement of the judgment or attempting to have a judgment entered against the sureties on her own behalf. We cannot assume that she will be, and until she does the good faith of the respondent will be presumed.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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12 Cal. App. 403

In re DEVLIN & JUDAH CO. (Civ. 615.)

(Court of Appeal, First District, California. Jan. 6, 1910. Rehearing Denied Feb. 3, 1910. Denied by Supreme Court March 7, 1910.)

CONSTITUTIONAL LAW (§ 43*)—PERSON ENTITLED TO RAISE CONSTITUTIONAL QUESTION—RELIANCE ON STATUTE.

Applicant filed a petition under Pol. Code, § 4462, providing that when a newspaper desires to have its standing as a newspaper of general circulation, as that term is defined in section 4460, giving as one of the essentials that it be published for one year prior to the application established, it may file a verified petition setting forth the facts, and, upon a proper showing, a decree may be entered. The petition failed to show that the paper had been published for one year. *Held*, that the applicant cannot contend that this requirement is in violation of Const. art. 1, §§ 11, 21, providing against class legislation; since it constitutes only a part of the definition defining a paper of general circulation, and, if held invalid, no law remains under which the petition can be brought, and, if valid, the petition shows a failure to comply therewith.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. § 43.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Application by the Devlin & Judah Company for a decree declaring the Santa Cruz Evening News to be a newspaper of general circulation, which was opposed by Friend W. Richardson. From an order granting the prayer of the petition, an appeal was taken. Reversed.

McGowan, Squires & Westlake and Duncan McPherson, Jr., for appellant. Hugh R. Osborn, for respondent.

KERRIGAN, J. This is a proceeding instituted under title 5, pt. 4, of the Political Code, to have the Santa Cruz Evening News declared a newspaper of general circulation and entitled to print official advertising.

The petition shows that said newspaper was established November 1, 1907; that it is printed and circulated in the city of Santa Cruz every day, Sundays and holidays excepted, and is devoted to the dissemination of local and telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers numbering over 1,500, and is not devoted to the interests of a particular class, profession, trade, calling, race, or denomination. The petition was filed July 20, 1908, at which time said paper had not been published and established for a period of one year. Section 4462 of said Code authorizes any one to appear and contest such a petition, and Friend W. Richardson, on behalf of the California Press Association, appeared and filed what was denominated a "demurrer and contest." The demurrer was upon the ground that the petition does not state facts sufficient to constitute a cause of action, and that it does not set forth facts sufficient to authorize the court to grant the relief prayed for, in this: That it has not been published for one year preceding the filing of said petition. The demurrer was overruled, and upon final hearing the prayer of the petition was granted.

We think the demurrer should have been sustained, and the respondent's application denied. Section 4460 defines what is a newspaper of general circulation, to wit, one "published for the dissemination of local and telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town where such publication, notice of publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement." It thus appears that the petition fails to show that the Santa Cruz Evening News was a newspaper of general circulation as defined by said section, in that it had not been established for the period of a year. If section 4460 is a valid exercise of legislative power, it cannot be doubted that the petition fails to state a cause of action. Respondent, however, contends that the section is unconstitutional as class and discriminating legislation, because the section requires that such newspaper shall have been established, printed, and published for one year. Its argument is based on article 1, §§ 11, 21, Const., which read that "all laws of a general nature shall have uniform operation, * * * nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." The provision of the section assailed is an essential and inseparable part of the definition. It is contained in the same sentence, and grammatically and logically it is a modification of every other part of the definition. The section requires the newspaper to be of a certain character as to contents, and published at regular intervals for a period of one year. We cannot assume that the Legislature would have enacted any portion of this section defining a newspaper of general circulation without the qualifying clause requiring it to be published at regular intervals for a period of one year. If the requirement for the publication during one year is invalid and of no effect, then section 4460 fails to define such a newspaper.

Section 4462 provides that when a newspaper desires to have its standing as a newspaper of general circulation, as that term is defined in section 4460, ascertained and established, it may at its option file a verified petition, setting forth the facts which justify such action, and upon a proper showing such a decree may be made. No right can exist to have established by decree of court that a newspaper is one of general circulation, as that term is defined by section 4460, if that part of the section defining such a paper is invalid.

The result is that whether the section is valid or not the petition fails to state a cause of action. If the section is valid, the petitioner has failed to state facts sufficient to bring its newspaper within the definition. If it is invalid, the section as a matter of law contains no definition of a newspaper of general circulation, and there is no foundation for the petition.

The judgment is reversed.

HALL, J. I concur.

COOPER, P. J. I concur in the judgment of reversal. The sole and only authority for a proceeding of this kind is the Political Code, §§ 4460, 4461, 4462. Section 4462 provides that when a newspaper shall desire to have its standing as a newspaper of general circulation, as that term is defined in section 4460, ascertained and established, it may file a verified petition, and obtain a judgment of the court, by doing the things therein enumerated, to the effect that it is such paper. The petition does not show that the Santa Cruz Evening News is a newspaper of general circulation as that term is defined by section 4460, in this: That it does not allege nor show that said paper had been printed and published for one year prior to the time of filing the petition, but, on the contrary, it shows that the said newspaper had been established and published less than nine months at said time.

To entitle the petitioner to this special kind of judgment provided for by the sections of the Code enumerated, it must comply with the express conditions on which the judgment is authorized. It is elementary that statutory remedies must be strictly pursued, and cannot be extended to cases not named nor included within the classes enumerated. It is not necessary to discuss or determine the constitutionality of the provisions of the Code relied upon by the petitioner.

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12 Cal. App. 293

MAHONEY v. BOARD OF EDUCATION et al. (Civ. 691.)

(Court of Appeal, First District, California. Dec. 27, 1909. Rehearing Denied by Supreme Court Feb. 24, 1910.)

1. DEDICATION (§ 58*)—OPERATION AND EFFECT—USE OF PROPERTY.

Where land has been dedicated to a definite purpose by grant or devise, it cannot, without the consent of the grantor or devisor, or his successor in interest, be used for any other purpose.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 100; Dec. Dig. § 58.*]

2. DEDICATION (§ 58*)—OPERATION AND EFFECT—USE OF PROPERTY.

Where land dedicated to a particular purpose by grant or devise is situated within a municipality, but is set aside and reserved by the state for certain purposes, the municipality has no authority to divert it from such purposes, but the power of the state to do so is unlimited, unless there are contract relations or private rights of an abutting owner or other person involved.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 100; Dec. Dig. § 58.*]

3. DEDICATION (§ 38*)—RIGHTS AND LIABILITY AS TO USE—CARE OF PROPERTY—PUBLIC AUTHORITIES.

Where lands are held by a city, board, commission, etc., in trust for the state, the Legislature may revoke the dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 77; Dec. Dig. § 38.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 65*)—RIGHTS AND LIABILITY AS TO USE—CARE OF PROPERTY—PUBLIC AUTHORITIES.

The board of education of the city and county of San Francisco, in proceeding under San Francisco Charter, art. 7, c. 3, § 1, subd. 11, empowering them to lease property of the school department not required for school purposes, which subdivision was approved by the Legislature (St. 1907 [Second Extra Sess.] c. 1), was acting for the municipality under the authority of the Legislature, and had the power to lease land held by them in trust for the use of the public schools of the city the same as if the Legislature, on its own initiative, had directed the act.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 65.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 65*)—LEASE—CONSTITUTIONAL LAW.

The management of public schools is, under article 9 of the Constitution, a state, and not a municipal, affair, and under section 1616,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pol. Code, the powers and duties of city boards of education are such as are prescribed by the law covering the cities, except as otherwise provided in chapter 3, Pol. Code. Pol. Code, § 1617, subd. 20, provides that the board of trustees may, under certain conditions, call a meeting, which shall be competent to instruct them as to certain matters, none of which relate to the leasing of school property, and subdivision 4 empowers the board to rent school property. *Held*, that San Francisco Charter, art. 7, c. 3, § 1, subd. 11, giving the school board power to lease school property under certain conditions, is not invalid as conflicting with these sections of the Political Code, but rather in harmony with them.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 65.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 65*)—POWER OF SCHOOL BOARD—STATUTES—CONSTRUCTION—"SCHOOL PROPERTY."

Pol. Code, § 1617, subd. 4, empowering the school board to rent school property, does not mean to rent property for use of schools, because such property would not be "school property."

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 65.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Margaret Mahoney against the Board of Education and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hiram W. Johnson, Austin Lewis, and R. M. Royce, for appellant. Percy V. Long, for respondents.

KERRIGAN, J. This is an action brought to restrain the board of education of the city and county of San Francisco from leasing certain premises dedicated to public school purposes. The property involved is on the southeasterly corner of Fifth and Market streets in San Francisco, and is known as the Lincoln school lot. After some formal allegations the complaint alleges that said property was in the year 1858 vested in the commissioners of the funded debt of said city and county; that in said year an act of the Legislature was passed and approved, authorizing and empowering that commission to convey said property to the board of education of said city and county, in trust to and for the use of public schools in said city and county; that thereafter, the said commissioners did make, execute, and deliver to said board of education, as trustee and in trust to and for the use of such public schools, a conveyance and transfer of said property; that thereafter, by an ordinance of said city and county, known as the Van Ness ordinance, approved by a act of the Legislature duly passed, the title to said property was confirmed in said board of education for the purpose of sites for schoolhouses, and thereafter the title of said board for said purposes was, by an act of Congress of the United States, again confirmed. That said board of education, as such trustee, has ever since held and does now hold the title to said real property for public school purposes, and as a site for schoolhouses, and for no other use or purpose whatsoever. The complaint further alleges that the board of education, unless restrained, will lease that property for a term of 35 years to one Maurice Rosenthal, to be devoted to purposes foreign to those contemplated by the dedication; that the board of education is without power to devote said lands to any other use than that to which they were dedicated. Then follows the prayer of the complaint. Defendants demurred to the complaint, the demurrer was sustained without leave to amend, and judgment was rendered against plaintiff, from which judgment this appeal is prosecuted.

Plaintiff contends that to permit the defendants to lease this property as contemplated will be, as alleged in the complaint, to allow the property to be diverted from the purposes to which it was dedicated, and that this the board of education has no power to do. When land has been dedicated to a definite and specific purpose by grant or devise, it is well settled that the property cannot, without the consent of the grantor or devisor, or his successor in interest, be used for any other purpose. 2 Dillon on Municipal Corporations, § 650; Harter v. San Jose, 141 Cal. 659, 75 Pac. 344. It is also true that when dedicated land is situated within a municipality, but is set aside and reserved by the state for certain purposes, the muncipality has no authority to divert the property from such purposes. But the right of the state to do so, on the other hand, is unlimited, unless there are contract restrictions or private rights of an abutting owner or other person involved.

This proposition is abundantly supported by the authorities. In the case of Hart v. Burnett, 15 Cal. 530, at page 581, the court found that the city and county of San Francisco held the title to the land which constituted the old pueblo of Yerba Buena as the successor of the Mexican pueblo, and in trust to and for the purposes for which it was dedicated by the Mexican law. The court, at page 581, said: "We do not dispute the proposition that the Legislature, perhaps without the consent of the city and county of San Francisco—certainly with it—could, by virtue of its paramount political sovereignty, change the trusts upon which those lands were held. It might undoubtedly authorize another and different mode of disposing of them, and by other and different agents." In Polack v. S. F. Orphan Asylum, 48 Cal. 492, it was held that land dedicated for street purposes could be revoked by an act of the Legislature. It was there said: "That the Legislature possesses competent power to dedicate a street in a city; that the Legislature may delegate or give such power to the municipal authorities in such city; that its exercise by the municipal authorities is dependent upon the will and subject to the control of the Legislature; and that after such power has been thus given to municipal authorities, the Legislature may revoke it in part, as well as in whole, or without an express revocation may itself exercise it in any particular instance—are propositions about which there can be no controversy in this state." In City of Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436; Id., 203 U. S. 360, 27 Sup. Ct. 67, 51 L. Ed. 220, the court held that the lands dedicated to the pueblo of Monterey for certain public uses were held by the city of Monterey as successor of the pueblo, subject to the same purposes. There certain lands dedicated for named public purposes were sold to an individual, which sale was approved, ratified, and confirmed by an act of the Legislature, and the court held the sale valid, and said that where land was not acquired by a municipality in its proprietary right the Legislature had absolute power to alienate it, or when it had been sold to ratify such sale. In Payne v. Treadwell, 16 Cal. 233, the Supreme Court of this state said: "The agents of the corporation can sell and dispose of the property of the corporation only in the way and according to the order of the Legislature, and therefore the Legislature may, by law operating immediately upon the subject, dispose of this property, or give effect to any previous disposition, or attempted disposition, of it. The property itself is a trust, and the Legislature is the prime and original controlling power, managing and directing the use, disposition, and direction of it." See, also, Brook v. Horton, 68 Cal. 555, 10 Pac. 204; San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; 2 Dillon on Municipal Corporations, §§ 651, 652. These authorities undoubtedly are to the effect that, where lands are held by a city, board, commission, or other entity, in trust for the state, the Legislature may revoke the dedication.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

According to the allegations of the complaint the land in question, by an act of the Legislature, was held by the board of education in trust, to and for the use of public schools in San Francisco, and was subject, therefore, as we have just seen, to be diverted by the Legislature from such purpose, and the leasing of the property by the board of education as proposed, it is conceded, would be a diversion of it from the use to which it was dedicated; but, as it would be under a provision of the charter approved by the Legislature, it would in effect be by the direction and under the authority of the Legislature, and hence valid. The board of education in this case was proceeding to act in accordance with subdivision 11, § 1, c. 3, of article 7, of the charter of San Francisco, which reads: "* * * The board of education shall have power: 11. To lease to the highest responsible bidder, for the benefit of the common school fund, for a term not exceeding thirty-five years, any real property of the school department not required for school purposes. * * *" This subdivision of the chapter was approved by the Legislature (St. 1907 [Sp. Sess.] p. 55). The board of education, therefore, was acting for the municipality and under the authority of the Legislature. Ex parte Sparks, 120 Cal. 395, 399, 52 Pac. 715. The lease made under this permission of the charter is as effective as if the Legislature on its own initiative had directed and authorized the board of education to execute the document.

But plaintiff claims that subdivision 11, § 1, c. 3, art. 7, of the charter above quoted, giving the board of education power to lease school property under certain conditions, is in conflict with chapter 3 of the Political Code, and hence unconstitutional. The management and control of public schools is, under article 9 of the Constitution, a state and not a municipal affair (Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558); and under section 1616 of the Political Code the powers and duties of boards of education of cities are such as are prescribed by the law governing such cities, except as otherwise provided in chapter 3 of said Code. The above-quoted subdivision of the charter of the city and county of San Francisco is the provision which authorizes and empowers the board of education to lease real property belonging to the school department under the circumstances therein stated. Is this subdivision in conflict with subdivision 20, § 1617, c. 3, of the Political Code? That section provides that the "board of trustees may, upon a petition signed by the majority of the heads of families resident in the district * * * call a meeting of the qualified electors of the district" for certain purposes; that a meeting so called shall be competent to instruct the board of trustees in three specified matters, none of which has anything to do with the leasing of school property. They are: (1) In regard to location of schoolhouses or the use of the same for other than school uses; (2) in regard to the sale or purchase of a school site; (3) in regard to litigation. Moreover, section 1617, contrary to plaintiff's contention, seems to be in harmony with the subdivision of the charter in question, for subdivision 4 thereof empowers the board "to rent * * * school property." This does not mean to rent property for use of schools, because such property would not be school property.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 319

Ex parte PIERCE. (Cr. 120.)

(Court of Appeal, Third District, California. Dec. 30, 1909.)

1. INTOXICATING LIQUORS (§ 221*) — COUNTY ORDINANCE — CONSTRUCTION — COMPLAINT FOR VIOLATION.

A county ordinance forbade the issuance of a license for the sale of spirituous or fermented liquors or wines till the applicant had procured an order therefor from the board of supervisors of the county, and the penal clause provided that every person who commenced and carried on any business or calling for which a license was required without procuring a license, as prescribed therein, should be guilty of a misdemeanor, etc. *Held*, that the ordinance did not denounce as a misdemeanor failure by a person commencing and carrying on the retail sale of liquors to procure an order from the board for a license, but only the doing business without it, and hence a complaint thereunder, charging one with commencing and carrying on the business of selling spirituous liquors, without having procured an order from the board of supervisors "for" a license from the license tax collector of the county, as required by the provisions of such ordinance, etc., stated no offense, but that by substituting the word "or" in place of the word "for" it clearly did so.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 240–248; Dec. Dig. § 221.*]

2. HABEAS CORPUS (§ 85*)—EVIDENCE—SUFFICIENCY OF COMPLAINT.

Evidence on habeas corpus *held* to show that a portion of the charging part of a complaint under which petitioner was convicted contained, as originally prepared and filed, the word "or," instead of the word "for"; thus showing that it stated an offense under a county ordinance relating to sale of intoxicating liquors.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 77; Dec. Dig. § 85.*]

3. INTOXICATING LIQUORS (§ 16*)—LICENSE TO SELL—ORDINANCES—VALIDITY.

A county ordinance was designed to regulate all classes of business carried on in the limits of a county. The first article provided: "That, in the exercise of the police powers and for the purpose of regulation, a license tax be and the same is hereby imposed upon persons, occupations and businesses in the county of G.," etc. It then enumerated the various kinds of business and the license tax provided as to each, and, reading together all the provisions relating to the sale of spirituous liquors, the obvious intent of the board of supervisors was to regulate the business of selling the same, and, to that end, to impose a license tax. The penal clause provided that every person who commenced and carried on any business or calling for which a license was required without procuring a license should be guilty of a misdemeanor. *Held*, that the ordinance imposed a license tax on the business of selling liquors, and not on individual sales, and was valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 19; Dec. Dig. § 16.*]

Application of Samuel Pierce for a writ of habeas corpus. Writ discharged, and petitioner remanded.

Frank Freeman, C. L. Donohue, W. T. Belieu, and G. R. Freeman, for appellant. Claud Purkitt, for the People.

HART, J. The petitioner was convicted in the justice's court of the Fourth judicial district of Glenn county of a misdemeanor, under a complaint charging him with "commencing and conducting the business of retailing and selling spirituous liquors" within said county of Glenn, without first obtaining a license for that purpose, in violation of certain provisions of Ordinance No. 62 of said county. The petitioner, upon his conviction, was sentenced by the court to a term of 90 days' imprisonment in the county jail of Glenn county, and, in addition thereto, to pay a fine of $200.

The only point originally made by the petitioner was that the complaint upon which he was prosecuted and convicted does not state facts constituting an offense under the ordinance whose provisions the complaint purports to accuse him of violating; but in their brief, filed subsequently to the hearing before this court, counsel for the petitioner claim that those provisions of said ordinance relating to the business of retailing spirituous liquors are void for the alleged reason that they seek "to impose a license tax upon individual sales, and not upon the business of selling." Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399.

The first point relied upon by the petitioner for his release rests upon the determination of the question of fact whether the charging part of the complaint, as filed, reads as indicated by the copy thereof annexed to the petition herein or reads as the district attorney contends that he originally prepared and filed said complaint. The contention of the district attorney is that the complaint was altered in a material particular—that is, by substituting the word "for" for "or" in the charging part of the document, so that it would fail to charge the accused with an offense under the terms of the ordinance—after he had filed the pleading with the justice of the peace. The petitioner claims that the complaint, as indicated by a copy thereof attached to and made a part of the petition herein, is an exact copy of the complaint as it was filed, although it is conceded by counsel for petitioner that a change was made in the instrument, but the intimation is that such change was attempted for the purpose of obliterating the letter "f" so that what appears to be the word "for" would read "or." To determine this controverted question of fact, this court received evidence offered by both the people and the petitioner, and, as we have stated, the proposition whether the complaint states an offense under Ordinance No. 62 must depend upon what, from the evidence, we find the ultimate fact to be. A copy of the complaint in the language in which the petitioner claims the pleading was prepared and filed is, as stated, made a part of the petition, and so much of the charging part thereof as is of interest to this inquiry reads as follows: "* * * That prior to said time said Samuel Pierce had not procured an order from the board of supervisors of the county of Glenn for a license from the license tax collector of said county to so commence, conduct or carry on said business, as required by the provisions of said Ordinance No. 62," etc.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The district attorney insists that that portion of the complaint which we have quoted as personally prepared and filed by him read as follows: "* * * That prior to said time said Samuel Pierce had not procured an order from the board of supervisors of the county of Glenn, or a license from the license tax collector of said county to so commence, conduct or carry on said business, as required by the provisions of said Ordinance No. 62," etc. Section 1 of article 10 of said ordinance provides: "No license shall be issued for the sale of spirtuous or fermented liquors or wines until after the applicant shall have procured an order of the board of supervisors of the county of Glenn for the issuance of the same." The penal clause of the ordinance provides that "every person who commences and carries on any business or calling, for the transaction or carrying on of which a license is required by this ordinance, without procuring a license as prescribed herein, is guilty of a misdemeanor," prescribing and authorizing to be imposed upon conviction a penalty by way of a fine of not less than $5 nor more than $300, or by imprisonment in the county jail for a period not exceeding 90 days, or by both such fine and imprisonment. Readily it will be observed that the only act under the provisions of the penal clause or section of the ordinance which can become a misdemeanor is the commencement and carrying on of the business of selling the liquors mentioned in said ordinance without first procuring a license therefor. In other words, the ordinance does not denounce as a misdemeanor a failure on the part of a person commencing and carrying on the retail sale of liquors to procure an order from the board of supervisors for a license. The misdemeanor consists of the act of carrying on such business without having first obtained a license for that purpose. Therefore, if the complaint was prepared and filed by the district attorney in the language in which the petitioner claims that the quoted portion of the charging part thereof was expressed, it is very clear that no offense whatsoever was stated therein, and that the judgment of conviction against petitioner is absolutely void.

Now, as to the facts as they were adduced before us: An inspection of the original complaint itself will show, and does show, that it is as plainly manifest as physical facts can make any proposition that some change or alteration was made or attempted to be made in either the word "or," as the district attorney contends was the word as the complaint was originally written, or the word "for," as petitioner contends was the word used originally. We have seen that counsel for petitioner concede that the complaint had been tampered with in the respect referred to, claiming, however, as before stated, that it involved an attempt upon the part of some one to make the word "for" read "or." The district attorney testified that he personally drafted the complaint, and in the most positive manner declared that the word "or" was written therein, and that the alteration or attempted alteration had been made after the trial and the conviction of the petitioner. He stated that during the argument of the case to the jury he held the complaint in his hand and commented upon its averments and the proof necessary thereunder to justify a conviction, and that at that time the complaint was in the condition in which he prepared it.

Miss Crane, stenographer in the district attorney's office, testified that, after the case had been appealed to the superior court and all the papers transferred to the clerk of said court, she procured at the office of the last-named official the original complaint, from which she made a number of typewritten copies, and then compared the copies with the original; that the original was then in the condition in which the district attorney claims to have written it; that, in other words, the letter "f" had not at that time been inserted before the word "or" so as to make it read "for." Theodore Kytka, a handwriting expert, testified that the letter "f" had been written by some other hand than that which penned the body of the complaint; that he had made a microscopical examination of the instrument, and that he was of the opinion, from such examination, that the ink used in writing the letter "f" was a different kind from that used in writing the body of the complaint. Mr. Belieu, one of the attorneys for the petitioner, and who conducted the trial of the case before the justice's court on behalf of petitioner, testified that he observed, before and at the trial, that the word "for" was written in the complaint, but that subsequently he noticed that a pencil mark had been drawn over the letter "f" in said word; the inference from said testimony being that some one had thus attempted to erase or obliterate the letter "f" and thus make the word "or" in the place of "for." Mr. Frank Freeman was not called into the case until after it had been tried in the justice's court, and could only say that, when he first saw the complaint, the word "for" was written therein, with a pencil mark drawn over and across the letter "f" in said word. There was some other testimony received in behalf of the petitioner, but, as it reflected little light on the controverted point, we shall not specifically advert to it.

We think the evidence establishes beyond any reasonable doubt, and we accordingly so find, that the contention of the district attorney as to the original phraseology of the complaint in the particular to which the controversy is addressed is correct. The positive assertions of the district attorney and his stenographer that the complaint contained the word "or" instead of the word "for" in the quoted portion of the charging part of the complaint at the times said complaint was filed and the defendant tried and convicted and after the complaint, with other papers in the case, had been transferred to the custody of the county clerk, were uncontradicted, except by the testimony of Mr. Belieu. As to the latter's testimony, we are justified in saying that it proceeded from an erroneous recollection of the time at which he first observed the "f" inserted immediately before the word "or." This declaration is based upon the assumption, founded in experience, that, where an attorney has observed before the trial of a cause that a complaint against his client does not state a cause of action in a civil case or an offense known to the law in a criminal case, he would, by an appropriate proceeding, object to a trial being had under such a pleading, if, indeed, such a document could properly be called a pleading; for certainly no substantial or effective purpose could in any possible view be accomplished by the trial of a person upon a statement of facts not constituting or even squinting at an offense known to the law. There was no suggestion by Mr. Belieu at the trial, either in the examination of the jurors upon their voir dire or in the examination of the witnesses or by objection to testimony, that he regarded the complaint insufficient for any reason. Our opinion is that Mr. Belieu in his zealous solicitude for the interests of his client became somewhat confused as to the actual occasion on which he first observed the word "for" in the place of the word "or" in the complaint, and that as a matter of fact he did not notice the fact until after the cause had been transferred to the superior court by appeal.

In justice to counsel in this case, we deem it proper to say that there is nothing in the testimony received before this court from which even a suspicion of wrongdoing on the part of any of the attorneys for petitioner in connection with the changing of the phraseology of the complaint could be inferred. How the complaint came to be altered no one knows, so far as we are advised, but we hold the attorneys for petitioner above such a practice. The complaint, as it read (according to our finding from the testimony) when the district attorney drew and filed it and when the petitioner was tried and convicted under its allegations, clearly stated an offense under Ordinance No. 62.

The second point suggested by the petitioner is without merit. The ordinance, under the provisions of which the petitioner was convicted, is an omnibus local measure, designed to regulate all classes of business carried on within the limits of the county of Glenn. The first article reads: "That, in the exercise of the police powers and for the purpose of regulation, a license tax be and the same is hereby imposed upon persons, occupations and businesses in the county of Glenn, outside of incorporated cities and towns therein, as follows." Then follows an enumeration of the various kinds of businesses and the license tax provided as to each. In the case of Merced Co. v. Helm, supra, cited by petitioner, an ordinance of the county of Merced was so far as it affected the business of retail liquor dealers declared to be void "because it attempted to impose a license tax upon each single sale and not upon the business of selling." But the rule laid down in that case is criticised and relaxed, if not overruled, in the case of Ex parte Seube, 115 Cal. 630, 47 Pac. 597, where Chief Justice Beatty says: "I have always considered that the rule of construction applied in that case went to the extreme verge of strictness, and the court has been disposed to limit rather than extend its application, as appears from the manner in which the case of Ex parte Mansfield was distinguished in 106 Cal. 400 [39 Pac. 775]."

In the Helm Case, as seen, the ordinance required a license for each single sale of the proscribed liquors, and not for carrying on the business of selling such liquors. Here, reading together all the provisions relating to the sale of spirituous liquors, we find that the obvious intent of the board of supervisors was to regulate the business of selling such liquors, and to that end to impose a license tax. For instance, section 3 of article 10 of the ordinance provides that the bond required to be executed by a party to whom a license is issued for carrying on the business of selling liquors shall contain a condition "that said applicant shall conduct the business for which said license is issued in a quiet, orderly and peaceful manner," etc. Besides, it is held in the Helm Case that the ordinance therein involved "does not purport to have been enacted" in the exercise of the police power, but that "by its very terms is a revenue measure." In the case at bar the ordinance not only expressly declares that its purpose is to regulate all the businesses mentioned therein under the power of police conferred by the Constitution upon cities, towns, and townships within the state (section 11, art. 11, Const.), but, by its very terms, it is apparent that its purpose is the regulation of the several kinds of business which are specifically designated therein. As is said in Ex parte Seube, supra, so it is true here, for the ordinance there is strikingly similar to the one here: "If the letter of the ordinance embraces all who sell, it certainly embraces all who make a business of selling; and petitioner cannot claim that the acts charged in the complaint upon which he was convicted do not come within the letter of the ordinance. The only point he can urge is that the whole ordinance is void because it imposes, or attempts to impose, a license tax upon every single sale." But, as is further said in that case: "It is perfectly clear from all the provisions of the ordinance that the intention of its framers was to impose the tax only upon the business of selling. It is only those who carry on the business who incur the penalty, and it was for carrying on the business that the petitioner was arrested and prosecuted." The language just quoted exactly fits this case, for, as before declared, the evident intention of the framers of the ordinance was to impose a tax upon the business of selling, and it is clear, from the allegations of the complaint, that the petitioner was arrested and prosecuted for and convicted of carrying on the business of selling liquors without the required license.

The ordinance appears to be valid in all respects and to represent a legitimate crystallization of the power of police expressly vested by the Constitution in all the cities, towns, and townships of the state.

For the reasons herein given, the writ is discharged, and the petitioner is remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

12 Cal. App. 362

PACIFIC PAVING CO. v. VERSO et al.

(Civ. 242.)

(Court of Appeal, First District, California. Jan. 3, 1910.)

1. MUNICIPAL CORPORATIONS (§ 293*)—STREET IMPROVEMENTS — RESOLUTION — JURISDICTION.

Under St. 1885, c. 153, § 3, providing that, before ordering any work done or improvement made which is authorized by section 2, the city council shall pass a resolution of intention so to do, describing the work, the resolution of intention in due form and properly adopted is the basis of all further proceedings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773–775; Dec. Dig. § 293.*]

2. EVIDENCE (§ 10*) — JUDICIAL NOTICE — STREETS.

A court may take judicial notice of the streets of a city, of their boundaries, and their relation to each other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 11, 12; Dec. Dig. § 10.*]

3. MUNICIPAL CORPORATIONS (§ 340*)—STREET IMPROVEMENTS—RESOLUTION OF INTENTION —DESCRIPTION OF WORK—"INTERSECTION."

Under St. 1885, c. 153, § 3, providing that, before any work shall be done or improvement made, the city council shall pass a resolution of intention so to do, and describing the work, the board of supervisors of the city and county of San Francisco passed a resolution of intention to order the following street work in the city, to wit: "That granite curbs be laid where not already laid on the intersection of San Jose avenue, Twenty-Eighth and Guerrero streets, and that the roadway of said intersection be paved with bituminous rock except that portion required by law to be kept in order by the railroad company having tracks thereon." Such resolution was followed by a resolution ordering the work, and directing "that granite curbs be laid where not already laid on the intersection of San Jose avenue, Twenty-Eighth and Guerrero streets, and that the roadway of said intersection be paved with bituminous rock except that portion required by law to be kept in order by the railroad company having tracks thereon." *Held*, that the word "intersection" interpreted in its broadest sense meant the place where the three streets crossed each other, and that the letting of a contract for the improvement of a space outside such intersection was unauthorized, and an assessment levied thereon was void on its face, the act requiring that the notice of intention shall describe the work, and the limits of the district with common certainty, so that a person of ordinary understanding would know what it was proposed to do.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 869; Dec. Dig. § 340.*

For other definitions, see Words and Phrases, vol. 4, p. 3724.]

4. MUNICIPAL CORPORATIONS (§ 562*)—STREET IMPROVEMENTS — INVALID ASSESSMENT — FAILURE TO APPEAL—COLLATERAL ATTACK.

Where certain lots were assessed for street improvements contrary to the provisions of the San Francisco city charter (St. 1899, p. 297, c. 2, art. 6, subch. 2, § 8), defining property subject to assessment for such improvements, and also for work done outside the resolution of intention, so that the assessment was void on its face, the property owners were not required to appeal from the assessment, but were entitled to rely on its invalidity as a defense to a suit to enforce it.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 562.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

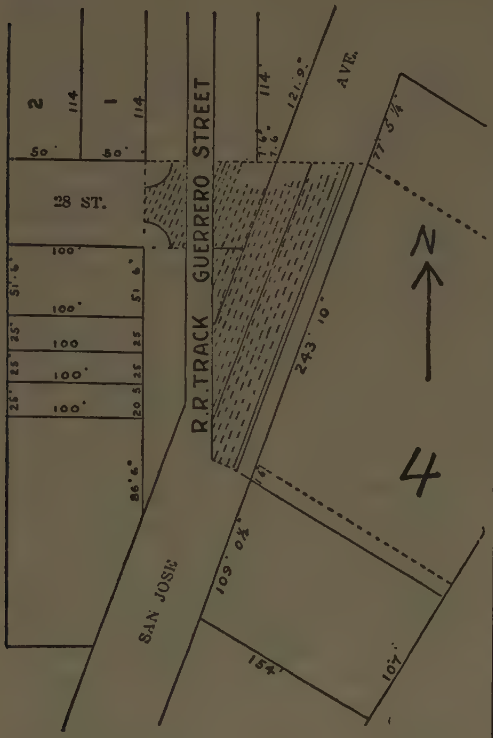
Action by the Pacific Paving Company against Peter Verso and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 105 Pac. 136.

W. J. Bartnett and R. K. Barrows, for appellant. Alexander D. Keyes, for respondents.

COOPER, P. J. This action was brought to recover separate assessments against the several defendants, 15 in number, on a street assessment for paving and curbing "the intersection of San Jose avenue, Twenty-Eighth and Guerrero streets," in the city and county of San Francisco. The court made findings, upon which judgment was ordered, and entered in favor of each of the defendants. The plaintiff made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

The contract was entered into and all the preliminary proceedings taken under the act of 1885 (St. 1885, p. 147), commonly called the "Vrooman act," but the work was not completed, nor was the assessment issued, until the charter of San Francisco became effective. The act provides (section 3) that "before ordering any work done or improvement made which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do and describing the work. * * *" The resolution of intention in due form and properly adopted is the foundation and basis upon which all further proceedings must stand. It is the essential thing which clothes the city authorities with jurisdiction to proceed with the proposed improvements. The very meaning of the word "jurisdiction" is power to hear and determine; and, if no resolution of intention was passed substantially as required by the statute, there was no power in the municipal authorities to let the contract, issue the assessment, or to take any other of the various steps by which a valid lien could be created upon the adjoining lots. In order that what is said here may be understood the following diagram is inserted, which shows the location of the land assessed and the place where the work was done:



The court found that the board of supervisors passed a resolution as follows: "Resolved, that it is the intention of the board to order the following street work in the city and county of San Francisco: that granite curbs be laid where not already laid on the intersection of San Jose avenue, Twenty-Eighth and Guerrero streets, and that the roadway of said intersection be paved with bituminous rock except that portion required by law to be kept in order by the railroad company having tracks thereon"—and, further, that this resolution was followed by a resolution ordering the work to be done, as follows: "That granite curbs be laid where not already laid on the intersection of San Jose avenue, Twenty-Eighth and Guerrero streets, and that the roadway of said intersection be paved with bituminous rock except that portion required by law to be kept in order by the railroad company having tracks thereon." The court further found that "at all of the times in the complaint mentioned the roadway of San Jose avenue, Twenty-Eighth street and Guerrero street, and of the whole thereof, were, and each and every part of it was, an open public street, and duly dedicated to public use, and the width and grade thereof officially established as by law in such cases made and provided; that San Jose avenue, Twenty-Eighth street, and Guerrero street do not intersect; that there is no such place as the intersection of San Jose avenue, Twenty-Eighth street, and Guerrero street in the city and county of San Francisco."

It is claimed that the latter finding is not supported by the evidence. The diagram and plat which were annexed to the assessment, and which appear to have been used on the trial, show the relative position of the improvement and the streets; and not only this, but the court had a right to take judicial notice of the streets, of their boundaries, and of their relation to each other. Brady v. Page, 59 Cal. 52; Williams v. Sav. & Loan Soc., 97 Cal. 122, 31 Pac. 908; Labs v. Cooper, 107 Cal. 657, 40 Pac. 1042. The act requires that the notice of intention shall describe the work, and the courts so hold. Richardson v. Heydenfeldt, 46 Cal. 68; Fay v. Reed, 128 Cal. 357, 60 Pac. 927; Bay Rock v. Bell, 133 Cal. 150, 65 Pac. 299; Piedmont Paving Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081. In the latter case it is said: "The range of the district to be included within a single improvement, and the character of the work to be performed therein within the specifications of the statute is left to the judgment of the board. The resolution of intention must, however, define alike the limits of the district and the nature of the work to be done." Here the limits of the district were not defined or described. The only reference was to the intersection of the three streets. If we employ the word "intersection" in its broadest sense and meaning, as being the place where the three streets cross each other, or that part of the street that is common to and a part of each of the three streets, there appears from the diagram to be only a small triangle included within the three streets, that is a small triangle north of the southerly line of Twenty-Eighth street extended, west of the easterly line of Guerrero street extended, and east of the westerly line of San Jose avenue, and that is a part of each of the three streets. In one sense this small triangle is where the three streets intersect or cross each other, but the area is apparently only a few square feet and a very small part of the surface of the street upon which the work was done. If the resolution of intention described this small triangle, it certainly could not be held to include a description of all that part of the street included within the exterior limits of the crossing of Guerrero and Twenty-Eighth streets, and of all that part of the street within the exterior limits of the crossing of Twenty-Eighth street and San Jose avenue, nor of that part of the street included within the exterior lines of the crossing of Guerrero street and San Jose avenue, nor of all that territory which is clearly only a part of San Jose avenue and no part of either Guerrero or Twenty-Eighth street. A part of the street upon which the paving was done was San Jose avenue and not common to either of the other streets. Now, if upon the most liberal rule we called the portion of the street which is a part of each of the three streets named the intersection of those streets, we have no resolution of intention to pave any other part of the street which was paved. If we can hold that such description includes all the parts of the streets which were paved and curbed by the plaintiff, upon the same principle we could hold that the resolution of intention described all the work if it had extended for blocks along San Jose avenue, and for blocks along Twenty-Eighth street and for blocks along Guerrero street. We think the limits of the district must be defined at least to a common certainty so that a person of ordinary understanding would know what it is proposed to do. The plaintiff in putting in its bid does not appear to have had clearly in mind the amount of work called for by the resolution of intention, and to have understood that it included a much less area than that upon which the work was done, as it computed the total cost of the work by the lineal foot for curbing, and by the square foot for paving, at $650, and so stated in its bid. After it put in its bid and gave its bond for $650, it completed the work, and the city engineer computed the amount at $3,164.08, nearly five times the amount which the plaintiff evidently had in mind when it stated or computed that the total cost would be $650. The finding is therefore supported by the evidence as applied to all the work except a small fraction which is insignificant as compared with the total area. It is plain beyond controversy that the resolution of intention did not describe any place where the work was to be done other than the small triangle or intersection of the three streets.

In Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082, it was held that the board did not have jurisdiction to make other improvements than those described in the resolution of intention. The court said: "It is plain that the work described in the resolution of intention did not include the construction of rock gutterways in the street to be macadamized. Therefore the board of trustees did not under the rule above stated acquire jurisdiction to contract for such gutterways, and the contract as to these is void." In San Jose I. Co. v. Auzerais, 106 Cal. 498, 39 Pac. 859, it was held that, where the resolution of intention described the proposed improvements as "granite or artificial stone curbing," it gave the board no jurisdiction for the reason that the work was not described. The court there said, in speaking of the resolution of intention: "By this statute the Legislature has required the city council to determine the character and extent of any improvement that is to be made upon the public streets; but in the present case that body, instead of itself determining this matter, has not even designated the officer or person by whom the character of the improvement shall be determined." It appears to be equally important that the place or places upon which the work is to be done should be described. In fact, the language of section 2 of the Vrooman act that the city council may "order the whole or any portion either in length or in width of the streets * * *" to be graded or paved, contemplates that the resolution of intention and the order shall designate the portion or portions of the streets to be improved.

The engineer's certificate divided the locality where the paving was done into three separate parts or descriptions as follows: (1) 255 square feet on the north half of Twenty-Eighth street between San Jose avenue and Guerrero street; (2) 4,156 square feet on the south half of San Jose avenue; (3) 9,037 square feet on the remainder of the crossing. The court found that all the paving had taken place at the following places: (1) On San Jose avenue south of the northerly line of Twenty-Eighth street extended easterly; (2) on Twenty-Eighth street between Guerrero street and San Jose avenue; (3) on Guerrero street south of the southerly line of Twenty-Eighth street and northwest of San Jose avenue; (4) on the crossing or intersection of Twenty-Eighth and Guerrero streets.

In the assessment the work done on the third area last above mentioned is described as follows: All work except that done on the east side of San Jose avenue and on Twenty-Eighth street between Guerrero street and San Jose avenue, and was assessed entirely upon the land fronting on Twenty-Eighth and Guerrero streets. Under the plain provisions of the charter (chapter 2, § 8, St. 1899, p. 297) the assessment should have been upon lots 1 to 18, being all the lots fronting on the quarter blocks and irregular blocks cornering on the intersection. For the work done on the small triangle common to Twenty-Eighth street, Guerrero street, and San Jose avenue, as described in the resolution of intention, it is difficult to say as to how the assessment should have been made, as this particular triangle is bounded entirely by San Jose avenue, Guerrero, and Twenty-Eighth streets, and there does not appear to be any blocks adjoining or quartering upon it, unless we speak of the blocks on the opposite sides of the streets as adjoining or quartering upon it. It is the settled rule that in such case the assessment is void on its face, and the owners of the assessed lots do not have to appeal to the city council for the correction of the assessment. Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Kenny v. Kelly, 113 Cal. 364, 45 Pac. 699; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373; San Diego Investment Co. v. Shaw, 129 Cal. 273, 61 Pac. 1082. In the latter case it is said: "Defendant was the owner of one of the lots on the east side, and the assessment against his lot was $51.22, being the amount with which it is sought to charge the lot in this action. Whether or not the judgment is correct depends upon the validity of the assessment so made. The city authorities have no power to assess the entire cost of grading the street on the lots on one side thereof. * * *"

The authority to levy the assessment in this case in the manner in which it was levied is not found in the statute. Subdivision 1 of section 7 of the act expressly declares that the expenses incurred for any work authorized by the act shall be assessed upon the lots and lands fronting thereon, except as otherwise specifically provided. The cases cited by appellant are cases in which the assessment was not correctly apportioned and distributed, or where certain lands were improperly left out. In such case the owners of the lots that are properly assessed for at least a part of the work must appeal to the board of supervisors and have the assessment corrected, or they will not be heard to complain; but such is not this case. Here many of the lots were assessed for improvements for which the board had no power to assess them under any circumstances. As before stated, it has been many times held that, if an assessment is void, the owner need not appeal to the board, but may rely upon such fact when it is attempted to enforce the assessment.

It is not necessary to decide the other questions discussed by counsel, as the points which we have decided dispose of the case.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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12 Cal. App. 380

BOTSFORD v. HENEY. (Civ. 734.)

(Court of Appeal, Second District, California. Jan. 5, 1910. Rehearing Denied by Supreme Court March 3, 1910.)

1. CORPORATIONS (§ 118*)—CONTRACTS—DELIVERY.

Where the terms of sale of mining stock were complete, and the seller deposited the stock in a bank for delivery on payment of a note for the price as requested by the buyer, the sale was complete, for the delivery to the bank was equivalent to a deposit for delivery on the payment of the stipulated price, and the bank was an agent of the buyer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 497, 498; Dec. Dig. § 118.*]

2. SALES (§ 201*)—CONTRACTS.

The principles embodied in Civ. Code, § 1059, providing that, though a grant be not actually delivered into the possession of the grantee, it will be deemed constructively delivered where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed, are applicable to any contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529–541; Dec. Dig. § 201.*]

3. CORPORATIONS (§ 118*)—PASSING OF TITLE—REMEDY OF SELLER.

Where a delivery of stock by the seller to a bank for delivery to the buyer on specified conditions was made pursuant to the request of the buyer, the title passed to the buyer, and the seller could sue for the price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 497, 498; Dec. Dig. § 118.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by W. F. Botsford against Ben Heney. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Marshall Stinson, for appellant. Max Loewenthal and Denis & Loewenthal, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment and an order denying a new trial. The action was one to recover the purchase price of certain shares of mining stock alleged to have been sold by one Mellus to defendant for an agreed price, and the assignment of the claim for such unpaid purchase money by Mellus to plaintiff. The court found that on June 17, 1907, Mellus sold and delivered to defendant the shares of stock; that defendant agreed to pay therefor the sum of $14,500 on or before September 10, 1907; that before suit the demand was by Mellus assigned to plaintiff, and by reason of nonpayment judgment went for plaintiff in the sum demanded.

It is contended by appellant that the evidence is insufficient to support the findings with reference to the sale, or the agreement to pay the stipulated price, or the assignment of the claim. The contract was evidenced by correspondence in which defendant offered to pay Mellus in cash on or before August 10, 1907, dollar for dollar on account of his original investment in the Hardshell-Flux mining properties, and $10,000 in addition. Mellus on the 11th day of June, by letter, accepted the proposition, and notified defendant that he had placed the 9,000 shares of stock in the American National Bank subject to his order, when $14,500 was paid to the bank, and that the bank would forward a note to be signed evidencing the debt, payable August 10th, without interest. Defendant on June 14th wrote to Mellus objecting to the form of the note sent by the bank and inclosing a note in such form as he would sign, but asked to modify his proposal to pay August 10th and make the note payable September 10, 1907, and in the letter stated that the modification of his original offer was, total cash sum to be paid thirty days later than the date first mentioned, and required Mellus to make a written assignment of his interest in said mining properties, which, with the shares of stock assigned, were to be placed in escrow, deliverable upon payment of the note. Mellus accepted the modification and by written assignment transferred to defendant all his interest in the mining properties, and delivered the shares of stock, duly indorsed, to the American National Bank to be delivered upon payment of the note, and defendant was notified by Mellus of this fact. It was not necessary in order to complete the contract that the bank give a notice to the same purport. Mellus's notice was sufficient to apprise defendant of the full compliance with his demands in reference to the escrow. It is conceded that the original investment of Mellus in the mining properties and this stock was $4,500. We do not think that appellant's contention that no contract was to be completed until the note was signed and forwarded can be sustained. The terms of the agreement were all complete, the price at which the stock was purchased was stipulated, and even the time of payment was stated. The deposit in the hands of the bank for delivery upon payment of the note, as requested by defendant, was equivalent to a deposit for delivery upon the payment of a stipulated price. The delivery to the bank by Mellus was to an agent of the purchaser designated by him, and, when so delivered, it was too late for either party to retract, and the sale was complete. The due and proper indorsement of the stock is made to appear from the evidence. Section 1059, Civ. Code, provides that: "Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: * * * (2) Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." Referring to this section of the Code, our Supreme Court in Carr v. Howell, 154 Cal. 380, 97 Pac. 889, says: "While this section relates by its terms to a grant, we think the principles therein laid down are equally applicable to any contract." There is no room for controversy as to the absolute and unqualified character of Mellus's acceptance of the offer. The delivery being made, although constructively but pursuant to defendant's request and demand, the title passed to Heney and plaintiff possessed elective remedies upon default, of which suing for the purchase price is one. Lassing v. James, 107 Cal. 358, 40 Pac. 534. We see nothing in Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339, establishing a contrary doctrine. The assignment appearing in the record seems to us to be complete and a full performance of the conditions imposed by defendant in his letter of June 14th.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

12 Cal. App. 274

FINCH v. FINCH (WESTERN NAT. BANK OF SAN FRANCISCO, Garnishee).

(Civ. 690.)

(Court of Appeal, Third District, California. Dec. 21, 1909. Rehearing Denied by Supreme Court Feb. 17, 1910.)

1. GARNISHMENT (§ 112*)—PAYMENT BY GARNISHEE AFTER SERVICE OF WRIT—LIABILITY TO JUDGMENT CREDITOR.

In determining the liability of garnishee bank to pay to the judgment creditor a sum which it admitted in its answer in the garnishment proceedings that it held for the debtor, but which is afterwards paid to satisfy an execution upon a judgment against the same debtor after the garnishment writ issued, a decree in an accounting proceeding by the judgment creditor against the debtor and others, brought before the garnishment proceedings, restraining the bank from paying out any money belonging to the debtor, was immaterial upon the bank's liability under the garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 235; Dec. Dig. § 112.*]

2. GARNISHMENT (§ 148*)—PROCEEDINGS—DENIAL OF INDEBTEDNESS—EFFECT.

Code Civ. Proc. § 719, permits the judge to order any unexempt property of a judgment debtor, or due him, to be applied to the satisfaction of a judgment, but prohibits such order as to money in the hands of another or claimed to be due the judgment debtor from him if such person denies the debt, and section 720 permits an action by the judgment creditor against a third party to recover the property or debt where the debt is denied. *Held*, that the garnishee's denial of indebtedness would not prevent the making of an order under section 719 if the other averments and admissions showed the existence of the indebtedness.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 275–279; Dec. Dig. § 148.*]

3. GARNISHMENT (§ 112*)—DISCHARGE—PAYMENT BY GARNISHEE—PAYMENT TO DIFFERENT CREDITOR—UNAUTHORIZED PAYMENT.

Code Civ. Proc. § 544, provides that all persons owing debts to defendant at the time of service of a copy of the writ of attachment and notice upon them, unless such debts are paid to the sheriff, shall be liable to plaintiff for the amount thereof until the attachment is discharged or the judgment is satisfied. Appellant was garnished on December 3, 1907, but did not furnish the sheriff any information as to any money held by it and due the debtor until cited on December 17th for examination, when it admitted holding $2,000 for the debtor when the writ was served, and on December 26th appellant paid that sum to the sheriff upon service upon it of a writ of execution issued upon a judgment rendered against the debtor on December 24th in favor of another creditor, without mentioning the garnishment proceedings. *Held*, that the garnishment substituted plaintiff therein for the debtor as to the indebtedness due from the garnishee, and the payment to the sheriff required by the statute to relieve the garnishee from liability was payment to him as agent for plaintiff, and appellant's payment to the sheriff upon service of the execution writ was, under the circumstances, a fraud upon plaintiff and did not discharge appellant from liability.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 235; Dec. Dig. § 112.*]

4. GARNISHMENT (§ 176*)—FORM OF PROCEEDINGS BETWEEN PLAINTIFF AND GARNISHEE.

Under the circumstances, the garnishee's liability to the garnishment plaintiff was properly enforced by an order, issued upon hearing of an order to show cause why it should not pay to plaintiff the sum held by it when served.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 335; Dec. Dig. § 176.*]

5. GARNISHMENT (§ 176*)—AFFIDAVITS—CONCLUSIONS.

Where the undisputed facts showed that money belonging to the debtor was delivered to the sheriff by the garnishee under a writ of execution served upon it, the garnishee's affidavit, on a hearing of an order to show cause why it should not pay the money garnished, that it was delivered to the sheriff in compliance with the attachment writ, should be disregarded as a mere opinion.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 348; Dec. Dig. § 176.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Helen M. Finch against Paul V. Finch, in which the Western National Bank of San Francisco was made garnishee. From an order directing garnishee to pay plaintiff a certain sum to be applied on her judgment, the garnishee appealed. Affirmed.

For decision on rehearing in Supreme Court affirming this decision, see 107 Pac. 598.

Gavin McNab, for appellant. J. L. Smith, for respondent.

BURNETT, J. The record discloses evidence of three separate actions, all of which, respondent claims, are material to the controversy. The first, numbered 12,695, was brought October 29, 1907, by the plaintiff here against the defendant Finch and others for an accounting. A restraining order was issued and served upon this appellant, on said October 29th, enjoining it from paying out or transferring any money it had on said date to the credit of the defendant, Paul V. Finch, until the further order of the court. On November 14, 1907, the same plaintiff filed a complaint in case No. 12,845 against the same defendant to secure a judgment for the sum of $5,500 upon a different transaction and liability. On December 3, 1907, a writ of attachment was issued in this case, and appellant was regularly garnished. Appellant failed to furnish the sheriff with a statement of the amount of money due defendant or any information concerning the same, and appellant was cited on the 17th day of December, 1907, to appear for examination, whereupon appellant "made answer to said plaintiff that said Western National Bank had in its possession and under its control the sum of $2,000 in cash, as a commercial account, owned by or due to the defendant, Paul V. Finch, at the time of the service upon the said bank of the said writ and order for examination as aforesaid." Judgment in said cause No. 12,845 was awarded to plaintiff and respondent herein on April 29, 1908. A writ of execution was thereupon issued, but it was returned by the sheriff unsatisfied; appellant answering that the money had been paid to the sheriff on December 26, 1907. On June 9, 1908, respondent procured an order citing the garnishee to appear and be examined concerning the $2,000 which it had admitted, on December 17th preceding, to be due defendant, or any other money in its possession belonging to defendant at the time of said garnishment, and to show cause why it should not be required to pay to respondent the said sum of money. Upon the hearing the following additional facts appeared: On the 24th day of December, 1907, one E. G. Moyes secured judgment against the same defendant, Finch, for the sum of $2,270.98. Execution issued immediately, and on December 26th appellant was served with the writ and paid $2,000 to the sheriff, who returned that he "duly levied on the 26th day of December, 1907, upon the Western National Bank of San Francisco, all moneys, goods, credits, effects, debts due or owing, or any other personal property in possession or under control of the Western National Bank of San Francisco belonging to the judgment debtor, and on the 26th day of December, 1907, I received from said judgment debtor, through W. C. Murdoch, Jr., assistant cashier of said bank, the sum of $2,000," and this was applied in part satisfaction of said judgment. The writ of attachment in the present suit and the writ of execution in the Moyes case were served by different deputies connected with the sheriff's office, and when the money was paid over as aforesaid appellant did not inform the deputy sheriff of the prior service. The appeal is from an order of the court directing appellant to pay to respondent the sum of $2,000 to be applied toward the satisfaction of the judgment in favor of plaintiff.

Respondent summarizes the matter as follows: "Appellant on October 29, 1907, was served with a restraining order, whereby it was enjoined from paying the money to any one at all, in one suit; again on December 3, 1907, appellant was served with a notice of garnishment, and ordered to hold the money in another suit, and on December 26, 1907, appellant is served with a writ of execution in a third and separate suit and appellant, without question pays the money to the sheriff on this writ in the third suit though the injunction and attachment are still in full force and effect, and now appellant asks the court to sanction gross negligence or willful disregard of the law and relieve appellant of the direct liability created by statute, in which event either the sheriff or the plaintiff, who are innocent parties, must suffer."

Consideration of the injunction, we think, should be eliminated from this proceeding, as is was issued in an entirely different action, and it has no relevant connection with the order in controversy here.

Appellant contends: "(1) That the trial court had no jurisdiction to make the order appealed from; and (2) that conceding the question of jurisdiction for the purpose of the argument, and not otherwise, the payment to the sheriff was a complete discharge of all liability on the part of the appellant." The avowal of the want of jurisdiction is based upon the ground of the denial of the indebtedness at the time of the service of plaintiff's execution supported by the evidence that the money was paid to the sheriff on said 26th day of December, 1907. In this behalf it is contended by the learned counsel for appellant that this remedy by proceedings supplementary to execution "to disclose and subject to the satisfaction of the judgment a fund in the hands of the garnishee or any indebtedness owing by the garnishee to the judgment debtor" is limited to cases where "the garnishee in such supplementary proceedings admits the possession of such fund or the indebtedness claimed to be due from him to such judgment debtor, and that this does not contemplate the litigation of any rights or claims of such garnishee or a personal money judgment against him."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The provisions of the statute directly involved in the solution of the question are sections 719 and 720 of the Code of Civil Procedure. In the former it is provided that "the judge or referee may order any property of the judgment debtor, not exempt from execution in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor if such person claims an interest in the property adverse to the judgment debtor or denies the debt." And section 720 provides that where such claim is made, or the debt denied, an action may be maintained by the judgment creditor against said third party to recover the property in dispute.

It will not be controverted, we think, that the court below was not bound by appellant's denial of the debt if the undisputed facts showed that the debt really existed at the time of the service of the said writ of execution. The mere denial by the garnishee of the indebtedness which the other averments and admissions of the parties show to be an erroneous conclusion from the whole transaction certainly should not be deemed sufficient to divest the court of jurisdiction to make the order provided for in said section 719.

The question then arises whether the payment of the $2,000 to the sheriff on December 26th discharged the indebtedness and relieved appellant of liability to respondent. In view of the facts, we think it should be held that appellant is in the same position, as far as respondent is concerned, as though it had retained in its possession the said money and had not made any payment to the sheriff.

At the time of the service of the writ of attachment it is admitted that the money was on deposit, and that therefore appellant owed defendant Finch the sum of $2,000. What was the effect of the garnishment as to the indebtedness? It was manifestly to make appellant liable to plaintiff for the amount of said debt; in other words, practically to substitute plaintiff for the creditor. Thereby, appellant having become liable to plaintiff in the amount of $2,000, this relation must have continued unless it was terminated by said payment to the sheriff. Section 544 of the Code of Civil Procedure makes this clear. It provides that "all persons * * * owing any debts to the defendant at the time of service upon them of a copy of the writ and notice as provided in the last two sections shall be * * * unless such debts be paid to the sheriff, liable to the plaintiff for the amount of such debts, until the attachment be discharged or any judgment recovered by him be satisfied." It would hardly seem to require argument that the payment to the sheriff which is to relieve the garnishee of liability to the plaintiff is payment in pursuance of said service; in other words, payment to the sheriff as the agent of the plaintiff. It would probably be immaterial whether the payment was made on the day of the service, as long as it is made for plaintiff. But surely there is no warrant for the interpretation that the garnishee is relieved of his liability when, in violation of his plain duty, he refuses to disclose his indebtedness to the defendant, holds the money in his possession until served with a writ of execution in another case, and then pays the money to the sheriff without any suggestion as to the former service or the appropriation of said payment. Does the law permit one in this manner to deceive and mislead another and then take refuge under the plea that the other should not have been misled? We cannot so understand it. It does not seem just or reasonable, in view of appellant's palpable remissness, that the sheriff should be held liable because, perchance, he innocently paid the money to the wrong party by reason of his confidence in appellant. It is hardly necessary to say that an entirely different case would be presented if appellant had made proper answer to the service of the garnishment or had paid the money to the sheriff before the levy of the execution in the Moyes case, or even then had revealed the true situation. Here, as we view it, appellant cannot be relieved of liability without lending encouragement to fraud. It is not designed by this to assert that the officers of the bank actually intended to deceive or defraud any one; it is more just to infer that their conduct was the result of misinformation, but it operated as a fraud upon plaintiff.

It is true that on said 19th day of June, 1908, at the hearing of said order to show cause, the affidavit of William C. Murdoch, Jr., the cashier of said bank, was received in evidence, in which he declared: "That heretofore, and on or about the 20th day of December, 1907, and in compliance with a writ of attachment theretofore served by the sheriff of the city and county of San Francisco, upon said bank, at the instance of the plaintiff herein he delivered up to said sheriff the sum of $2,000, being the amount in the possession of said bank on deposit to the credit of the defendant herein at the time of the service of said writ of attachment." But in view of the undisputed facts, we think the recital that the money was delivered in compliance with said writ of attachment could properly be treated as the mere opinion of affiant and as such disregarded.

Certain authorities are cited bearing more or less upon the propositions to which we have alluded, among which we note the following: Drake on Attachment, § 453, uses this language: "Garnishment is an effectual attachment of the effects of the defendant in the garnishee's hands, differing in no essential respect from attachment by levy, except, as is said, that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value."

In 20 Cyc. p. 1091, it is said: "Where the garnishee after proper service of the writ fails to file an answer within the time prescribed by the statute, or where he fails to make a full disclosure or files a false or evasive answer, judgment may be rendered against him for the amount claimed in the writ of garnishment."

In Twelves & Co. v. Lodano, 15 Ala. 732, the case is stated in the syllabus as follows: "An attachment was sued out by T. against F., and L. was garnished as a debtor of F. After service of the garnishment, F. obtains judgment against L. for the amount of the debt due from him, in the same court in which the attachment is pending, and, execution issuing thereon, L. paid the amount to the sheriff, by whom it was paid to the attorney of F., who pursuant to instructions personally given him by F. paid the money to a third person. Held that, upon this state of facts, the garnishee was liable to the plaintiff in attachment."

In Kimball v. Macomber, 50 Mich. 362, 15 N. W. 511, in the discussion, by the Supreme Court of Michigan, of a somewhat similar situation as to the garnishee, it is said: "The pivot on which the case was made to turn was that the defendant, prior to the time for showing cause, was put upon his guard; that it was only necessary for him to make a true statement of what he knew to the justice, to protect himself from loss; and that his neglect could not serve as a reason for visiting the consequences upon an innocent third party."

Russell v. Lawton, 14 Wis. 219, 80 Am. Dec. 769, is an interesting case as to the liability of the sheriff for the acts of his deputies and might be relied upon with a good deal of confidence by the defendant in case an action were brought here against the sheriff for the misapplication of the said $2,000.

We cannot see that the cases cited by appellant, in view of their peculiar facts, are opposed to the views herein expressed. There certainly could be no difference of opinion as to the soundness of the principles announced in the case of Roberts & Co. v. Landecker, 9 Cal. 262, that "the proceedings by attachment are statutory and special and must be strictly pursued, * * * and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step." In that case the plaintiffs did not seek to enforce any lien upon the property, nor did they seek a discovery of it and the subjection of it to their debt; but, the property having been fraudulently disposed of by defendants, the plaintiffs brought the action upon a statutory liability for the value of the goods. This was clearly their right. As stated by the court: "If it be true, as alleged, that defendant fraudulently disposed of the goods, the plaintiffs could have no object in his examination on oath. They did not want his testimony, and could not expect to obtain any admission against him. The liability of defendant being direct to plaintiffs for the value of the goods, the defendant had no right to give his testimony, unless required by the plaintiffs. The law did not require the plaintiffs to do an idle thing."

Robinson v. Tevis, 38 Cal. 611, involves the consideration of the attachment of partnership property for the debt of one of the partners, and Roberts v. Landecker, supra, was affirmed to the effect that the examination of the garnishee is not compulsory upon the plaintiff in the attachment, and, if the garnishee has not voluntarily paid or delivered the property to the sheriff, the plaintiff, after recovering judgment, may sue him and recover the property or its value, to the extent of his judgment, if the garnishee in the meantime has converted it.

Hartman v. Olvera, 51 Cal. 501, is more directly in point; but in that case there was a positive denial of the indebtedness, and, in the course of the opinion, Parker v. Page, 38 Cal. 522, is reviewed, and it is declared: "But we held, on the peculiar facts of that case, that the answer of the garnishee could not be deemed a denial of her indebtedness to the judgment debtor, and, while in some sense a denial in form, was not so in substance, and in fact, * * * when the garnishees explicitly denied on their examination their indebtedness to the judgment debtor, neither the referee nor the court had the power to compel them to pay over to the sheriff the amount of the alleged indebtedness."

Under the admitted facts of this case, however, the denial of the indebtedness, we think, should be treated as a legal conclusion and was properly disregarded by the judge below.

In Deering v. Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801, it was held that "when a garnishee is subjected to numerous attachments he is not obliged to pay the money to the defendant until the attachments are discharged, nor to pay it to either of the plaintiffs in the attachment, or to the sheriff for them, until the settlement of their adverse claims by a judicial tribunal." In that case there were other persons claiming liens upon the money in the possession of the garnishee, and the question was raised as to the validity of a prior attachment, and the court held that these matters could only be properly determined in a suit where all necessary parties might be brought in and all adverse claims adjudged and conclusively settled and the garnishee thereby protected. Here, as we have seen, there is no adverse claimant, the only possible controversy is as to whether appellant or the sheriff should pay the money, it presents simply a question of law, and, if the ordinary principles of fair dealing are to be observed, the decision of the point would seem to involve no difficulty.

Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332, is in line with the foregoing cases in holding that where notice was served upon the garnishee under an attachment, and an execution against the judgment debtor is returned unsatisfied, an action may be maintained by the judgment creditor against said garnishee without requiring him to appear and answer or without obtaining an order authorizing said action to be brought, as the suit is upon a direct liability of the garnishee provided for by section 544 of the Code of Civil Procedure.

In fact, it seems very clear, as pointed out by appellant, that the law provides three remedies for judgment creditors who seek to recover as against third persons: (1) By the supplementary proceedings provided for in section 719, Code Civ. Proc., and adopted herein; (2) by a separate action to establish the indebtedness if it be denied, and to recover the debt as authorized by section 720, Code Civ. Proc.; and (3) by an action to enforce the statutory liability imposed upon the garnishee by said section 544, Code Civ. Proc., in case of the conversion by him of the thing attached. But we see no reason why, under the facts here disclosed, the simple and efficacious course pursued by plaintiff and ratified by the judge of the lower court should not be upheld.

After all, the vital question is whether appellant, by said payment under the circumstances detailed, discharged its liability, and as all the evidence showing the foregoing facts was admitted without objection, and the presence of no other party seems necessary for a complete determination of the matter, we see no useful purpose to be subserved by subjecting the parties to the delay and expense of another proceeding to reach the same just conclusion.

We think the order should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

12 Cal. App. 274

FINCH v. FINCH (WESTERN NAT. BANK OF SAN FRANCISCO, Garnishee).

(S. F. 5,228.)

(Supreme Court of California. Feb. 23, 1910.)

In Bank. On motion for rehearing. Motion denied.

For opinion of the District Court of Appeal, see 107 Pac. 594.

Gavin McNab (Bronte M. Aikins, of counsel), for appellant. J. L. Smith, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. In response to the rule to show cause, the bank by its cashier made return that in compliance with the writ of attachment in plaintiff's action it had paid to the sheriff of San Francisco, December 26, 1907, the whole of the $2,000 belonging to the defendant Paul at the time the garnishment was served. If this was true, it completely exonerated the bank; and whether it was true or not was a question for a jury in an action to be brought by the plaintiff, and it could not be determined by the court in this summary proceeding.

ANGELLOTTI, J. I concur.

(157 Cal. 301)

In re SNOWBALL'S ESTATE. (Sac. 1,729.)

(Supreme Court of California. Feb. 10, 1910. Rehearing Denied March 12, 1910.)

1. APPEAL AND ERROR (§§ 1002, 1011*)—REVIEW OF EVIDENCE — CONFLICTING EVIDENCE.

The rule that a verdict or finding will not be disturbed on appeal, where there is a real and substantial conflict of evidence on the issue of fact involved, is as applicable to will contests as to other proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937, 3979–3982; Dec. Dig. §§ 1002, 1011.*]

2. WILLS (§ 324*)—CONTEST—FRAUD—UNDUE INFLUENCE.

The fact that the jury in a will contest did not find against proponents on the issue whether the will was procured by fraud did not preclude it from considering evidence of fraud as bearing on the issue of undue influence.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 324.*]

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*For other cases see same topic and section NUMBER in Dec & Am. Digs. 1907 to date, & Reporter Indexes

3. Wills (§§ 153, 155*)—Contest—"Fraud" and "Undue Influence" Distinguished.

"Undue influence" in the execution of a will is not the same thing as fraud. One may exist without the other, though undue influence may be exerted by means of fraud; "fraud" being a distinct head of objection from importunity and undue influence. That is undue influence which amounts to constraint which substitutes the will of another for that of the testator, whether through a threat or fraud, but, however exercised, it must, in order to avoid the will, destroy testator's free agency at the time the instrument is made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 371, 375–381; Dec. Dig. §§ 153, 155.*

For other definitions, see Words and Phrases, vol. 3, pp. 2943–2954; vol. 8, p. 7666; vol. 8, pp. 7166–7172; vol. 8, pp. 7823, 7824.]

4. Wills (§ 159*)—Execution—Undue Influence.

While undue influence is not sufficient to avoid a will, unless it bears directly on the testamentary act, proof of undue influence is sufficient if of such a nature as to warrant the inference that the will was the direct result of the influence exerted to procure it, and was not the natural result of the uncontrolled will of the testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 387; Dec. Dig. § 159.*]

5. Wills (§ 166*)—Undue Influence—Evidence.

Evidence *held* to sustain a verdict finding that testatrix's will was procured by undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

6. Wills (§§ 54, 165, 487*)—Contest—Undue Influence—Declarations of Testatrix.

Declarations of testatrix, not a part of the res gestæ, are inadmissible to show her testamentary intention or undue influence, whether made before or after the will, but are competent as bearing on her condition or her state of mind, if that is material.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 131–134, 415–420, 1026–1032; Dec. Dig. §§ 54, 165, 487.*]

7. Wills (§ 165*)—Contest—Undue Influence—Declarations of Testatrix.

In a will contest, evidence of a conversation between testatrix and one of the contestants some 10 months prior to the execution of the will, in which testatrix stated she wished to make a will, and that she would leave the other contestant $3,000 or $4,000, the children $1,000 apiece, and the ranch to "you boys," and that L., her daughter, already had enough, was admissible as bearing on testatrix's state of mind with reference to her various children, and particularly toward the contestants; the will being materially different from the disposition mentioned.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415–420; Dec. Dig. § 165.*]

8. Wills (§ 164*)—Contest—Undue Influence—Personal Differences.

In a will contest for undue influence, evidence of personal differences existing between proponents and contestants, or either of them, and testatrix was admissible in so far as it tended to show testatrix's state of mind with relation to her children at times not too remote from the date of the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. § 164.*]

9. Witnesses (§ 268*)—Cross-Examination—Scope.

Where a witness in a will contest on direct examination testified that he had never heard testatrix's daughter, who was charged with undue influence, say anything to indicate that she wished to poison testatrix's mind against her brother H., he was properly asked on cross-examination as to a statement made by the daughter regarding her brother in testatrix's absence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

10. Evidence (§ 220*)—Contest—Admissions—Imputations—Failure to Deny.

In a will contest for alleged undue influence exerted by L., contestant testified that on one occasion he went into testatrix's room, and found L. on the lounge crying, and testatrix said to him: "See what you have done; you brought a dishpan, and Leutie pulled me over and broke my arm"—that on another occasion he went into the kitchen and found testatrix and L.; that testatrix was crying, and stated that L. hit her with the frying pan and blacked her eye; and that on neither of such occasions did L. deny the truth of testatrix's statements. *Held*, that the charges were of such a character as to call for a denial, and hence L.'s failure to deny the same rendered them admissible as admissions, as provided by Code Civ. Proc. § 1870, subd. 3.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771–785; Dec. Dig. § 220.*]

11. Wills (§ 164*)—Contest—Undue Influence.

In a will contest for alleged undue influence, evidence that on one occasion contestant attempted to borrow a cultivator of testatrix temporarily, and that she forbade him taking it, and on his asking her why she treated him so, replied, in the presence of contestant's sister, who was charged with the undue influence, that the sister made her do it, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. § 164.*]

12. Witnesses (§ 248*)—Reception of Evidence—Responsive Answer.

An answer to a question as to what witness meant by saying that testatrix was weak mentally that witness meant she was "easily influenced" was not objectionable as not responsive.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861–863; Dec. Dig. § 248.*]

13. Evidence (§ 478*)—Opinions.

Questions addressed to witnesses in a will contest for undue influence as to whether testatrix was a person "easily influenced" were objectionable as calling for conclusions, and inadmissible, except in the case of a witness who is an intimate acquaintance, and is authorized to give an opinion by Code Civ. Proc. § 1870, subd. 10.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242–2244; Dec. Dig. § 478;* Wills, Cent. Dig. §§ 113–115.]

14. Appeal and Error (§ 1056*)—Rulings on Evidence—Prejudice.

Where, in a will contest, a witness testified that he had never seen anything to indicate mental weakness on testatrix's part, but that she was an exceptionally strong-minded woman, proponents were not prejudiced by the court's refusal to permit the witness to answer whether testatrix was a person easily influenced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193; Dec. Dig. § 1056.*]

15. Wills (§ 164*)—Admissions.

In a will contest for undue influence, alleged admissions by the beneficiary charged with such impropriety, consisting of her failure to deny charges made against her by the testatrix indicating an actual attempt to influence testatrix against contestants, were not inadmissible under the rule excluding mere admissions of one beneficiary as to the mental capacity of testatrix or as to undue influence exerted over her, as against the other beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 410; Dec. Dig. § 164.*]

16. Wills (§ 164*) — Undue Influence — False Representations.

Evidence of false representations, made by a beneficiary charged with undue influence, to testatrix as to the amount of property received by contestant from his father, to influence testatrix to practically exclude contestant from her will, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

17. Wills (§§ 163, 164*)—Undue Influence—Nature of Provisions.

While an unjust will does not of itself raise a presumption of undue influence, the nature of the will may be considered on the issue of undue influence as a circumstance, together with the value of testatrix's estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 398, 405; Dec. Dig. §§ 163, 164.*]

18. Appeal and Error (§ 1064*)—Instructions—Prejudice.

Where the jury were emphatically instructed that the will in controversy could not be set aside because it was not in accordance with the law of succession, or was unjust or capricious, proponents were not prejudiced by an instruction that, if deceased had died without a will, her estate would descend to her children equally.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

19. Wills (§ 332*)—Contest—Instructions—Undue Influence.

An instruction that an unjust will does not of itself raise a presumption of undue influence, but that its nature may be considered as a circumstance in determining whether fraud or undue influence was exercised, was proper.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 785; Dec. Dig. § 332.*]

Department 1. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Proceeding for the probate of the will of Lucy A. Snowball, deceased. From an order denying probate, and overruling petitioners' motion for a new trial, they appeal. Affirmed.

R. H. Countryman and Hudson Grant, for appellants. Arthur C. Huston and Grover C. Julian, for respondents.

ANGELLOTTI, J. This is an appeal from an order denying a new trial of the issues made by the petition for the probate of the alleged will of the deceased, and the opposition thereto filed by Henry H. and Norman P. Snowball, two of her five surviving children. There were several grounds of opposition to the probate of the alleged will, but only two were relied on at the trial, viz.: That the will was the result of undue influence exerted over the deceased by A. L. Snowball and Leutie C. Snowball, two of her children, and that the execution thereof was procured by fraud of the same parties. Upon the issue of fraud the jury did not return a verdict. On the issue of undue influence the finding of the jury was in favor of the contestants. On this verdict an order was made denying admission of the alleged will to probate.

1. It is contended that the evidence is insufficient to support the finding of undue influence. An examination of the record shows that there was clear and positive evidence of such a nature as to warrant the finding if the evidence was believed by the jury to be true. It should be needless to state that it can make no difference in an appellate court that such evidence was given by interested and hostile witnesses, or that the appellate court may be of the opinion that the preponderance of evidence was against the finding of the jury. All questions of the credibility of witnesses and of the weight to be given to their testimony were exclusively for the jury and the trial judge. The rule is the same in will contests as in other proceedings, and a verdict or finding in such a case will not be disturbed "where there is a real and substantial conflict of evidence on the issue of fact involved." Estate of Doolittle, 153 Cal. 30, 94 Pac. 240.

It will not be necessary to indulge in any extended statement of the evidence given on behalf of the contestants, but a few words may properly be said as to the general nature thereof.

Preliminarily it should be said that the fact that the jury did not find against proponents upon the issue whether the will was procured by fraud did not preclude it from considering evidence of fraud as bearing upon the issue of undue influence. This matter was recently discussed by Mr. Justice Sloss in the Estate of Ricks, 108 Pac. —[1], and while a rehearing was granted in that case upon another point, what was said by him on this point was clearly correct. There, as here, the jury found against proponents on the issue of undue influence, and failed to return a verdict on the issue of fraud. It was said: "Undue influence is not the same thing as fraud. One may exist without the other. Undue influence may, however, be exerted by means of fraud. 29 Am. & Eng. Ency. of Law (2d Ed.) 107; Davis v. Calvert, 5 Gill & J. [Md.] 269; 25 Am. Dec. 282; Powell v. Plant [Miss.] 23 South. 399; Eckert v. Flowry, 43 Pa. 46; Robinson v. Robinson, 203 Pa. 400 [53 Atl. 253]. 'Fraud,' says the court in Davis v. Calvert, supra, 'is a distinct head of objection from importunity and undue influence. Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud.' To the same effect is the following language taken from the opinion of Strong, J., in Eckert v. Flowry, supra: 'Now, that is undue influence which amounts to constraint which substitutes the will of another for that of the testator. It may be either through threats or fraud, but, however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time the instrument is made.' And this view is entirely consistent with our Code definition of undue influence above quoted. Confidence or influence may be used to obtain an unfair advantage over another in a variety of ways, and no less by means of fraudulent misrepresentations than by means of duress or other pressure. The fact that the jury returned no answer to the interrogatory based on the issue of fraud did not preclude them from considering evidence of fraud as bearing upon the issue of undue influence."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[1] For opinion on rehearing, see 117 Pac. 539.

H. H. Snowball was practically disinherited by the will, being given thereby only the sum of $1,000; the estate being valued at something like $35,000, and the other four children being given the remainder in practically equal shares, except for legacies amounting to $2,250, and except that contestant Norman was given only a life interest in the Snowball home place, and that Leutie C. Snowball, the only daughter, was given all the personal property on such place. The will stated that the reason testatrix made no further provision for H. H. Snowball was that her husband made provision for him and his children, and that he had been already provided for, the truth of which statement as to him was positively denied by the evidence of contestants. The will was executed April 8, 1907, less than three months before the death of deceased. At the time of its execution the testatrix was about 70 years of age. From the time of the death of her husband, February 5, 1906, the testatrix lived with her daughter, Leutie, on the home place. The evidence indicated that up to the time of the death of her husband, and for some time thereafter, the testatrix and her son, H. H. Snowball, were on the most affectionate terms. The testimony of the contestants tended to show that from the time of her husband's death testatrix became gradually weaker physically, and more dependent on and more subject to the influence of her daughter; that the daughter systematically and constantly exerted this influence for the purpose of producing a change in the feelings of testatrix towards said son by making unwarranted accusations against him; that testatrix yielded more and more to the importunities of the daughter; that by many acts she showed herself to be completely under the influence of her daughter, and ready to yield to all her desires in regard to said son; that the daughter importuned testatrix to make a will by the terms of which said son should not receive as much as the other children; and that finally, in response to such importunities, the testatrix, shortly before a contemplated medical operation, went with her daughter to the office of a lawyer, and there, while the daughter remained in another room, made the will in question. According to the evidence of contestants, the reason stated in the will for the small provision made for said son was absolutely without basis in fact. The sum and substance of contestants' evidence was that the testatrix was unable to resist the importunities of her daughter, and made the will under the influence thereof, so that, so far as provision for H. H. Snowball was concerned, the will was in reality the will of the daughter, and not that of the testatrix. There is nothing in the claim that the undue influence was not exercised directly upon the testamentary act. There was sufficient in the evidence of contestants to support a conclusion that it was used purely for the purpose of procuring the will, and that the will was the direct result thereof. While it is true that there must be proof that the influence was used directly to procure the will, general influence not brought to bear upon the testamentary act not being undue influence (In re McDevitt, 95 Cal. 33, 30 Pac. 101), such proof exists where the evidence is of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix. See Estate of Arnold, 147 Cal. 589, 82 Pac. 252; Estate of Welch, 6 Cal. App. 50, 91 Pac. 336.

It is suggested by appellants that on the motion for a new trial the court erroneously adopted the view that the verdict of the jury was conclusive, and that it could not draw any inferences from the evidence contrary to the inferences drawn by the jury. There is absolutely nothing in the record warranting any such claim on the part of appellants.

2. It is urged that evidence was received in violation of the rule contended for by appellants that, "where the issue before the court is that of undue influence, the declarations of the decedent are inadmissible to show her testamentary intention, or undue influence, and this is true whether the declarations be made before or after the making of the will." The rule in this state in regard to the admissibility of such declarations, when not so made as to constitute a part of the res gestæ, is clearly established by the decisions. They are not admissible in proof or disproof of any statement of fact contained in them, or for the purpose of showing the exercise of undue influence. But wherever the condition or state of mind of the declarant is a material matter, declarations of the testator, legitimately tending to shed light on that question, are admissible solely for that purpose—that is, for the purpose of showing his then condition or state of mind—the effect being, as was said in Estate of Arnold, 147 Cal. 594, 82 Pac. 256, "carefully limited to the question of his condition of mind." The most common case in which such declarations are admissible is, of course, the case where the question is as to the mental capacity of the testator to make a will. But the authorities recognize that,

as is obvious, the condition or state of mind of the testator at times preceding the execution of the will is a material matter where the issue is undue influence, not for the purpose of showing the exercise of undue influence by another, which cannot be so shown, but for the purpose of showing the effect of undue influence proved by other evidence. As is said in the case last cited, there is a distinction between the effect of such declarations to prove the undue influence and fraud and their effect to prove the state of mind of the testator. What was said in Estate of Arnold, supra, was said with reference to the issue of undue influence, and in the later case of Estate of Thomas, 101 Pac. 798, it was said that in cases involving the question of the testator's sanity or the issue of undue influence, the underlying principle was the same with respect to such declarations, the declarations being admitted not in proof or disproof of any statement of fact contained in them, but as tending to show the condition or state of mind of the declarant; this condition or state of mind having a direct and important bearing upon the disputed question of his mental capacity or the execution of the will under undue influence. The principal evidence objected to by appellant in this connection was that given by Norman P. Snowball as to a conversation between himself and deceased some 10 months prior to the execution of the will with relation to her then testamentary intention. In this conversation she stated to him that she wished to make her will, that she thought she would leave Havey (Henry H.) $3,000 or $4,000, the children about $1,000 apiece, and the ranch to "you boys," and that "Leutie" already had enough. The court admitted this evidence solely for the purpose of showing the state of mind; the condition of mind; the friendly or unfriendly relations; the affection or nonaffection. In its instructions to the jury the court, at the request of appellants, again limited the effect of this testimony by declaring to them substantially that evidence of declarations made by Lucy A. Snowball was admitted for the sole purpose of showing the friendliness or unfriendliness existing between the said Lucy A. Snowball and the different children, and for the purpose of showing the state of mind of the said Lucy A. Snowball and the mental attitude of the said Lucy A. Snowball towards the various objects of her bounty, and could be considered by them only for that purpose. We are of the opinion that the evidence of these declarations as to the then intentions of the testatrix was admissible as bearing upon the material question of her then state of mind with relation to her various children, and particularly towards contestant Henry H. Snowball, and that its effect was limited by the instructions to the purposes for which it could legitimately be considered.

Other evidence complained of by appellants in this connection was that of Norman P. Snowball relative to a conversation between testatrix, Leutie, Leon, and the witness, a few months before the execution of the will, but this evidence was clearly admissible as tending to show a then effort on the part of Leutie and Leon to procure the execution of the will by the testatrix, and to prejudice her against H. H. Snowball to an extent sufficient to obtain his practical exclusion therefrom as a beneficiary.

3. Under the general statement that evidence tending to show personal differences existing between proponents and contestants, or either of them, and their mother, was inadmissible, appellants note certain exceptions to rulings admitting evidence. So far as any such evidence tended simply to show the state of mind of the testatrix with relation to her children at times not too remote from the date of the execution of the will, it was, as we have seen, admissible, as would be any evidence legitimately bearing on that question. The first four exceptions referred to in this connection relate to evidence that was clearly admissible for the purpose of showing the manner in which the undue influence was exercised; the extent to which it was exercised, and the effect thereof, being evidence as to declarations and conduct of Leutie to and in the presence of her mother, regarding and derogatory to H. H. Snowball, and indicating most plainly her desire and determination that H. H. Snowball should receive nothing from testatrix, and also tending to show that the testatrix was not able to resist the importunities of Leutie. The matter covered by exception 55, being evidence adduced on the cross-examination of proponents' witness Dickson as to a statement made by Leutie regarding H. H. Snowball in the absence of testatrix, was legitimate cross-examination, in view of the evidence of the witness on direct examination to the effect that he had never heard Leutie say anything to indicate that she wished to poison her mother's mind against H. H. Snowball. Exception 41½ amounts to nothing, as the question objected to was not answered. The same is true of exception 31. The evidence given under the ruling referred to by exception 37 is unimportant.

4. It is earnestly contended that testimony given by H. H. Snowball as to certain statements made by testatrix to him in the presence of Leutie was inadmissible for any purpose. He testified that immediately after his mother's arm had been fractured he went into the room where his mother was, and Leutie was on the lounge crying, and his mother said to him: "Havey, see what you have done; you brought a dishpan, and Leutie pulled me over and broke my arm"—and that Leutie did not deny the truth of the statement. He testified further that shortly before this occurrence he went into the kitchen, and there found his mother and Leutie; that his mother was crying; that he asked her what was the matter; that she said that

Leutie hit her with the frying pan and blacked her eye; and that his sister never said a word. Both of the instances referred to were prior to the death of the husband of the testatrix.

It was a theory of contestants that prior to the death of her father, Leutie was uniformly cruel and unkind to her mother, and that subsequent to his death her entire attitude to her mother changed, for the purpose of obtaining an influence over her in order that she might use the same to her advantage. There was considerable evidence received to show this change in her attitude, and we do not understand it to be seriously questioned that such evidence was admissible as tending to show an effort, on the part of Leutie, to obtain an influence over her mother and the manner in which that influence was acquired. Proof of the two incidents referred to by the testimony above stated was in line with this theory. Of course, the declarations of the mother testified to were not competent evidence to prove the incidents; were not evidence of the facts stated therein. They constituted simply narratives of past occurrences, and were in no sense a part of the res gestæ, but declarations which were made in the presence and hearing of Leutie. It is provided by our law that evidence may be given upon a trial of "an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto" (Code Civ. Proc. § 1870, subd. 3), for the purpose of showing such conduct on the part of the party as will constitute acquiescence in and admission of the truth of the statement. The theory is that a statement so made may be of such a nature, and made in such a way, as to naturally call for a denial if not true, and that a failure to deny may reasonably be taken as admission of its truth. In Tibbet v. Sue, 125 Cal. 546, 58 Pac. 160, this court said, quoting approvingly from Rice on Evidence: "Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement should make to the same. If he is silent when he ought to have spoken, the presumption of acquiescence arises. In this sense, admissions may be implied from conduct." The evidence here received was admissible as tending to show admissions by Leutie of the truth of the charges made against her by her mother. Whether it did show such admissions was for the jury to determine in view of all the circumstances, but it sufficiently bore on that question to be admissible. In justice to Leutie it may be stated that on the trial she emphatically and positively denied the truth of both of said charges.

Another alleged declaration of the testatrix testified to by H. H. Snowball was one made when she refused to allow him to take a cultivator from the premises for temporary use. According to his evidence he had put it on his wagon, when his mother came out and forbade him taking it. He took it off the wagon, and then said to her: "My God, mother, why do you treat me this way?" His mother commenced to cry, and said: "Havey, I can't help it. Leutie makes me do it." It is this declaration of the mother that is principally objected to, and its importance as tending to show the subordination of the will of the mother to that of Leutie is, of course, apparent. We are of the opinion that there is enough in the record to indicate that this declaration was made in the presence and hearing of Leutie without a denial on her part to warrant it going to the jury as evidence tending to show the then exercise of undue influence over her mother to prevent any favorable consideration by the mother of her son, H. H. Snowball.

5. Complaint is made that the court erred in permitting certain witnesses to state their opinions upon certain matters where opinion evidence was not admissible. Several exceptions are noted by number under this head, but only one is argued. On cross-examination by appellants of N. P. Snowball, who had testified that his mother was to a certain extent weak mentally, he was asked to what extent she was weak mentally, in other words, what he meant by saying that she was weak mentally to a certain extent, and answered that she was "easily influenced." A motion to strike this answer out as "not responsive" and as the "volunteered opinion of the witness" was denied. We are satisfied that it must be held that the answer was responsive to appellants' own question, and that they had no right to have it stricken out. We quite agreed with appellants' counsel that questions addressed to witnesses as to whether a person was one "easily influenced" call for mere opinions and conclusions from facts, as was held in Compher v. Browning, 219 Ill. 429, 76 N. E. 684, 109 Am. St. Rep. 346. Assuming for the purposes of argument that such evidence may be given by an "intimate acquaintance" under subdivision 10, § 1870, Code Civ. Proc., the sustaining of the objection to the question asked appellants' witness Dickson, "Could Lucy A. Snowball be easily influenced?" was not prejudicial, in view of his other testimony to the effect that he never saw anything to indicate a mental weakness on her part, but rather the reverse, and that she was an exceptionally clear-headed and strong-minded woman.

6. It is claimed that declarations and admissions of Leutie in the absence of others beneficially interested in the will were allowed to be shown, contrary to the doctrine declared in Estate of Dolbeer, 149 Cal. 245, 86 Pac. 695, to the effect that declarations constituting simply admissions of one beneficiary as to the mental capacity of the testatrix are not admissible against the other beneficiaries, and consequently are not ad-

missible at all. It is said that this doctrine is equally applicable where the issue is undue influence. For the purposes of this appeal, this may be conceded. But we cannot see that this rule is important here. Several of the exceptions noted under this contention relate to evidence of declarations and conduct of Leutie in the presence of her mother designed to influence her against H. H. Snowball; in other words, evidence of the actual attempt of Leutie to influence her mother against him. Necessarily such evidence was admissible. The only other exception noted under this head requiring notice relates to the evidence of H. H. Snowball as to the cultivator incident, held admissible as tending to show acquiescence on the part of Leutie in the statement of her mother to the effect that it was because of Leutie's insistence that she refused to treat H. H. Snowball more kindly. This incident occurred some time prior to the execution of the will. Such an admission or acquiescence is not at all within the meaning of the doctrine relied on. It stood upon the same plane as evidence to the effect that Leutie had then said to her mother that she insisted that she should not grant any favors to her son would have rested on; in other words, constituted evidence of the then actual attempt of Leutie, prior to the execution of any will, to influence her mother against the son. If any evidence of an actual attempt to exert undue influence is admissible, it would seem that such evidence must necessarily be competent. So, also, the evidence as to the broken arm and frying pan incidents, heretofore referred to, not noted by appellants under this contention, constituted evidence of the then course of treatment by Leutie of her mother.

7. Evidence tending to show false representations made by Leutie to her mother as to the amount of property received by H. H. Snowball from his father, for the purpose of influencing her to practically exclude him from her will, was clearly within the issues, and, so far as we can see, this is the nature of all the evidence specified in the exceptions noted under the contention that evidence of the financial standing of any of the beneficiaries was inadmissible, except the evidence as to the value of the estate of testatrix. While an unjust will does not of itself raise the presumption of undue influence, the nature of the will may be considered by the jury upon the issue of undue influence as a circumstance, and the value of the estate left by the testatrix is necessarily a factor in determining its nature. See Page on Wills, §§ 426, 427. The trial court nowhere refused to allow appellants to show that the representations as to what H. H. Snowball received from his father were true, and it was expressly stated by counsel for respondents that they would not object to evidence as to the property left by his father to the children of H. H. Snowball if the same was offered for the purpose of showing that this was the reason testatrix did not give him more by her will.

8. While we agree with counsel for appellants that "evidence which was immaterial, irrelevant, or incompetent for any purpose should not have been admitted," we do not find in any of the instances specified under this head any violation of this rule.

9. The refusal to allow proponents' witness Mrs. Carl to testify as to statements made to her by Norman P. Snowball concerning declarations by his mother inconsistent with his testimony as to the nature of such declarations was proper, in view of the objection that no foundation had been laid for any such evidence. As heretofore stated, the questions asked proponents' witness Dickson on cross-examination, as to statements of Leutie regarding H. H. Snowball was proper cross-examination. We are of the opinion that the same is true as to the questions asked Leutie on cross-examination as to what property she received from her father's estate.

10. We find no prejudicial error in the matter of instructions to the jury.

The matter stricken out of appellants' requested instruction 10 was covered, as far as was necessary and proper, by appellants' requested instruction 9, which was given.

Appellants' requested instruction 17 was properly refused. In its statement of alleged false representations upon which contestants relied as showing that the execution of the will was obtained by fraud and undue influence it would have been misleading and confusing, in that it was not a fair and complete statement of the false representations asserted by contestants and upon which they relied.

We cannot assume that proponents were prejudiced by the instruction that, if deceased had died without a will, her estate would descend to her children, share and share alike. The jury were clearly and emphatically instructed, over and over again, to the effect that the will could not be set aside on the ground that it was not in accord with the law of succession, or unjust or capricious.

Contestants' instruction 3, to the effect that while an unjust will does not of itself raise a presumption of undue influence, still the nature of the will may be considered by the jury as a circumstance in determining whether fraud or undue influence was exercised, was correct. In re Langford, 108 Cal. 624, 41 Pac. 701, cited by appellants, so intimates.

The point as to contestants' instructions 4, 11, 15, and 23 appears to be, not that they do not correctly state the law, but that they were not applicable under the facts of this case. We see no force in this contention. Contestants' requested instruction 6 was perhaps not pertinent under the facts, but clearly it was not prejudicial.

Contestants' instructions 7 and 8 were absolutely correct statements of law. They did not mean, and could not reasonably be taken as meaning, that certain evidence, received for a limited purpose and confined to that purpose by other instructions, could be considered by the jury for another purpose.

While it is said in appellants' brief that contestants' instruction 14 had no application to the facts, it is not claimed that it was in any way prejudicial, and we cannot see that it may have been so.

We see no prejudicial error in the giving of contestants' instructions 17, 19, 20, 21, and [illegible].

The modification of proponents' requested instruction 18 was proper, for the reason that the portion stricken out, a recital that certain specified evidence had been offered for a certain purpose, was not true. No such evidence had been offered for any such purpose. The instruction as modified fully covered the law applicable to the point that appellant desired to present.

There is no other point presented by the briefs that we consider it necessary to discuss. We deem it proper to say that we would have felt warranted in disregarding numerous exceptions, presented in the briefs solely by number of exception and folio of the record, without any statement as to the specific nature of the ruling complained of, and without any argument whatever in support of the exception. We have, however, carefully read the whole record in this case, with the result that we have found no substantial error in the rulings of the trial court.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

(157 Cal. 316)

GRIEB v. ZEMANSKY et al. (S. F. 5,438.)

(Supreme Court of California. Feb. 17, 1910. Rehearing Denied March 18, 1910.)

1. ELECTIONS (§ 95*)—PRIMARY ELECTIONS—REGISTRATION.

Pol. Code, § 1366, declares that the qualifications and registration of voters at primary elections shall be governed by the same rules established by the Constitution and Political Code for general elections, and that the same officers who furnished the original affidavits of registration, and indexes and supplements thereto, for general elections shall furnish them for primary elections, provided that where a new registration is not completed soon enough to permit its use at the next ensuing primary election, the original affidavits of registration and indexes used at the last general election may be used at the primary election, together with affidavits showing additional registration, changes, and corrections. *Held*, that the proviso applies only to cities where city elections are to be held prior to August in the even-numbered years, upon January 1st of which a current registration begins under Pol. Code, § 1094, and does not apply to the general August primary election to nominate candidates to be voted for at the November general election, and hence at such primary election in August, 1910, the current registration begun in the previous January alone determines the qualifications of voters.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 95, 96; Dec. Dig. § 95.*]

2. ELECTIONS (§ 143*)—PRIMARY ELECTION—NOMINATION PAPERS—QUALIFIED SIGNERS.

The primary law declaring that signers of the petition of a candidate for nomination shall be "qualified electors," and that a candidate seeking the nomination of a political party must accompany his petition by a percentage of the qualified electors "of that party," contemplates that such signers shall be qualified voters at the election in contemplation of which they sign the petition, and hence only those may sign such petition for nomination at the primary election of August, 1910, who upon the register of 1910 have declared their affiliation with such party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 121; Dec. Dig. § 143.*]

3. STATUTES (§ 190*)—CONSTRUCTION—ARGUMENT—AB INCONVENIENTE.

The argument ab inconveniente available in the construction of statutes, of doubtful meaning cannot be applied to Pol. Code, § 1366; its meaning being clear.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.*]

Shaw, J., dissenting in part.

In Bank. Mandamus by Henry T. Grieb against J. H. Zemansky and others, as members of the Board of Election Commissioners of San Francisco. Writ denied.

Lester G. Burnett (U. S. Webb, Atty. Gen., amicus curiæ), for plaintiff. Thos. V. Cator and Hugh J. McIsaac, for respondents.

HENSHAW, J. The plaintiff, for himself and all others similarly situated, applies for a writ of mandate from this court against the defendants, Zemansky, as the registrar of voters, and the other defendants as members of the board of election commissioners of the city and county of San Francisco, to compel them, when they come to examine the sufficiency of "nomination papers" filed in behalf of candidates proposed for nomination at the primary election in August, 1910, and in directing the manner of conducting said primary election, to recognize and use the great register of voters registered in the years 1908 and 1909, and, as supplementary thereto, the new great register which began to be made on January 1, 1910. In the return the defendants assert that the new registration beginning January 1, 1910, is the only one that can lawfully be used for the above-mentioned purposes. The questions to be determined therefore are: (1) What register shall be used at the primary election in August, 1910; (2) who constitute the qualified electors authorized by law to sign a candidate's nomination papers?

1. We are of the opinion that the provisions of the law plainly indicate that the new registration of 1910 shall alone be used at the August primary election. The provisions of the law in this respect are as follows: "The qualifications and registration of voters and the privileges of electors to attend the polls at primary elections shall be subject to the same tests and governed by the same

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rules and regulations as are in the Constitution and Political Code of this state established and prescribed for general elections; and the same officers who furnish the original affidavits of registration, indexes and supplements thereto, for general elections, as provided for in this Code, shall furnish them for use at primary elections. It shall be the duty of the proper officers to furnish the original affidavits of registration, indexes and supplements thereto, for use at primary elections, which shall show the names of all the voters entitled to vote at such elections; provided that where a new registration pursuant to law is not completed in point of time sufficient to permit of its use at the next ensuing primary election, then the original affidavits of registration and indexes used at the last general election in any county, or city and county, in this state, may be used at any primary election, together with the original affidavits of registration since the last election and supplemental indexes, showing all the additional registrations, changes and corrections, made since the last general registration, completed to and including the twentieth day prior to the primary, which shall be the last day on which any person may register or transfer his registration, so as to entitle him to vote at such primary." Pol. Code, § 1366.

Section 1094 of the Political Code provides that the new registration, beginning on January 1st of the even-numbered years "shall be in progress at all times except during the forty days immediately preceding any election, when it shall cease as to the electors residing within the territory in which such election is to be held." It is contended that the new registration of 1910 "will not be completed in point of time sufficient to permit of its use" at the time of the primary election on August 16th, and, therefore, that under the proviso to section 1366 the old registration of 1908 and 1909 may be used. We think the proviso in section 1366 was not intended to refer to the general August primary election to nominate candidates to be voted for at the November general election.

The proviso originated in the primary election law of 1899 in which it was numbered as section 1375 of the Political Code (St. 1899, p. 54). This act provided for a primary election for delegates to conventions in cities to nominate city officers, in addition to the primaries for state and county conventions. St. 1899, p. 51. In 1901 a new primary law was enacted in which the proviso appeared as part of section 1366 (St. 1901, p. 614). That act was not made operative, except in certain cities. Section 1372, St. 1901, p. 616. The present law (St. 1909, c. 405) provides for direct primaries, and applies to all cities, except those having a freeholders' charter covering the subject (sections 1, 2, 3). In 1899, and ever since, the laws and charters governing city elections in many cities of the state provided for city elections to be held during the early months of the even-numbered years, at times when it was not to be expected that many persons would be registered upon the new registration begun in January. City elections are to be held in cities of the second class on the second Monday of March (Mun. Cor. Act [St. 1883, p. 185] § 301), in cities of the third class on the second Tuesday of March (section 502), and in cities of the sixth class on the second Monday of April (section 852). In San Jose under the city charter such elections are held on the third Monday of May (St. 1897, p. 596), in Santa Rosa, on the first Tuesday of April (St. 1905, p. 870), and in Vallejo on the first Monday of March (St. 1899, p. 394). All of these are in the even-numbered years. None of these charters makes any provision for primary elections, nor does the general municipal corporation act. Hence, in each of these cities, under section 5 of the present primary election law, for party nominations primary elections must be held on the "Tuesday three weeks next preceding the city election." The general municipal corporation law was enacted in 1883 (St. 1883, p. 93). As will be seen, therefore, similar conditions existed in 1899 when this proviso was first enacted as a part of the primary law of that year. It was necessary to make some provision in that act permitting voters not newly registered to participate in such primaries, for it is apparent that if this were not done, there would be few of the voters of such cities qualified to act in the choosing of candidates so soon after the current registration had begun. The proviso finds its full justification in these conditions, and to these only was it intended to apply. If it were intended to apply to the regular and general state and county primary election to be held in the August preceding the general election, the effect would be that the old registration would be used at all primaries, except in a few cities where elections occur in the odd-numbered years, or immediately after the November election. The main object of the act was to provide for the nomination of candidates for offices to be filled at the general state and county elections in November. The holding of such primaries for city officers, in the few cities where elections were held so early in the even-numbered years, was incidental and of comparatively small importance. If it had been intended that the old register should be used at the general primary election, the one for which the law was really enacted, it is scarcely conceivable that the Legislature would not have so declared in plain terms in the main body of the section, leaving to the proviso the office of stating the converse proposition that in the city elections occurring after the November election and in the odd-numbered years the old register should not be used. The natural conclusion from the language of the proviso to section

1366, and from the whole act and the conditions to which it was addressed, is that the regular August primary election for candidates for state and county offices was not considered an exceptional case to be met by a proviso, that the registration which at that time has been in progress for nearly seven months was considered as sufficiently complete for use, and that the proviso was intended to apply only in the cities having local elections earlier than the general August primary election.

This conclusion is strengthened by the fact that it gives ample time for any voter to register and qualify himself to vote at the August primary. Its necessity is also shown by the provisions of section 1366a of the Political Code, referred to in sections 16 and 17 of the act. Section 1366a requires every voter when he registers to declare in his affidavit the name of the political party with which he desires to affiliate at ensuing primary elections, and provides that no person shall be entitled to vote at a primary election unless he has so declared. This section was enacted in 1907, and, until the enactment of the present law, it was in force only in certain cities mentioned in section 1372, added to the Political Code in 1901. Hence persons residing outside of those cities, who registered in 1908 and 1909, were not usually required to declare their party affiliation. Section 16 of this act provides that the right of a voter at a primary election to vote the party ticket of the party with which he has declared his affiliation, as provided in section 1366a, shall not be challenged or subjected to any test, if he is otherwise qualified as a voter. Section 17 provides that an elector who has, 20 days before a primary election, "qualified by registration and by declaration of the political party with which he intends to affiliate, as provided in section 1366a of the Political Code, shall be entitled to vote at such primary election, such right to vote being subject to challenge only as hereinbefore provided; and shall, on writing his name or having it written for him on the roster, * * * receive the official primary election ballot of the political party designated in his affidavit of registration, and no other." If the old registration should be allowed in use at the regular August election of the present year, these provisions could not be followed in any part of the state, except in the cities aforesaid, for the registration affidavits outside of those cities would not show any declaration of party affiliation, and the voter would not by the letter of the law be entitled to receive any ballot. The law would not operate uniformly this year. By limiting the application of the proviso in section 1366 to the cities where elections are to be held prior to August in the even-numbered years all difficulty is removed, the legislative purpose will be carried out and the law made harmonious. The defendants are correct in their assertion that the registration of 1910 is constituted the test by which to determine the right to vote at the next August primary election, and that no other registration is to be used on the polls at that day.

2. From the conclusion above reached and expressed there follows necessarily the determination that only those electors whose names appear upon the register of 1910 can join in the nomination paper of a candidate who is to be voted for at the August primary. The reasons compelling this conclusion are two. First, the law contemplates and declares that the signers shall be "qualified electors." They must make affidavit to such effect. This cannot mean that they were qualified electors in the past—one year, two years, or five years ago. It must and can mean only that they are electors qualified to participate in the election in contemplation of which they are signing a candidate's nomination paper. But, as admittedly, only those electors who have registered in 1910 can vote at this primary, it must follow that only such are qualified to sign a candidate's paper. The second reason is this. Throughout the primary law it is repeatedly declared that a candidate seeking the nomination of a political party must accompany his petition by a percentage of the qualified electors of that party. If, then, a candidate seeks the Republican or Democratic nomination in August, 1910, his candidacy must receive the indorsement of a sufficient number of the electors of that party. Who at the primary election of 1910 are the qualified electors of the Republican, the Democratic, or any other political party? The answer is evident. Only those who upon the register of 1910 (and not upon the register of any preceding year) have declared their affiliation with such party. The law extends the fullest permission to an elector in registering to change his political party. If the register of preceding years may be used in behalf of a candidate in the August primary of 1910, it will follow that men who appear upon the registration of 1909 as Republicans, and who have registered in 1910 as Democrats, will have aided in putting before the people the candidate of a party to which they do not belong. Indeed, it is conceivable that under such circumstances, by changes in registration, if the use of old registers is permitted, a candidate might go before the electors seeking the suffrages of a political party without having the indorsement of anywhere near the number of names of qualified electors of his party as required by law. The language of the statute presents no difficulties of interpretation. Only those who by registration have declared their membership in a party may vote at the primary election, and only those can and should be allowed to join in the selection of the candidates of that party.

The argument ab inconveniente may be

employed in the construction of a doubtful statute, but it has no force in the interpretation of a statute like this, whose terms are not doubtful. But even if they were—in the present instance the argument in favor of the use of old registers is entitled to little weight. On the part of the candidates it may be said that it is not in contemplation that they will be able to perform personally the labor of obtaining signatures to their nomination papers throughout the various counties of the state. In view of this the law itself permits the candidate to appoint "verification deputies" to obtain signatures to their nomination papers. It is not easy to see that any greater labor or any greater expense is cast upon the candidate in that he is required to direct deputies to obtain signatures from the registration of 1910 rather than from the registration of some preceding year or years. But considering the public officers, the weight of the argument ab inconveniente is quite on their side. The time allowed them for the inspection of candidates' papers is extremely short, only 10 days. It will greatly increase the burden cast upon them if in verifying the competency of the electors' names, they shall have to resort to the old registration instead of the new. Indeed, as advised in the argument of this case, of the 90,000 electors upon the great register of San Francisco for the year 1909, only 35,000 are qualified at the present time to vote at the place of registration. Moreover, no reasonable fear may be entertained that the time allowed for the new registration may prove insufficient for obtaining the signatures of an adequate number of a party's following. Under the earlier law 75 days was considered sufficient time to complete a new registration. St. 1895, p. 228; section 1094, Pol. Code. Now the registration begins upon the 1st day of January in each even-numbered year, "and is in progress at all times except during the 40 days immediately preceding any election." There are thus about six months allowed for this registration before the date of the primary. It will freely be conceded by the court that this primary law is both complex and onerous, but we are advised that it was adopted in response to a very general popular demand. This being so, it is but fair to assume that the vast majority of the electors who find in this law a panacea for all political ills will flock to the registration booths and qualify themselves to take part in the important primary elections which follow.

For the foregoing reasons the application for mandate is denied.

We concur: BEATTY, C. J.; LORIGAN, J.

ANGELLOTTI, J. I concur in all that is said in subdivision 1 of the foregoing opinion. It appears to me to necessarily follow therefrom that the conclusion reached upon the second proposition discussed in the opinion is correct. It may be conceded that the requirement of the primary law as to the number of signatures to nomination papers is unnecessarily onerous, but that is, of course, a matter wholly within the control of the Legislature. To my mind the law enacted by the Legislature clearly contemplates that only those qualified to participate at the primary election may participate in the nomination of candidates to be voted for thereat. I, therefore, concur in the judgment.

SHAW, J. I concur in all that is said in subdivision numbered 1 of the opinion of Justice HENSHAW. I dissent from that part of the opinion embraced in subdivision 2 thereof.

Justices SLOSS and MELVIN do not participate in the determination of this matter.

157 Cal. 333

JOHNSON v. SOUTHERN PAC. CO. et al.

(S. F. 5,328.)

(Supreme Court of California. Feb. 24, 1910.)

1. MALICIOUS PROSECUTION (§ 20*) — "PROBABLE CAUSE"—BELIEF IN GUILT OF ACCUSED.

"Probable cause" is a suspicion founded upon circumstances warranting a reasonable man in the belief that the charge is true; and, in an action for malicious prosecution under Penal Code, § 481, making it a crime to alter a railroad ticket with intent to defraud, evidence that a ticket had been altered, with intent to use it a second time beween the same points, that it was purchased from plaintiff, and, on a comparison of plaintiff's handwriting with the writing on the ticket which constituted the claimed alteration, both the railroad employés and a reputable expert, acting in good faith, were convinced that the writing on the ticket was plaintiff's, was sufficient to show probable cause for the prosecution, though plaintiff denied ever having seen the ticket.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26–28; Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 6, pp. 5618–5620; vol. 8, p. 7765.]

2. MALICIOUS PROSECUTION (§ 71*) — QUESTIONS FOR JURY—PROBABLE CAUSE.

In an action for malicious prosecution, where the testimony is not in conflict, the question whether or not the evidence shows want of probable cause is for the court.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 161, 162; Dec. Dig. § 71.*]

3. MALICIOUS PROSECUTION (§ 20*)—CRIMINAL PROSECUTION—PROBABLE CAUSE.

A person instituting a prosecution need not investigate the crime itself, or seek to ascertain whether there are any other facts relating to the offense, or whether the accused had any defense to the charge, or exhaust all sources of information bearing upon the facts which have come to his knowledge, but it is sufficient, to justify him in seeking to have the act punished, if the facts within his knowledge, although not in law constituting a crime, are such as to induce in the mind of a reasonable man the honest belief that a crime has been committed.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26–28; Dec. Dig. § 20.*]

4. MALICIOUS PROSECUTION (§§ 21, 22*)—CRIMINAL PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL.

The fact that defendant in an action for malicious prosecution consulted a lawyer in good standing and the district attorney of the county, stating to them all the facts, and being advised by them that a prosecution would lie, and on this advice proceeded in good faith to institute it, was sufficient to show probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40–48; Dec. Dig. §§ 21, 22.*]

5. MALICIOUS PROSECUTION (§ 24*)—CRIMINAL PROSECUTION — PROBABLE CAUSE — RESULT OF PROSECUTION.

The fact that after the taking of evidence upon the preliminary examination of one accused of crime the committing magistrate adjudged that he was guilty of the offense, and made an order committing him to answer thereto in the superior court, is prima facie evidence of probable cause in an action for malicious prosecution.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 54; Dec. Dig. § 24.*]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by C. W. Johnson against the Southern Pacific Company and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

William T. Jeter and Joseph H. Skirm, for appellants. George P. Burke and Carl E. Lindsay, for respondent.

SHAW, J. This is an action to recover damages alleged to have been caused by a prosecution initiated by the defendants against the plaintiff, which plaintiff avers was done maliciously and without probable cause. The answer denied the material allegations of the complaint, including the allegation of want of probable cause. There was a verdict for the plaintiff, and judgment was entered accordingly. The defendants' motion for a new trial was denied. Appeals are taken both from the judgment and from the order denying a new trial.

The only question which it is necessary to notice is the contention of the defendants that the verdict is not sustained by the evidence. The particular point upon which they claim that the evidence is insufficient is the issue relating to the existence of probable cause for the prosecution. The plaintiff was prosecuted for an alleged violation of section 481 of the Penal Code. This section, among other things, declares that: "Every person who * * * alters any ticket * * * issued by any railroad company * * * designed to entitle the holder to ride in the cars of such company * * * with intent to defraud any such railroad company is punishable by imprisonment," etc. It was charged that the plaintiff on December 26, 1903, altered a railroad ticket, theretofore issued by the defendant company for passage from San Francisco to Santa Cruz, by indorsing on the back thereof the words "San Jose," on a blank line stamped thereon under the words "Stopover granted at," with intent than and there to defraud the said company, and that having so altered the said ticket plaintiff uttered and put the same in circulation as genuine and true to one Sam Hawkins, with intent to defraud the said Hawkins and the said company.

The evidence shows that, at the time of instituting and while carrying on the said prosecution against the said plaintiff, the defendant McMonigal and the agents of the defendant company in charge of the prosecution either had personal knowledge or credible information of the following facts: The Southern Pacific Company was operating a line of railroad from San Francisco through Pajaro to San Luis Obispo and beyond, and also a branch line from Pajora to Santa Cruz. They were also operating a shorter direct line to Santa Cruz, by way of Los Gatos. The shorter line controlled the price of through tickets, the result being that tickets from San Francisco to Santa Cruz were sold for about the same price as tickets to Watsonville, a place on the branch line near Pajaro. Owing to this condition, it was customary for persons going to Watsonville or Pajaro to buy a ticket to Santa Cruz, and after arriving at the end of their proposed journey, to sell the remainder of the ticket entitling the holder to proceed from there to Santa Cruz. These tickets were transferable, good for six months, and included stop-over privileges. On the back thereof was printed the words "Stopover granted at," with a blank line beneath the same, upon which it was intended that the conductor from whom the stop-over privilege was asked should insert a statement showing the point at which the stop-over was granted. Tickets of this character which had been used as far as Pajaro had been sometimes altered by writing on the blank line aforesaid words indicating that a stop-over had been given at San Jose, and such altered tickets had been used by persons traveling from San Jose to Pajaro, thus obtaining two rides upon one ticket over the same portion of the road. On November 18, 1903, the defendant company issued a ticket to some person unknown for passage from San Francisco to Santa Cruz. This ticket was soon afterwards presented to the defendant McMonigal, who was the conductor in charge of the train, for passage from San Francisco to Pajaro, and was punched by him to indicate that it was so used, and was thereupon by him given back to the passenger. This was done because McMonigal's train ran to San Luis Obispo, and it was necessary for the passenger to Santa Cruz to have his ticket to present to the conductor of the train which carried him from Pajaro to Santa Cruz. On the 26th of December, 1903, this ticket was again presented to the defendant McMonigal by Sam Hawkins for passage from San Jose to Pajaro. At that time it had written, on the blank line, the words, "San Jose." Hawkins had boarded the train at San Jose with intent to travel from there to Pajaro upon the said ticket. He then stated to McMonigal, and afterwards to the agents of the defendant company, that he had purchased the ticket, thus altered, at Watsonville, from the plaintiff Johnson, to be used from San Jose to Pajaro, and that he was to pay Johnson therefor, after having used it for such passage. When the ticket was presented, McMonigal told Hawkins that the ticket had already been used as far as Pajaro, took up the ticket, and compelled Hawkins to pay fare. Samples of Johnson's handwriting were procured and compared with the handwriting of the words "San Jose" on the back of the ticket. The handwritings resembled so much that the agents of the defendant company, who were men of experience in comparing handwritings, believed that Johnson had written those words on the ticket, and so advised McMonigal. These exemplars, together with the ticket, were submitted to a reputable expert in handwriting, who gave a written opinion to the defendants to the effect that Johnson had written the words "San Jose" on the back of the ticket. Johnson, himself, upon being questioned by the district attorney and the persons acting for the defendant company and McMonigal, denied that he had ever seen the ticket, or that he had sold it or given it to Hawkins, and upon their request he wrote in their presence the names of several stations on the road, including San Jose. Johnson was a hotel keeper at Watsonville.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was no attempt to contradict the evidence showing these facts, nor was there any evidence tending to prove that the defendant, McMonigal, and the agents of the railroad company were not acting in entire good faith, and in the full belief that the facts aforesaid were true, or that they had knowledge or information of other facts tending to exculpate plaintiff.

These facts were all related to an attorney at law at San Jose, employed by the defendant company for that purpose, and his advice was asked concerning the same. Thereupon he stated that the plaintiff was guilty of a violation of the aforesaid section of the Penal Code, and advised that he be prosecuted therefor. He and McMonigal as agents for the railroad company then went to Santa Cruz, and laid the facts before the district attorney of Santa Cruz county, who, after questioning Johnson as above stated, also stated that the facts sufficed to show that the plaintiff had violated the aforesaid section, and advised the prosecution. Thereupon the complaint charging a violation of the said offense was sworn to by the defendant McMonigal, and filed with a justice of the peace in Santa Cruz. The plaintiff was arrested upon said charge, and a preliminary examination was had. After hearing the evidence, the plaintiff was committed to the superior court to answer the said charge.

We think the facts above related were sufficient to constitute probable cause. "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. Where there is no conflicting testimony the question whether or not the evidence introduced by the plaintiff shows want of probable cause is always for the court to decide, and it is error in such case, where there is a proof of probable cause, to submit any question to the jury." Davis v. Pacific, etc., Co., 127 Cal. 319, 57 Pac. 765. As to the duty of the person instituting such prosecution it is said: "It is not necessary that he shall institute an investigation of the crime itself, or seek to ascertain whether there are any other facts relating to the offense, or try to find out whether the accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon the facts which have come to his knowledge." Dunlap v. New Zealand, etc., Co., 109 Cal. 369, 371, 42 Pac. 30. In the same case the court also says: "The facts within his knowledge may not in point of law constitute a crime; but, if they are of such character as to induce in the mind of a reasonable man the honest belief that a crime has been committed, he is justified in seeking to have the crime punished."

The defendant McMonigal testified that it was his practice, when indorsing stop-overs on the back of such railroad tickets, to insert, not the name of the station, but the station number as established by the railroad company, and that it was for this reason, among others, that he knew that the ticket had been altered. It is claimed that this practice of McMonigal was not disclosed to the attorneys who gave the advice to begin the prosecution. This claim, however, is not borne out by the evidence. It satisfactorily appears that this and all the others facts bearing upon the case were fully stated to the attorneys and to the district attorney at the time their advice was asked. Moreover, that fact alone would not make the plaintiff guiltless of the offense.

In addition to the proposition that the evidence was of itself sufficient to constitute probable cause for the prosecution, the defendants were also entitled to the benefit of the rule that where one, before instituting such a prosecution, has in good faith consulted an attorney at law of good standing, has stated to him all of the facts of the case, and has been thereupon advised by such attorney that a prosecution would lie, and such person has acted honestly upon that advice, this, of itself, constitutes probable cause. The question is fully discussed and settled in Dunlap v. New Zealand, etc., Co., supra. In addition to this it was shown that, after the taking of the evidence upon the preliminary examination, the committing magistrate adjudged that the plaintiff was probably guilty of the offense and made the order committing him to answer thereto in the superior court. It is settled law that this is prima facie evidence of the existence of probable cause for the prosecution. Ganea v. S. P. R. R. Co., 51 Cal. 140; Hahn v. Schmidt, 64 Cal. 286, 30 Pac. 818; Diemer v. Herber, 75 Cal. 390, 17 Pac. 205; Holliday v. Holliday, 123 Cal. 32, 55 Pac. 703. There was no evidence in contradiction of the prima facie case made by this commitment, but on the contrary the evidence tended to confirm it. The uncontradicted evidence in the case therefore shows the existence of probable cause in three separate ways: First, because the facts of themselves are such as to justify a reasonable man in believing that the plaintiff was guilty of the offense; second, because upon a full statement of the case the attorney of the defendant company and the district attorney of the county were consulted by defendants, and, they having advised to the same effect, the prosecution was made in good faith, relying thereon; and, third, because upon the hearing the plaintiff was held to answer by the magistrate.

Upon the evidence as presented the court should have given the instruction asked by the defendants, directing the jury to return a verdict in their favor, and should have granted the motion for a new trial afterwards presented by the defendants.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

12 Cal. App. 153

HAMBERGER v. POLICE COURT OF CITY OF FRESNO et al. S. F. 5,464 (Civ. 625).

(Supreme Court of California. March 3, 1910.)

In Bank. Dissenting opinion.

For majority opinion, see 106 Pac. 894.

BEATTY, C. J. I dissented from the order denying a rehearing of this cause at the time it was made, and desire now to state the reasons for my dissent. It seems plain to me that the decision of the District Court of Appeal—which is now finally approved by the court of last resort—will, unless reversed, deprive the citizens of California of a right secured to them by the Constitution—the right, that is to say, to invoke the judgment, not only of the District Court of Appeal, but of this court, in a large and important class of cases in which they may deem themselves aggrieved by usurpation or excess of judicial authority. The effect of the decision here is to establish the doctrine that, when a justice of the peace, police magistrate, or other inferior officer or tribunal is assuming jurisdiction of a civil action in which a final appeal lies to the superior court, it matters not how plain or how doubtful the question as to his jurisdiction of the subject-matter or of the person of the defendant may be, such defendant can never have a hearing upon that point in either the District Court of Appeal or in this court, and this because his right to appeal to the superior court from the "judgment sought" is a plain, speedy, and adequate remedy, sufficient to cut him off from any recourse to the writ of prohibition—the remedy under our statute, as it was at common law, especially adapted, especially efficacious and solely adequate in many cases, to redress the grievance of persons threatened by a usurped authority. It is, as defined by the statute, the counterpart of the writ of mandate. It arrests the proceedings of any tribunal or person exercising, or assuming to exercise, judicial functions, when such proceedings are without or in excess of the jurisdiction of such person or tribunal. Code Civ. Proc. § 1102. It was the same at common law and was a remedy very freely administered by the court of King's Bench in England not only in behalf of the particular person aggrieved by the threatened usurpation, but, in the discretion of the court, equally at the suit of any of the king's subjects; and this upon the obvious ground that usurpation of judicial power is not only a private injury, but is more especially a public mischief, not beneath the dignity of the highest court in the kingdom to restrain as often as attempted. Upon this point I deem it sufficient to refer to a somewhat extended discussion of the subject in Havemeyer v. Superior Court, 84 Cal. 401 et seq., 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, where the leading English cases are cited. Another and quite modern case decided in the Queen's Bench Division in 1894 shows how rigidly that high tribunal still upholds and how freely they continue to administer this remedy by prohibition, and the grounds of public policy which in their judgment demand its prompt and firm application.

That the framers of our several state Constitutions have at all times held the same high estimate of the importance of this remedy that has for centuries prevailed in England is abundantly proved by the fact that from the organization of the Supreme Court in 1849 to the present day there has never been an hour when a person invoking the remedy had not the right by the plain terms of the Constitution, under all its changes, to bring his cause to this court for a final adjudication in one form or another. By the Constitution of 1849 (article 6, § 4) the Supreme Court was invested with original and sole jurisdiction to issue the writ of prohibition, and thus was imposed upon it a corresponding obligation to allow the writ, in a proper case, certainly to any person beneficially interested, if not, as in England, to any citizen of the state suing for the benefit of the public. By the Constitution of 1879 (article 6, § 5) the superior court was invested with original jurisdiction concurrent with that of the Supreme Court in prohibition, and although the Supreme Court was not then given in express terms any appellate jurisdiction where the original proceeding was commenced in the superior court, there seems never to have been any question of its right to review the decision of the superior court when the appeal was taken. McDonald v. Agnew, 122 Cal. 448, 55 Pac. 125; Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143.

But, if there ever had been any question of the final appellate or original jurisdiction of this court in cases of prohibition under the Constitution of 1879, the question has been set at rest, and all uncertainty ended by the recent amendments creating the District

Courts of Appeal and defining their jurisdiction. Under those amendments, the Supreme Court and the superior court retain their concurrent jurisdiction of the original proceeding, and the District Courts of Appeal are invested with both original and appellate jurisdiction, which can only mean that an appeal lies to those courts in original proceedings commenced in the superior courts, and that this court may, and in a proper case must, review and reverse the decision of the District Court of Appeal if erroneous.

Now in this case the appellant, having been made defendant in a civil action for the recovery of $121, filed a petition in the superior court for a writ prohibiting the police court of the city of Fresno, in which the action was pending, from proceeding to try it, basing his petition upon the ground that the police court had no jurisdiction. A demurrer to his petition was sustained by the superior court and the proceeding dismissed. It cannot be learned from the opinion of the District Court of Appeal affirming the judgment of the superior court what the alleged want of jurisdiction consisted in—whether it was of the person or of the subject-matter, whether it presented a plain question or a doubtful question—all that, as above stated, was treated as a matter of perfect indifference, and the decision went upon the ground that, however plain or doubtful the question of jurisdiction might be, there was no room for prohibition for the reason that an appeal to the superior court from the "judgment sought" was a plain, speedy, and adequate remedy to the appellant, even if he was compelled to plead in a court having no jurisdiction. But was it an adequate remedy? We may suppose that the allegations of the appellant's petition were true, and that in fact and in law the police court had no jurisdiction, but that the superior court on appeal has erroneously sustained the jurisdiction. The appellant has no further appeal in that action. He must rest content with the erroneous decision of the superior court in a case which the Constitution says he may appeal to the District Court of Appeal, whose decision may be, and in a proper case must be, reviewed by this court. In a proceeding which by the plain letter of the Constitution may be carried for final judgment to the highest courts of the state, can it be said that another remedy which deprives the petitioner of that constitutional right is adequate? Is the right of appeal to the higher courts of no value? Such is certainly not the theory of the Constitution, which in creating the appellate and Supreme Courts necessarily assumes that errors may be committed by the superior courts which they are competent to correct. And what is proclaimed by the Constitution as a theory it scarcely becomes us to controvert as a fact. When a citizen brings his appeal to this court, or to the District Court of Appeal, in a case which by express provision of the Constitution is within our appellate jurisdiction, we cannot turn him out of court upon the ground that another appeal, in another case, which cannot be carried beyond the superior court, is a full and adequate remedy for his grievance, without implying that the right to appeal to the higher courts is of no value.

This is a proposition to which I cannot assent, and least of all in its application to a class of cases which so largely partake of a public character. It is stated by counsel for appellant in his petition for a rehearing that the question as to the civil jurisdiction of the police court of the city of Fresno has long been the subject of vexatious controversy among the members of the local bar. If this is so, it is especially important, as it is in all doubtful cases of this sort, that the question should be authoritatively settled by a decision of this court; for the more doubtful such a question is the more it becomes a public question and the more necessary that it should be set at rest, not only for the benefit of all who are liable to be harassed by the exercise of the asserted jurisdiction if unlawful, but equally for the benefit of those who may have occasion to invoke it, if lawful.

Without dwelling further on the general considerations which sustain the policy of the framers of the Constitution in securing the right of all persons menaced by a threatened usurpation of judicial authority to invoke the protection of this court directly or by appeal, I wish to notice briefly the cases cited as authority for the decision of the District Court of Appeal. Most of them are not in point, for they were decisions in original proceedings commenced in this court to prohibit the superior court or judges of those courts from exercising jurisdiction in matters which could be brought here for review on appeal. Of course, in such cases the appeal would secure to the petitioner as full a review in this court of the question of jurisdiction as he could have in prohibition, and was therefore in most cases an adequate remedy. This circumstance marks the wide distinction between all that class of cases and this case in which the petitioner is remitted to an appeal which ends in the superior court, a court with final appellate jurisdiction to decide whether a defendant in an action properly brought before it owes $121—but not the court of last resort upon a question of jurisdiction. It must be admitted, however, that among the decisions of this court cited in the opinion of the District Court of Appeal there are two or three which sustain and would have compelled its conclusion, as well as that of the superior court, that an appeal from "the judgment sought" was as complete a remedy as the appellant had any right to claim.

The earliest of these was Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143. That case, however, does not decide the point stated in the first syllabus. What it decides, and all that it decides, is that prohibition does not lie to correct errors of procedure in actions of which an inferior court has jurisdiction. The case, which was an appeal from a judgment of a superior court denying the writ of prohibition, was decided upon its merits, upon the ground—that is to say, that the justice of the peace, although he may have erred in denying the petitioner a jury trial, had not exceeded his jurisdiction—a proposition sustained by numerous decisions of this court rendered before and since that decision. The next case in order of time was Strause v. Police Court, 85 Cal. 49, 24 Pac. 747. That was an original proceeding in this court, and absolutely the correct proceeding, to test the validity of a municipal ordinance, for the alleged violation of which the petitioner was being prosecuted. The decision, after quoting section 1103 of the Code of Civil Procedure, is condensed into five lines of the report and consists entirely of a citation of Levy v. Wilson, 69 Cal. 105, 10 Pac. 272, which was a proceeding against the superior court in a matter reviewable on appeal to this court. The fact that Strause's appeal would end in the superior court, and Levy's appeal would come to this court, seems not to have been suggested or considered in that case as affecting the question of remedy. The case of Valentine v. Police Court, 141 Cal. 616, 75 Pac. 336, was a case on the facts for certiorari and not prohibition, though the petitioner did pray for both writs. It was decided on the merits as a proceeding in certiorari, and it was also shown that aside from the question of other adequate remedy it was not a case for prohibition. In passing it was said incidentally: "It is also settled that prohibition cannot be resorted to where, as here, there is a plain, speedy, and adequate remedy by appeal" (to the superior court)—citing White v. Superior Court, 110 Cal. 54, 42 Pac. 471. The White Case was a proceeding in certiorari, had nothing to do with prohibition, and least of all with the application of the doctrine of other adequate remedy. It is no authority for the proposition to which it is cited, which in fact was no part of the matter decided in the Valentine Case. It will be seen from this review of the cases in which there was no appeal to the Supreme Court upon which the question of jurisdiction could be there reviewed, but one of them (the Strause Case) really decides that an appeal ending in the superior court is an adequate remedy to the petitioner in prohibition, ignoring the fact that he is given by the Constitution an ampler remedy in the form of an original proceeding in this court or of an appeal from the superior court.

It seems to me that the decision in the Strause Case was so plain a renunciation of the original jurisdiction of this court that it cannot be regarded as authority, and the other cases are scarcely in point. Certain it is that no consideration has been given in any of the cases cited to the point I am insisting upon here—that when the Constitution gives the district courts and this court appellate jurisdiction in a certain case, as in prohibition—we cannot, upon any excuse, remit a suitor in that case to the final judgment of a subordinate tribunal.

(157 Cal. 324)

DAHLBERG v. GIRSCH. (S. F. 5,035.)

(Supreme Court of California. Feb. 24, 1910.)

1. Trial (§ 400*) — Judgment — Vacation — Finding—Amendment.

Code Civ. Proc. § 663, provides that a judgment based on findings of fact may be set aside on motion of the party aggrieved and a different judgment entered because of incorrect or erroneous conclusions of law not consistent with or supported by the findings of fact, or because the judgment is not consistent with or supported by a special verdict. *Held* that, on such a motion, the court has no jurisdiction to change any finding of fact; the exclusive remedy of the party aggrieved by a finding of fact being a motion for a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 949, 950; Dec. Dig. § 400.*]

2. Contracts (§ 321*)—Building Contracts—Breach—Election by Owner to Complete—Effect.

Where, on the alleged breach of a building contract by the contractor, the owner elected to complete the same pursuant to a contract provision authorizing him to do so after notice, and in that event to take a reasonable expense of completion from the contract price, the owner could not thereafter deny the contractor's right to recover such difference because the contractor's failure to perform was found by the court to be willful.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508–1527; Dec. Dig. § 321.*]

3. Contracts (§ 321*)—Breach—Completion by Owner—Damages.

Where an owner terminates a building contract because of the contractor's failure to comply with the specifications, and finishes the building under a provision authorizing him to do so and deduct reasonable cost from the contract price, the owner's act in so proceeding does not preclude him from claiming damages against a contractor for defective performance, or for failure to complete the building within the time specified.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508–1527; Dec. Dig. § 321.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Andrew Dahlberg against Paul Girsch. From a judgment for plaintiff for less than the relief demanded, and from an order granting defendant's motion to correct a judgment, plaintiff appealed to the Court of Appeals, where the judgment was reversed, and defendant applied to the Supreme Court for a rehearing, which was granted.

The following is the opinion of the District Court of Appeal, per Hart, J., concurred in by Chipman, P. J., and Burnett, J.:

"This is an appeal from the judgment on the judgment roll alone and from an order granting defendant's motion to correct the judgment upon the ground that the conclusions of law were incorrect and erroneous because inconsistent with, and not supported by, the findings of fact.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"The order appealed from was made upon the authority of section 663 of the Code of Civil Procedure, which provides that a judgment or decree of a superior court, when based upon findings of fact made by the court, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for the 'following cause, materially affecting the substantial rights of such party and entitling him to a different judgment: Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact, and in such case when the judgment is set aside the conclusions of law shall be amended and corrected.' The action grows out of a contract entered into between the plaintiff and the defendant on the 25th day of May, 1905, by the terms of which the first named agreed to construct for the defendant, and furnish the requisite materials therefor, a three-story building on a certain lot situated in the city of San Francisco for the sum of $17,363, the same to be paid in installments as the work progressed. The structure was to be constructed according to the plans and specifications prepared by one A. T. Ehrenpfort, the architect of the defendant. On the 5th day of June, 1905, the plaintiff proceeded to perform the terms of said contract by the commencement of the erection of said building, and continued to so perform the terms of his agreement until the 22d day of July, 1905, when he was notified by the said architect of defendant that he was not putting in the foundation in conformity with the plans and specifications, and was notified and commanded by said architect to do his work in accordance therewith. The plaintiff, however, continued in the erection of the building without heeding the notice given him by the architect until the 16th day of August, 1905. At this time the work of erecting the building had so far progressed as that the plaintiff, had he performed his work in accordance with the plans and specifications, would have been entitled to the first payment under the stipulations of the contract. The plaintiff made a demand upon the defendant for such payment, but it was refused for the reason that the defendant claimed that the work of construction had not up to this time been performed as required by the contract and the plans and specifications. Thereafter an agreement was entered into between the parties to arbitrate the differences between them with reference to the foundation, and to that end each named an arbitrator, and the two arbitrators thus appointed were authorized to and did select a third.

"The arbitrators, with a view of performing the duties thus cast upon them, went upon the premises for the purpose of inspecting and examining the foundation, and, although requested to do so by said arbitrators, as well as so asked in writing by the defendant, the plaintiff refused to expose and thus subject to the examination of the said arbitrators said foundation nor would he permit them to remove the sand from said foundation for the purpose of examining the same. Thereupon the arbitrators notified the defendant that they could not make a proper or satisfactory examination of the foundation or its exact condition unless the same were exposed in such manner and to such an extent as to enable them to give it a thorough and an accurate inspection. Nothing further was done in the matter of the proposed arbitration. After the failure to arbitrate and thus to adjust the differences between the parties, the plaintiff ceased work upon the building, and the defendant, after notifying the plaintiff, as required by the contract, to continue in the construction of the building and to furnish the necessary material therefor, proceeded, as he was authorized by the contract to do in case the plaintiff refused to do so, to finish and complete the erection of the structure, the plaintiff having disregarded the notice and declined to go on with the work.

"The contract provided for the payments to be made as follows: $3,500 when the frame should be put up; $4,863 when the brown coat of mortar should be on; $4,500 when the building should be completed and accepted; $4,500 on the thirty-sixth day after completion and acceptance. The contract further provided that the foregoing payments should be made upon certificates in writing from the architect, stating that the installments were due or work completed. It was further provided that, in the event the work was not done properly or according to the plans and specifications, the architect should issue and deliver to the plaintiff, in lieu of the certificates mentioned, a writing setting forth 'a just and true reason for not issuing said certificate, including a statement of the defects, if any, to be remedied to entitle the contractor to the certificate or certificates, and that in the event of the failure of said architect to furnish and deliver said certificates or any of them, or, in lieu thereof the writing referred to, within three days after the time aforesaid, and after demand therefor made in writing by the contractor, the amount which might be claimed to be due by the contractor and stated in said demand made by him for the certificate, shall, at the expiration of three days, become due and payable, and the defendant herein shall be liable and bound to pay the same on demand.'

"The plaintiff brought this action to recover the sum of $11,000 alleged to be due him from the defendant for services performed and materials furnished in the construction of the said building. For the sum of $7,500 of said amount he counts on a quantum meruit for services performed and a quantum valebat for materials furnished. The remainder of the sum for which he asks judgment —$3,500—he alleges is due under the terms of the contract, and avers: 'That on the 16th day of August, 1905, the plaintiff, in the performance of his said contract, had so far proceeded in the construction of said building and had completed it to the extent that the frame thereof was up and properly constructed. That on or about the 16th day of August, 1905, the plaintiff demanded of the defendant the said sum of $3,500, as in said contract provided, but to pay the same or any part thereof the defendant refused and still refuses without right or cause. That prior to the making of such demand upon the defendant made by the plaintiff, as hereinabove stated, the plaintiff demanded of A. T. Ehrenpfort at the time the said $3,500 became due a certificate in writing stating that the payment or installment was then due and the amount then due. That the said A. T. Ehrenpfort, who was the architect employed by the defendant in the construction of the said building and supervision thereof, refused and declined to give to the plaintiff the said certificate so demanded, and failed and refused in lieu of said certificate to deliver to the plaintiff in writing under his hand a just or true reason for not issuing the said certificate or any writing containing a statement of any defects or thing to be remedied. That the said A. T. Ehrenpfort, architect as aforesaid, failed to furnish or deliver the said certificate or in lieu thereof the writing aforesaid within three days after the said payment of $3,500 became due, or within three days after demand therefor had been made by the plaintiff.'

"The court found the facts as we have in substance stated them, and gave the plaintiff judgment originally for the sum of $3,492.81. Thereafter, as seen, the court changed the judgment on the application of the defendant by reducing the amount awarded thereby to the sum of $1,089.78, 'less the sum of $150 heretofore paid to one Frank Simonart by consent, leaving a balance amounting to $939.78', etc. The reformed judgment awards to the plaintiff the exact sum which the defendant admits in his answer is due the plaintiff under the contract, and which was tendered and deposited in court to be so applied. The specific contention upon the part of the respondent is, and such was the view adopted by the court below in making the order to which objection is here made, that the conclusion of law is inconsistent with the finding 'that the plaintiff's failure to construct the foundation as required by the contract between plaintiff and defendant and plaintiff's failure to remedy the defects therein and referred to in said finding when pointed out by defendant's architect was willful, because under said findings plaintiff is not entitled to recover anything from defendant in said action. We are not under our view of this record required to notice the several points which are presented and argued in this controversy, but we deem it proper to state briefly the contention of counsel for the respondent upon what we conceive to be the most important question discussed in the briefs.

"The court found that the plaintiff after having his attention called by the architect to the fact that he was not constructing the wall and foundation in conformity with the plans and specifications, and that, to the contrary, he was causing material deviations from said plans, etc., to be made therein, and after having been duly notified by said architect to remedy or correct the defects in said wall and foundation 'wholly disregarded said notification and failed to remedy the defects in said wall and foundations, or to construct the same as required by said contract'; that plaintiff would not 'permit the defendant's architect to examine said foundations or to look at the footings thereof or make any investigations whatever with reference to the construction thereof during the time that the same were being put in and after the completion thereof.' The court further found 'that said plaintiff's failure to construct said foundation as required by said contract and his failure to remedy the defects therein hereinbefore referred to when pointed out by said architect as is hereinbefore specified was willful.'

"Upon the question of the sum to which the plaintiff proved that he was entitled the court found 'that the plaintiff has not by any action of defendant or his employés or the said A. T. Ehrenpfort, architect, as aforesaid, suffered damage in the sum of $11,000 or any greater sum than $3,642.81, which said sum is the reasonable value of work, labor, and materials performed and furnished in and upon the said building by plaintiff prior to September 13, 1905; that plaintiff is not entitled to any profits on his performance of the said contract.' As a conclusion of law, the court decided that the sum to which plaintiff was entitled is that set forth in the foregoing finding, less $150 which the parties agreed should be paid to one Frank Simonart for work performed on the building at the request of the plaintiff.

"The contention of respondent is that the plaintiff can recover neither upon his contract nor upon a quantum meruit or quantum valebat because he deliberately and willfully refused to do the work in accordance with the terms of the contract, after performing in a defective manner only a small portion of the work, and leaving the defective work uncorrected and the materials upon the ground, thus compelling the defendant 'to elect whether he would go to the expense and trouble of removing the materials and labor so left upon his lot or patching up the defective work.'

There are authorities from other jurisdictions which lend force to that contention, and under that theory the findings upon which the original judgment was planked are inconsistent. But the difficulty in the way of upholding the order and judgment appealed from is that the conclusion of law as to the sum to which plaintiff is entitled, as originally reached by the court, is supported by finding No. 13, heretofore referred to, and that the correction of the judgment necessarily involves, therefore, the correction of or the making of a new finding. This obviously cannot be done in the proceeding authorized by section 663 of the Code of Civil Procedure.

"It is true, as seen, that the corrected judgment is for the amount which the defendant admitted to be due the plaintiff and which the defendant tendered to and deposited in court to be paid to the plaintiff, and it is also true that it is not necessary, under our practice and procedure, to make a finding of an admitted fact. But the court's finding that the plaintiff is entitled to the sum of $3,642.81 is tantamount to a finding that the claim of the defendant that he is indebted to the plaintiff in no further sum than $939.78 is untrue, and, of course, the specific finding that the larger sum is due must be assumed, in the absence of a statement of the case or a bill of exceptions bringing up the evidence, to be sufficiently supported. And it is no answer in this proceeding to say that the court made findings by which the theory, contended for by the respondent, that the plaintiff was not entitled to judgment in any event, appears to be sustained. If the court misconceived the law applicable to the proven facts in the case, and was thus led into making findings not sustained by the evidence under respondent's theory of the law, assuming it to be correct, or made inconsistent findings of fact, the remedy for the correction of such errors is in a motion for a new trial, and not in a proceeding where the power of the court is expressly limited to the correction of the decree or judgment because the conclusion of law is inconsistent with and not supported by the findings. It is not necessary to add that, if the defendant's theory of the law of this case be correct, the plaintiff would be entitled to recover nothing.

"We have not considered it necessary to cite authorities in support of the conclusion reached.

"For the reasons stated in the foregoing, the judgment and order are reversed."

Wal. J. Tuska, for appellant. Jordan, Rowe & Brann, for respondent.

ANGELLOTTI, J. Plaintiff originally had judgment against defendant for $3,492.81. Upon motion duly made under the provisions of section 663, Code Civ. Proc., that the judgment be vacated and a different judgment entered because of an incorrect or erroneous conclusion of law not supported by the findings of fact, an order was made vacating the judgment and amending the conclusion of law upon which the same was based by finding that plaintiff was entitled to recover from defendant only $939.78, instead of $3,492.81. Judgment was thereupon given for plaintiff for $939.78 only. This is an appeal by plaintiff from such order and from the judgment based thereon. The only questions presented thereby relate to the action of the court in vacating the first judgment and entering a different judgment on the findings.

In the determination of this appeal we are restricted, of course, to the case made by the findings of fact in the trial court, taken in the light of the pleadings and the issues made thereby. If the first judgment was the correct legal conclusion upon the facts so found, the trial court had no right to vacate it and substitute a different judgment therefor. Section 663, Code Civ. Proc., authorizes simply the substitution of the judgment that should have been given as a matter of law upon the findings of fact in a case where the judgment already given is an incorrect conclusion from such findings. The court cannot on such a motion in any way change any finding of fact. The sole remedy in the trial court of a party who is aggrieved by any finding of fact is a motion for a new trial. The action was brought by plaintiff to recover money alleged to be due him from defendant for services performed and materials furnished in the construction of a building for defendant. A portion of the money sought, $3,500, he claimed to be due under the terms of the building contract between the parties, and some $6,000, as we understand his complaint, to be due as the reasonable value of services and material furnished by him in the matter of said building.

The findings show the following facts: Everything done by plaintiff in connection with the building was done under a written contract between himself and defendant, dated May 23, 1905, whereby plaintiff agreed to construct the building according to certain plans and specifications for the aggregate sum of $17,363, payable upon certificates of the architect in installments at certain stages of the work and after the completion and acceptance of the building. It was provided in this contract "that should the contractor at any time during the progress of the work refuse or neglect, without the fault of the owner, his architect, or superintendent, to supply a sufficiency of materials or workmen to complete said contract within the time limited therein, due allowance being made for the contingencies provided for therein, for a period of more than three (3) days after having been notified by the owner in writing to furnish the same, the said owner should have power to furnish and provide said materials or workmen to finish the work and that the reasonable expense thereof should be deducted from the amount of the contract price." Plaintiff proceeded with the work until some time in July, 1905, when it was claimed by defendant's architect that the foundation of the building had not been constructed in all respects as required by the plans and specifications, and plaintiff was notified to make such foundation comply with the plans and specifications. The alleged defects in the foundation, which the court found to have existed, were that the north and east walls were a few inches lower than they should have been, while the south wall was not put down deep enough by a few inches, and also that in some places there were no "footings" where required by the specifications. Plaintiff failed to remedy these defects, although notified thereof. He continued his work on the building to August 16, 1905, when the frame of the building was up, and, if the work had been properly performed up to that point, he would have been entitled to his first payment, amounting to $3,500. This he then demanded, but the architect refused to give him a certificate, upon the ground that he had never remedied the defects in the foundation of which he had been theretofore notified. An arbitration of their difficulties was attempted by the parties, but was ineffectual. The court found by finding 5 "that said plaintiff's failure to construct said foundation as required by said contract and his failure to remedy the defects therein hereinbefore referred to when pointed out by said architect * * * was willful." After the failure of the arbitration, plaintiff ceased work and ceased to supply materials, and defendant on September 5, 1905, duly notified him in accordance with the provision of the contract hereinbefore quoted that, if he did not within three days supply a sufficiency of materials and workmen to complete the building, he, defendant, would furnish the same, "and would finish said building and that the reasonable expense thereof would be deducted from the amount of the contract price." Plaintiff not heeding said notice, defendant on September 13, 1905, took possession of the building and premises and work done by plaintiff thereon, and fully completed the building, using the foundations built by plaintiff after portions thereof had been underpinned with brick, and also using the frame constructed by plaintiff. It was alleged by defendant in his answer that the building was fully completed "according to the terms of said contract and specifications, and not otherwise." The court found in finding 9 that "the reasonable cost of the labor and materials furnished for and used in the completion of said building by defendant, according to the plans and specifications and contract, was and is the sum of" $12,721.19. Plaintiff has never received anything for services or materials furnished in or about the building. No claim exists against defendant in behalf of any other person for work or materials furnished in the matter of said building except one in favor of Frank Simonart, which, by consent of the parties, was paid to said Simonart. By finding 13 the court found that plaintiff had not by any action of defendant suffered damages in "any greater sum than," $3,642.81, "which said sum is the reasonable value of work, labor, and materials performed and furnished in and upon said building by plaintiff prior to September 13, 1905," and that "plaintiff is not entitled to any profits on his performance of the said contract." As a conclusion of law, the court found that plaintiff is entitled to recover from defendant the said sum of $3,642.81 less the $150 paid by defendant to Simonart, namely, $3,492.81, and the original judgment was so made.

The answer of the defendant clearly proceded upon the assumption that defendant was liable for any portion of the contract price remaining unexpended by defendant after the payment of the reasonable cost of completing the building according to the plans and specifications. He himself set up the contract, and the provision thereof authorizing him to complete the work and deduct the reasonable expense of such completion from the contract price, the notice to plaintiff that he would do so, the completion by him under said notice, and that the reasonable cost of such completion was $16,273.22, leaving a balance due under the contract of only $1,089.78. The trial court, as we have seen, found against him on this issue of the reasonable cost of such completion.

We fail to see wherein the original judgment was not as favorable to defendant as the facts found warranted, or why the theory of defendant's answer as set forth above was not correct. The whole basis of the claim of learned counsel for defendant that the trial court did not err in its modification of the conclusion of law is the finding of fact numbered 5 hereinbefore set forth, by which it is found that plaintiff's failure to comply with the contract so far as the foundations were concerned was "willful." It is learnedly argued that, in view of this finding, he was not entitled to recover anything. It is said that a building contractor cannot recover upon his express contract without showing such performance thereof as entitles him to payment according to its terms, or that such performance has been in some way waived or excused, and that he cannot recover upon an implied contract for the reasonable value of his labor and materials, furnished under such express contract, and of which the other party has the benefit, where he has willfully failed to perform his contract; and many authorities are cited in support of this claim. This may here be conceded to be the general rule, and it is entirely unnecessary to consider what limitations and modifications thereof have been made by the courts, for it clearly appears to us that there are in this case other facts that make the finding as to willful failure one of no importance whatever in determining what judgment should have been given.

We have already quoted in this opinion the provision of the contract authorizing the defendant in certain contingencies to take charge of and complete the contract himself, deducting the reasonable expense thereof from the amount of the contract price. This provision was, of course, one in favor of the defendant, which he might resort to or not at his option. He undoubtedly had the right to require performance of the contract by plaintiff as a condition precedent to payment for the work and materials furnished thereunder. But with full knowledge of the facts, including the fact of willful failure to construct the foundations in the precise manner specified in the plans and specifications, he deliberately elected to proceed under this provision of the contract, giving to the plaintiff formal notice that he would do so, and deduct the reasonable expense thereof from the amount of the contract price. He proceeded in accord with his election, and the building was completed by him in full accord with the plans and specifications. The reasonable cost of the labor and materials furnished and used by him in such completion was as found by the court only $12,721.19, which deducted from the contract price would leave $4,641.81 due on the contract under the terms of this provision.

It appears clear to us on principle that the owner, having so elected, cannot now successfully urge that the contractor cannot recover. A similar question was presented to the Court of Appeals of New York in Murphy v. Buckman, 66 N. Y. 297. There was in that case a very similar provision in the contract, and, the contractor having defaulted, the owner gave the notice and completed the building, expending therein a sum which added to what he had theretofore paid the contractor was $778.90 less than the sum the contractor was to receive under the contract. This amount of $778.90 was awarded to a lien claimant who could recover it only in the event that the money was actually due to the contractor. The court said: "The defendant, by electing to go on under this clause of the contract, waived the right to insist upon a forfeiture for the failure of the contractor to perform the contract. The owner was not precluded thereafter from claiming damages against the contractor for defective performance, or for failure on his part to complete the building at the time specified; and these damages he could recoup, against any sum due the contractor, for work done under the contract. But he could not avail himself of the right, given him by the contract, to complete the work, thereby substituting himself in place of the contractor, and at the same time claim that the contract was at an end, and refuse to account to the contractor for work done under it, on the ground that the contract was forfeited. The election to do the work at the contractor's expense, under the clause referred to, assumed that the contract was then in force. The case of Gillen v. Hubbard, 2 Hilt. 304, a case arising under a similar contract, contains a very satisfactory exposition of the meaning of this clause." The case of Gillen v. Hubbard, 2 Hilt. (N. Y.) 303, referred to in the foregoing quotation, involved a similar provision. After stating that the owner had acted under this provision, the court said: "The penalty for a failure or refusal to supply materials and workmen appears to have been determined by the contract and to have been understood and acted upon by the defendant. If the contract had been silent upon the subject, there would be no difficulty in relieving the defendant from any of his alleged grievances, because, the contractors having failed to perform their contract, the plaintiff, as a lienor, could not recover. Neville v. Frost, 2 E. D. Smith, 62; Cunningham v. Jones, 3 E. D. Smith, 650; Smith v. Brady, 17 N. Y. 173 [72 Am. Dec. 442]." In Taylor v. Mayor, etc., 83 N. Y. 625, the action was by the contractor to recover the balance due after completion by the owner under such a provision. The court said: "The plaintiff refused to do work that he was by his contract bound to do. Had the defendants taken the position then, they might now claim that he thereby worked a forfeiture of his contract. His failure to completely perform his contract would then have been a perfect bar to a recovery under it. The defendants did not then take that position. They rested upon a clause in the contract that enabled them to go on and complete the work, and to charge the expense of completion to the plaintiff. That action forbids them to now insist that the contract was forfeited. Murphy v. Buckman, 66 N. Y. 297." In Larkin v. McMullin et al., 120 N. Y. 210, 24 N. E. 447, it is said that in such a case "the work of completion by the owner is performed *pursuant to the contract*"—citing Murphy v. Buckman, supra. The italics are ours. We can see no possible answer to the views enunciated in these decisions. The decision in Taylor v. Mayor, supra, recognizes that the rule applied does not preclude the owner from a counterclaim to the contractor's demand "of so much as was the cost of completing the work according to the plaintiff's contract," and, as seen from the quotation in Murphy v. Buckman, supra, the owner is not precluded thereby from claiming damages against the contractor for defective performance or for failure on his part to complete the building at the time specified. As we have seen, there is no question of any counterclaim or any claim for damages in this case.

It follows from what we have said that, notwithstanding the finding as to willful failure on the part of the contractor relative to the foundations, the defendant was in no position to urge that the original conclusion of law was inconsistent with and unsupported by the findings of fact. If there was any error at all in such conclusion, it was error favorable to him, for the trial court did not award plaintiff the full difference between the contract price and the reasonable cost of completing the building less the $150 paid to Simonart, but deducted $999 from such difference. So far as the original conclusion of law and judgment went against defendant, they were in accord with and compelled by the findings of fact.

As an order reversing the order and judgment appealed from, without other direction, will leave the original conclusion of law and judgment in force, it is not necessary to make any order directing a new conclusion of law or the entry of another judgment.

The order vacating the original judgment and amending the conclusion of law upon which the same was based is reversed, as is the judgment entered in pursuance of said order.

We concur: SLOSS, J.; SHAW, J.

12 Cal. App. 394

SHEPHERD-TEAGUE CO. v. HERMANN.
(Civ. 609.)

(Court of Appeal, First District, California. Jan. 6, 1910.)

1. Brokers (§ 40*)—Contracts—Validity.

Parties to a broker's contract to sell land may make the payment of commissions dependent on any lawful condition.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 40.*]

2. Brokers (§ 48*)—Contracts—Validity.

Within a broker's contract to sell real estate for commissions a sale or exchange is made when the broker has procured from a responsible purchaser, or one acceptable to the seller, a valid contract for a sale or exchange on the terms proposed by the seller, or has brought the seller and buyer together, who have in consequence thereof entered into such a contract, or the buyer, able, ready, and willing to buy on the terms of the seller offers so to do.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. § 48.*]

3. Brokers (§ 52*) — Commission — When Earned.

A broker's contract to exchange real estate stipulated for a commission in case the change was made. While a trade was under consideration, but before it had been agreed on, the contract was modified by extending the time for the broker to procure the exchange and by fixing the commission. The purpose of employing the broker was to effect a trade, and to secure from a third person a binding acceptance of the offer of the owner, who had learned that the broker was also acting for the third person, and was to receive a commission from him. *Held*, that the broker was entitled to commissions from the owner on his securing from the third person a binding acceptance of the owner's offer, and he was not required to wait until the consummation of the trade by exchange of deeds.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.*]

4. Brokers (§ 63*) — Commissions — When Earned.

A broker employed to sell land on commission, to recover the commission when a sale was not made, must prove that he found a purchaser ready, willing, and able to buy on the terms fixed, and that he procured from such purchaser a valid contract binding him to purchase on such terms, or that he brought the vendor and the proposed purchaser together, so that the vendor might have secured such contract had he desired.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96; Dec. Dig. § 63.*]

5. Brokers (§ 58*) — Commissions — When Earned.

A broker employed by an owner to procure an exchange of properties procured a contract from a third person signed by the manager of the third person's property. The third person had not authorized any one to make such a contract. The owner signed the agreement and took steps thereafter to carry it out, but the trade was not consummated because the owner's title to a part of his property was defective. *Held*, that the broker was not entitled to commissions, not having secured a binding contract, and it was immaterial that the owner proceeded in the effort to consummate the trade in the expectation that it would be completed by an exchange of deeds, in which case only could the broker recover commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 90; Dec. Dig. § 58.*]

6. Principal and Agent (§ 173*)—Contracts by Agent—Ratification.

An agent without authority contracted for the exchange of his principal's property, and sent a copy of the contract to the principal. The agent received a deed in reply and also a letter. Neither the deed nor the letter were produced, and there was nothing to show that either had been delivered or shown to the other party to the contract. *Held* not to show a ratification by the principal so as to enable the adverse party to the contract to specifically enforce it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 659–661; Dec. Dig. § 173.*]

7. Brokers (§ 60*) — Commissions — When Earned.

Where no sale has been actually consummated, and the broker employed to sell has not brought the purchaser and vendor together, the broker must to recover commissions procure a valid contract to purchase which can be enforced by the vendor.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. § 60.*]

8. Pleading (§ 93*) — Inconsistent Pleadings.

Denials in one defense are not affected or qualified by inconsistent affirmative matter in another and separate defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.*]

9. Brokers (§ 67*)—Right to Act for Both Parties.

Where a principal knew that his agent was also employed by the adverse party in the transaction, and was to receive a commission from him, and the principal thereafter modified his agreement with the agent by reducing his compensation, the principal was liable to the agent as against the objection that he was also employed by the adverse party.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52–54; Dec. Dig. § 67.*]

Cooper, P. J., dissenting in part.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Shepherd-Teague Company against J. S. Hermann. From an order denying a new trial after judgment for plaintiff, defendant appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Everts & Ewing, for appellant. F. H. Short and F. E. Cook, for respondent.

HALL, J. Plaintiff recovered a judgment against defendant for the sum of $1,500, commission claimed to have been earned under a written contract of employment to find a purchaser for and negotiate a sale and transfer of certain real property for defendant. This is an appeal from the order denying defendant's motion for a new trial. Defendant in his answer admitted that he executed a written agreement in favor of the plaintiff, by which the defendant agreed to pay to the plaintiff a commission of $1,500, "provided that the said plaintiff should consummate a sale of certain property therein named and set forth," upon the terms in said writing set forth, but denied performance of the contract upon the part of plaintiff, and any indebtedness from defendant to plaintiff under said contract. Defendant attacks the sufficiency of the evidence to support the findings in favor of plaintiff.

The first contention of appellant involves the construction of the contract under which plaintiff claims that it has earned the commission sued for. The contract relied on is in two instruments executed by defendant to plaintiff. By the first, which by its terms was to expire in 10 days from June 13, 1905, defendant promised to exchange certain property of his, subject to a mortgage for $40,000, for a piece of property known as the "Home Place" of A. B. Butler, and contained the provision that: "In the event this exchange is made, I agree to pay to Shepherd-Teague Company a commission of two and one-half per cent upon the value of my property." The second instrument, dated June 24, 1905, was an extension and modification of the first as to the terms upon which defendant would exchange properties, and also contained this provision: "That said agreement is also modified by this extension to the effect that, in the event the trade is consummated, the commission that I was to pay therefor to the said Shepherd-Teague Company shall be $1,500, instead of the commission therein set forth." No exchange of properties between defendant and Butler has ever taken place. The trade was never consummated by any exchange of deeds, and defendant for this reason contends that under the contract plaintiff is not entitled to his commission. Of course, parties to a broker's contract for the sale of real estate may make the payment of commissions dependent upon any lawful condition, and such contract might be so worded as to make it clear that the parties intended that no commissions were to be paid except upon a completed sale resulting in the execution and acceptance of deeds of transfer. Such a contract, however, is not the usual one between the seller and his agent or broker. We do not think it is the meaning of the one now under consideration. In the first writing the commission was to be paid "in the event this exchange is made." Within the meaning of a broker's contract to sell real estate, a sale or an exchange is made when the broker has procured from a responsible purchaser, or one acceptable to the seller, a binding and valid contract for a sale or exchange on the terms proposed by the seller, or has brought the seller and buyer together and they have in consequence entered into such a contract, or such buyer, being able, ready, and willing to buy on the seller's terms, offers so to do. Phelps v. Prusch, 83 Cal. 627, 23 Pac. 1111.

The language of the second writing that, "in the event the trade is consummated, the commission that I was to pay therefor to the said Shepherd-Teague Company shall be $1500 instead of the commission therein set forth," lends somewhat stronger support to appellant's contention. But this language must be interpreted in the light of the purposes and objects of the contract. The record shows that, before the date of the second writing, defendant had learned that plaintiff was acting for Butler also, and was to receive a commission from him. This circumstance as well as the verbiage of the commission clause in the second writing shows that the primary purpose and object sought thereby was to change the amount of the commission to be paid, rather than the event upon which it was to be paid. Defendant at this time was anxious, or at least willing, to exchange certain property of his for certain property belonging to Mr. Butler. The Butler property was for sale, and certain negotiations had been carried on through plaintiff between defendant and Butler prior to the execution of the second writing, but which had not resulted in any meeting of the minds of the principals. A trade was under consideration, but had not been agreed upon. The purpose of employing plaintiff was to effect a trade to secure from Butler a valid and binding acceptance of the offer of defendant. When this should be accomplished by plaintiff, it would have consummated the trade, we think, within the meaning of the contract sued upon. It was the only consummation of the trade within the power of the broker. The consummation by exchange of deeds required the further act of defendant, over which plaintiff had no control.

The second and most important contention of appellant is that, conceding the interpretation of the contract to be as contended for by respondent, the evidence fails to show that plaintiff has performed the same.

In this case the exchange was never actually consummated between defendant and Butler. Under these circumstances, it is incumbent on the broker "to prove that he found a purchaser ready, willing, and able to buy the property on the terms fixed, and either that he procured from that person a valid contract binding him to purchase the property upon those terms, or that he brought the vendor and the proposed purchaser together so that the vendor might have secured such contract if he desired. On no other terms can he recover." Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105. Plaintiff never brought Butler to defendant. Butler was not within the state of California. Plaintiff relied upon a contract that it procured. This contract was not signed by Butler personally, but was signed thus, "A. B. Butler by J. J. Miley." It was also signed by defendant, and efforts were made to carry out the contract, but defendant's title to a portion of his property was defective, and the trade fell through. It is urged that the contract for the exchange of the properties is not shown to have been a valid contract binding upon Butler, and therefore its procurement was not a sufficient performance by plaintiff to entitle it to recover. Miley was the manager of the Butler property, a vineyard, but had no power of attorney to sell real estate. The agreement signed by defendant and Miley is dated June 30, 1905. It was admitted in evidence, over the objection of defendant, that it was not shown to have been executed by Butler. The only evidence of any authority for Miley to execute any contract for the sale or exchange of the Butler property is that contained in certain telegrams from Butler. For the better understanding of these, it is necessary to state that the first writing executed by defendant to plaintiff, under date June 13, 1905, contained an offer to exchange defendant's equity over a $40,000 mortgage in property known as the "Fresno Loan & Savings Bank Building" for the home place of A. B. Butler, consisting of 120 acres of land and improvements. No other property is referred to in the first writing. The first telegram from Butler is addressed to Wendell Easton, who was co-operating with plaintiff, and is dated June 17, 1905, and is as follows: "Replying yours 16, I will exchange 120 a. for bank building and $10,000, payable in three years secured by mortgage at 5 per cent clear. A. B. Butler." This was simply a counteroffer at most, and was not accepted by defendant. The next telegram is dated June 21, 1905, and is: "If Hermann will pay $8,000.00 in five years, 5 per cent close. No other proposition to make. A. B. Butler." This was not accepted by defendant. June 22, 1905, Eastman wired Butler: "Hermann offers instead of $8,000.00 five years 8 lots and improvements in Fresno, monthly rental $200.00. Advise you telegraph. Miley appraise it for you." To this letter Butler replied to Easton: "I prefer paper to property. Wire some definite proposition through Miley." On this day, June 24, 1905, the extension and modification of defendant's offer to plaintiff was executed. In this writing defendant offered to exchange the bank property, subject to the $40,000, and 8 lots in the city of Fresno for the Butler 120 acres, "together with all the personal property, including trays, sweatboxes, farming utensils, horses or mules with their harness, which has heretofore been used upon" the Butler home place. On June 29th Miley wired to Butler: "Have closed deal subject your confirmation allowing Hermann eight thousand trays now you to get rents from July first which more than offsets trays. Easton-Teague will take half interest of Chinatown property for four thousand at your option. A good trade. Answer immediately." On June 30, 1905, Butler wired to Miley: "Commission on $50,000 was for $10,000 mortgage. Close if you cannot do better." Upon the receipt of this telegram Miley signed the contract for Butler. The most that can be claimed for these telegrams is that they authorized Miley to agree for Butler to an exchange of Butler's 120-acre home place and 8,000 trays for Hermann's bank building property and the 8 lots.

The authorization from defendant to plaintiff required the transfer to him of all the personal property used upon the Butler place, and the contract signed by Miley and defendant likewise required the transfer to defendant of such property, consisting of four mules, harness, a wagon, and various farming implements and vehicles, all of which are enumerated therein. We look in vain through the telegrams and the record for any authorization from Butler to Miley or any one else to bind him to make such transfer. Up to the time he sent the last wire ending "Close if you can do no better," he had been informed of a proposition from defendant to exchange the bank building property and 8 lots in Fresno for the 120-acre Butler home place and 8,000 trays and nothing else. This is the most that it can be claimed that Butler had agreed to give for the property offered by defendant. The contract signed by Miley agreed for much more, and does not appear by this record to have been authorized by Butler. Neither can it be said that because defendant, after his attorney had examined the telegrams, upon his advice, signed the agreement with Miley for the exchange, and took steps thereafter to carry out this agreement, defendant accepted such contract as a full performance by plaintiff of its contract to consummate the trade. Defendant had the right to proceed in the effort to consummate the trade in the expectation that it could and would be completed by an exchange of deeds, in which case plaintiff would have earned its commissions. In this respect the case at bar is analogous to the case of Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105, where the broker took a deposit of $500 from the buyer upon an oral agreement to purchase. The broker reported the sale, and the seller approved the same in writing, but its title proved defective, and the purchaser refused to complete the purchase for this reason only. It was held the broker could not recover his commissions.

Apparently for the purpose of showing a ratification by Butler of the agreement signed by Miley, of date June 30, 1905, Miley testified that he sent a copy of the agreement to Butler, and further testified: "I received a deed in reply. I must have received a letter, but I don't know where it is. The deed was to property described in the agreement. I have got the deed in my pocket." This letter does not appear to have ever been delivered or shown to defendant. The deed was not introduced, though in the pocket of the witness, and what it contained is only shown to the extent that it was "to property described in the agreement." The witness did not even say that it was to the property described in the agreement. It may well have been to property described in the agreement, and yet not to all the property therein described. This evidence does not disclose such a state of facts as would have enabled defendant to enforce specific performance of the contract of June 30, 1905. Where no sale has been actually consummated, and the broker has not brought the buyer and seller together, it is his duty "to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect." Gunn v. Bank of California, supra. Plaintiff in the case at bar accomplished neither of these things, and for that reason the findings on which the judgment is predicated are not supported by the evidence. Respondent is not helped by the fact that in a separate and further defense defendant set up an affirmative defense predicated upon his construction of the terms of his contract with plaintiff, inconsistent with his denials in his first defense. Denials in one defense are not affected or qualified by inconsistent affirmative matter in another and separate defense. Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Buhne v. Corbett, 43 Cal. 264; Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076; Code Civ. Proc. § 441.

For the purposes of a retrial, it is proper to say that we do not think the defense founded upon the fact that plaintiff was also employed by Butler, and was to receive a commission from him, can be maintained upon the record before us. It clearly appears that when defendant executed the agreement with plaintiff dated June 24, 1905, he knew these facts. The commission was reduced to $1,500 for this reason. The cases relied upon by appellant upon this point are both cases where the seller was ignorant of the fact that the broker acted for and received pay from the buyer.

The order is reversed.

I concur: KERRIGAN, J.

COOPER, P. J. I concur in the judgment, but in my opinion the exchange of the property and the consummation of such exchange was a condition precedent, upon which the right to the commission depended. It was not proven that there was any exchange of the properties, nor was the exchange consummated. The contract signed by Miley was not binding upon Butler.

As to what is said in the last paragraph of the opinion, I think a broker who is acting as agent for one of the parties and receiving a commission from such party, should not be allowed to collect a commission from the other party for the same services unless it clearly appears that the broker fully and fairly stated all the facts to such other party. The law does not countenance double dealing; and there is a strong presumption in such case that one cannot at the same time serve two masters; but, of course, if the two masters both know all the facts, and knowing such facts each agrees to pay a certain sum, there is nothing unfair about such contract. In this case the defendant must have been fully informed as to all the facts, and as to the amount of commission that the plaintiff was to be paid by Butler before plaintiff can recover against him.

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12 Cal. App. 383

GUARANTY REALTY CO. v. RECREATION GUN CLUB (GALUSHA, Intervener).

(Civ. 728.)

(Court of Appeal, Second District, California. Jan. 5, 1910.)

1. VENDOR AND PURCHASER (§ 231*) — RESTRICTIVE COVENANTS—NOTICE—RECORDING.

Under Civ. Code, § 1213, providing that the recordation of a grant is notice to subsequent purchasers of its contents, a recital in a deed that "one of the conditions of this conveyance is that the use of firearms on said premises is and shall be forever prohibited, and that the said grantees agree, for and on behalf of themselves, their heirs and assigns, and all persons claiming through or under them, to observe and enforce this provision," was sufficiently clear to put a purchaser from the grantee on his guard as to the extent to which it affected the remaining lands of the original vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513–539; Dec. Dig. § 231.*]

2. INJUNCTION (§ 62*)—PERSONAL COVENANTS—ENFORCEMENT.

A purely personal covenant, made between the vendor and vendee, a violation of which is shown to be injurious to the remaining property of the vendor, is enforceable by injunctional remedy against one having notice thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124–129; Dec. Dig. § 62.*]

3. INJUNCTION (§ 62*)—PERSONAL COVENANT—ENFORCEMENT.

Equity will, in a proper case, enforce a personal covenant or agreement relative to land as effectually as would a court of law had the

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covenant been clearly one running with the land.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-129; Dec. Dig. § 62.*]

4. GAME (§ 3*)—PRIVATE RIGHTS OF TAKING GAME—PROTECTION.

The law recognizes as property and entitled to protection an exclusive right to hunt on game preserves, and that the destruction or impairment of such privilege by the driving away of the birds and deterring their return constitutes an injury which cannot be estimated in money damages, and on account of which an injunction will lie.

[Ed. Note.—For other cases, see Game, Dec. Dig. § 3.*]

5. COVENANTS (§ 49*)—USE OF PROPERTY—RIGHTS OF GRANTEE.

In an action to determine conflicting claims, where the only issue was as to defendant's right as grantor to enforce a restrictive covenant in a deed prohibiting the use of firearms on the premises, which covenant was solely for the benefit of defendant's remaining lands, one who in reliance on the covenant purchased a lot in the granted tract was not entitled to intervene, having no such interest in the covenant that he would either gain or lose by the judgment.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 49.*]

6. COVENANTS (§ 1*)—VALIDITY—RESTRICTIVE COVENANTS.

A restrictive covenant in a deed, providing that the use of firearms on the premises shall be forever prohibited, is not void either as being unreasonable or in violation of the inherent right of the citizen to bear arms.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 1.*]

7. APPEAL AND ERROR (§ 704*)—QUESTIONS PRESENTED—FINDINGS OF FACT.

Findings of fact supporting a judgment will be considered on appeal, even though one or more of them are found among the conclusions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2939-2941; Dec. Dig. § 704.*]

8. APPEAL AND ERROR (§ 854*)—REVIEW—JUDGMENT.

A judgment, properly given, will not be reversed, though the reasons assigned therefor are not well founded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403-3430; Dec. Dig. § 854.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Guaranty Realty Company (a corporation) against the Recreation Gun Club (a corporation), wherein Elon G. Galusha intervened. From the judgment, and from an order denying a new trial, plaintiff appeals. Affirmed, except as to intervener's costs.

Tanner, Taft & Odell and Anderson & Anderson, for appellant. Leon F. Moss, for respondent. W. A. Alderson and Elon G. Galusha, for respondent intervener.

ALLEN, P. J. Appeal by plaintiff from a judgment in favor of defendant and intervener, and from an order denying a new trial. Plaintiff's action was one to determine conflicting claims to a certain described 120 acres of land situate in Los Angeles county, Cal.; the complaint being in the usual form. Defendant, in addition to a specific denial of the allegations of the complaint, alleged that it is a corporation which was organized in 1884 under the laws of this state, the object thereof, as expressed in its articles of incorporation, being "for mutual recreation and pleasure by means of the rod and gun, and to hold real estate, and to preserve the game and fish of the state, and to that end enforce the fish and game laws of the state"; that shortly after the defendant's organization it acquired title to 340 acres of land in Los Angeles county, which tract comprised the land in controversy; that defendant ever since its acquisition has been in possession thereof, and in the use thereof consistent with the purposes of the corporate organization, except that in May, 1904, defendant sold and granted to A. R. Fraser and others a portion of said tract, comprising about 120 acres, and being the land described in the complaint; that at the time of said sale defendant had, at great expense, fitted up a clubhouse and made lasting and valuable improvements on said land owned by it, for the purpose of making it available and useful as a hunting and fishing preserve; that Fraser and others purchased the said portion described in the complaint for subdivision purposes, and it was agreed and understood at the time of said purchase that the purchaser should at once subdivide and sell the same in lots for building sites; that in the conveyance to said Fraser and others of the land so sold the following provision was inserted: "To have and to hold: All and singular the said premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever; provided, that one of the conditions of this conveyance is that the use of firearms upon said premises is and shall be forever prohibited, and that the said grantees agree, for and on behalf of themselves, their heirs and assigns, and all persons claiming through or under them, to observe and enforce this provision." It is alleged that this provision was inserted to and intended to be a restriction upon the use of said lands granted for the benefit of the remaining lands owned and retained by defendant, and as an assurance that nothing should be permitted thereon which would interfere with the use and purpose of said remaining lands so retained and used for hunting and fishing purposes. That defendant had established ponds upon its said lands, and placed thereon and around large quantities of grain for feeding game birds and to fatten them and render them palatable, and that fowls resorted to said ponds and grounds for the purpose of feeding; that the habit of the game was, when disturbed upon said hunting preserve, to take flight across the lands proposed to be conveyed to Fraser and others towards the ocean; that to prevent the destruction of said game by poachers and others shooting and destroying said game in its flight from the preserve to the ocean and return, thereby interfering with the recreation, pleasure, and sport of the owners of the remaining lands and interfering with the object and purposes of the organization of the club and acquirement of said lands, was this provision and restriction inserted in the conveyance. Defendant disclaims any interest in the premises described in the complaint, other than the right of enforcing the restriction in said deed contained.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

One Galusha, by a complaint in intervention filed by permission of the court, set up the ownership by him of one of the lots of the subdivision of the lands granted, and alleged that he made the purchase of said lot with the full knowledge of the restriction in the deed; that the same made his premises more valuable and desirable as a home, and was an inducement leading to its purchase, and that its enforcement was necessary to insure personal safety and full enjoyment of said premises. Issue was tendered by plaintiff to the complaint in intervention, and in the answer thereto it was alleged that plaintiff corporation acquired the lands described in the complaint of Fraser for subdivision purposes, as alleged, but without knowledge of the existence of said provision in the conveyance, except such notice as is implied from the recorded instrument.

The court upon the hearing of the cause found the allegations of the answer of the Recreation Gun Club to be true, and that the deed to Fraser and others was recorded in the public records of Los Angeles county on May 13, 1904; that said restriction in said deed was intended as a protection to lot owners in the tract of land, as well as a restriction upon the use of the premises sold, for the benefit of the remaining lands in the ownership of the defendant Recreation Gun Club, and for a protection of said defendant in the use and enjoyment of its remaining lands. The court also found the allegations of the complaint in intervention to be true, and by its judgment it was determined that the lands described in plaintiff's complaint are held by plaintiff subject and subordinate to the restrictive covenant contained in said deed, and that the intervener was entitled to an injunction restraining plaintiff from bringing any subsequent action to avoid said contract and covenant.

Counsel for all parties upon this appeal present the cause upon the theory that the character of the covenant contained in the conveyance to Fraser and others is determinative of the rights of the parties thereto. The trial court held the covenant to be one running with the land, and error on account of this is specified by appellant. Whether the covenant be one running with the land or one in gross appears to us of little materiality in determining the matters involved upon this appeal. Notice of the existence of the covenant was derived by the plaintiff from the recorded deed to Fraser and others. Section 1213, Civ. Code, prescribes that the recordation of a grant is notice to subsequent purchasers of its contents. The recital in the deed was sufficiently clear to convey the requisite information, and to put the plaintiff upon his guard to the extent to which it affected the remaining lands. Watson v. Sutro, 86 Cal. 522, 24 Pac. 172, 25 Pac. 64. Treating the covenant as one in gross, it is proper to apply the rule which binds the conscience of the vendee with notice of a purely personal covenant entered into between his vendor and the one from whom he obtains title, the effect of which, if disregarded, would be to materially injure the remaining property of the original vendor. Parker et al. v. Nightingale et al., 6 Allen (Mass.) 341, 83 Am. Dec. 632; De Gray v. Monmouth Beach, etc., Co., 50 N. J. Eq. 329, 24 Atl. 388. In the case last cited it is said that the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor. This, of course, presupposes that such inconsistent use is made to appear as injurious to the party complaining. As said by our Supreme Court in Los Angeles Terminal Co. v. Muir, 136 Cal. 36, 68 Pac. 308: "As there is no personal contract relation between the parties to this action, the plaintiff is not entitled to relief against the defendant, unless the evidence shows with reasonable certainty that the use of the lot for ferry purposes would materially injure the remaining property of plaintiff." This language was used where a personal covenant was found to exist which did not purport upon its face to bind the successors and assigns of the vendee, as does the instrument under consideration here. The doctrine of the case, however, may be said to be that a purely personal covenant made between the vendor and vendee, a violation of which when shown to be injurious to the remaining property of the vendor, is enforceable by injunctional remedy; and this is reaffirmed in Hunt v. Jones, 149 Cal. 297, 86 Pac. 686, where it is said that the authorities sustain the proposition that, where a proper case is presented, equity will enforce a personal covenant or agreement relative to land as effectually as would a court of law had the covenant been clearly one running with the land. The court finds that a disregard of the covenant of the deed here being considered would greatly injure defendant in the use and enjoyment of its remaining lands, and the evidence in the record amply supports such finding. The law recognizes as property and entitled to protection an exclusive right to hunt upon game preserves (Ex parte Elam, 6 Cal. App. 238, 91

Pac. 811); also, that the destruction or impairment of such a hunting privilege, by the driving away of the birds and deterring their return, constitutes an injury which cannot be estimated in money damages, and on account of which an injunction will lie. Kellogg v. King, 114 Cal. 386, 46 Pac. 166, 55 Am. St. Rep. 74; Garcia v. Gunn, 119 Cal. 320, 51 Pac. 684. It follows, therefore, that as to such rights, and the use of property connected therewith, the same rules are applicable as to any other species of property used or intended for any other legitimate use. The conflicting claims to real property which were the subject of the action relate solely to the right of defendant to assert, if occasion requires, its rights under the clause in the Fraser deed. That covenant was not for the benefit of the lands granted, or for the protection of subsequent owners thereof, and the intervener has no such interest in it that he will either gain or lose by the direct and legal effect of the judgment. Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

We are then presented with a case where a purchaser with notice of the covenant not only disregards the same by attempting to convey without reference thereto in subsequent deeds, but comes before a court of equity to obtain a decree the effect of which could only be, not only to sanction a violation of the contract, but to relieve the party from obligations imposed upon him and his property, without showing, or attempting to show, any reason therefor other than that a disregard of such covenant would be a benefit to complainant. We think there is no merit in the contention that the restriction and covenant is void as being either unreasonable or as in violation of the inherent right of the citizen to bear arms. As we have before said, the equitable right by this covenant granted applies only to instances or emergencies where the disregard of the covenant will work an injury to the remaining lands of defendant. Then, and then only, can such right be asserted, but that it could in such instances be invoked determines that a court of equity will not by its decree absolve the parties generally from the obligations imposed by the covenant. We do not consider that plaintiff has made out a case agreeable to equity.

The findings of fact support the judgment in defendant's favor, and such findings are to be considered, even though one or more of them are found among the conclusions of law; and the conclusions of law as to the character of the covenant in no wise affect the validity of the judgment, even though it be said the court erred in determining the covenant as one running with the land, for a judgment will not be reversed, if properly given, even though the reasons assigned therefor may not be well founded.

Notwithstanding the insufficiency of intervener's complaint and the evidence in support thereof to sustain a judgment in his favor, yet the record discloses that the judgment rendered included only such matters as were proper in determining and awarding to defendant its rights, other than the judgment for costs awarded intervener.

The judgment and order are therefore affirmed in all respects except as to the intervener's costs, and to that extent the same are reversed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 441

McCARTHY CO. v. MOIR et ux. (Civ. 719.)

(Court of Appeal, Second District, California. Jan. 13, 1910.)

1. Appeal and Error (§ 1010*)—Findings—Conclusiveness.

Where the evidence tends to support the findings and is uncontradicted, it must be deemed sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

2. Vendor and Purchaser (§ 231*)—Bona Fide Purchaser—Notice.

A recorded contract of sale of lots forming a part of property not subdivided, described as fronting on a street corresponding with a street actually located on the ground, gives to a subsequent purchaser of the entire tract including the lots described in the contract notice that the sale was made on the representation of the vendor that the lots were bounded by a street located on the ground.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513–539; Dec. Dig. § 231.*]

3. Easements (§ 17*)—Property Conveyed—Appurtenances.

Where lots are sold as fronting on or bounded by a space designated in the conveyance as a street, the use of the space as a street passes as appurtenant to the grant.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 17.*]

4. Frauds, Statute of (§ 60*)—Interest in Land—Parol Contract.

Where a contract for the sale of lots forming a part of a tract not subdivided described the lots as fronting on a designated street actually located on the ground and the purchaser assigned the contract, the rights of the assignee of the easement in the street as appurtenant to the lots did not rest in parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 60.*]

5. Vendor and Purchaser (§ 243*)—Bona Fide Purchaser—Notice—Evidence.

Where an owner of a tract not subdivided contracted to sell lots fronting on a designated street actually located on the ground, and then conveyed the entire tract to a third person, subject to the rights acquired by the purchaser in the contract which was recorded, that the owner located buildings and improvements with reference to such street was admissible as a circumstance in connection with the contract to give notice to the third person of the existence of the street.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 243.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the McCarthy Company against Frank Moir and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Clifton Axtell and Edw. L. Payne, for appellant. Edgar E. Lefebvre, for respondents.

SHAW, J. Action to quiet title. On January 9, 1904, one Harvey Rice, as owner, made a contract to sell to defendant Frank Moir certain real estate situate in Los Angeles county, Cal., the description of which and consideration therefor, as inserted in the contract, being as follows: "Lots No. 19 & 20 of the proposed map of the Rice Tract. Located on the S. W. corner of South Main and Rice Av's, being 328.61 feet west of Main St. Located on the S. West corner of Rice and Burnett Av's, being 100 ft. front on Burnett Ave. running back 128.61 ft. west. Said tract of land above described having been sold to said Frank Moir this day for the sum of forty-five hundred dollars, ——— of the United States of America, the balance to be paid as follows: Two hundred ($200) dollars every 6 months on or before, with interest at 9 per cent. per annum, payable at office of Grider & Hamilton, city of Los Angeles." Moir assigned the contract to his wife, Lizzie Moir. Rice did not subdivide the property, but thereafter conveyed the entire tract, including the parcels of land sold to Moir, to the plaintiff, subject, however, to the rights and interest of Moir under said contract. Upon acquiring the property, plaintiff proceeded to subdivide and plat the same, locating upon the ground the lots designated as "No. 19 & 20 of the proposed map of the Rice tract," as called for in said contract, save and except that no street was laid out or platted to represent Burnett avenue as called for in the contract. According to the map of the subdivision, the land which defendants claim should have constituted the street known as Burnett avenue was delineated thereon as lot 22 and 10 feet off the west side of lot 23.

The controversy involves the right of defendants to an easement over the land designated as lot 22 and 10 feet off the west side of lot 23. The court found that at the time of plaintiff's purchase the contract was on record, and that plaintiff took the property subject to the contract and with notice of the existence of said street; that at the time of the execution of the contract to Moir there were improvements upon the property consisting of a dwelling house constructed to front on the street called Burnett avenue; and that a street had been laid out in front of said property 50 feet wide, occupying what is now shown on said map of record as lot 22 and the west 10 feet of lot 23 of said tract. As a conclusion of law the court found plaintiff to be the owner of lots 19 and 20, in block A, of the subdivision so laid out by plaintiff, subject, however, to the terms and conditions of the contract made between Rice and defendant Frank Moir, and that plaintiff was the owner of lots 22 and 23, in said block A, subject to the right of defendants to an easement or right of way for street purposes over and across the same, and gave judgment accordingly. Plaintiff appeals from the judgment and an order denying its motion for a new trial.

It is insisted that the finding to the effect that at the time of the execution of the contract a street 50 feet in width had been laid out in front of the property to represent Burnett avenue is unsupported by the evidence. While the evidence is not as full as it might be, nevertheless it tends to support the finding, and, being uncontradicted, it must be deemed sufficient. Moir testifies that at the time he took possession a street was laid out on the side of the property, which he used and in which a water pipe was laid leading to the house which fronted upon this street. Another witness testified that he made two surveys of the property, the first being made about six months after the contract of purchase was made, at which time he found a street laid out to the east of the property and marked by stakes. It also appears that this street as marked upon the ground was 50 feet in width. There is no reason for assuming that Moir in his testimony referred, as contended by appellant, to Rice street, as to which there was no controversy.

Appellant also attacks the finding to the effect that plaintiff purchased with notice of the existence of the street. This contention is fully answered by the fact that the contract described the lots as "fronting one hundred feet on Burnett avenue," and that a street 50 feet in width had actually been laid out and marked upon the ground by stakes and corresponded with the street upon which the contract described the lots as fronting 100 feet. The contract afforded notice to appellant that the sale was made to Moir upon the representation of the seller that the lots were bounded on the east by a street the exact location and width of which was marked upon the ground. See Breed et al. v. Cunningham, 2 Cal. 361, where it is said: "Where lots are sold as fronting on, or bounded by, a certain space, designated in the conveyance as a street, the use of such space as a street passes, as appurtenant to the grant," etc. See, also, Stone v. Brooks, 35 Cal. 489; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145. The lots were sold according to the proposed map of the subdivision to be made of the tract, which in the minds of the parties contemplated the location of streets on both the east and north boundary lines of the lots, of which fact the court, upon sufficient evidence, found that plaintiff had notice. The rights of defendant Lizzie Moir do not rest in parol, nor did they have their origin in mere parol, as suggested by appellant. The easement is appurtenant to lots 19 and 20 and described in the contract as having a frontage of 100 feet on Burnett avenue. Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

There was no error in the court's ruling under which evidence was admitted as to the acts of Rice, the original owner, in locating the buildings and improvements upon the lots with reference to the proposed street called Burnett avenue. Myers v. Kenyon, 7 Cal. App. 112, 93 Pac. 888. It was a circumstance not only tending in some degree to corroborate the location of a street upon which the house and other improvements fronted, but also a circumstance which, taken in connection with the contract, was calculated to give notice to defendant of the existence of such street. Conceding that questions as to the interior arrangement of the house were incompetent by reason of the same being immaterial, it is apparent that the rights of plaintiff were not prejudiced by the evidence thus elicited.

We find no prejudicial error, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

12 Cal. App. 375

BELL v. GERMAIN et al. (Civ. 748.)

(Court of Appeal, Second District, California. Jan. 4, 1910. Rehearing Denied by Supreme Court March 3, 1910.)

1. ADVERSE POSSESSION (§ 49½,* NEW, VOL. 6, KEY NO. SERIES)—PAYMENT OF TAXES.

Where defendants, whose buildings encroached on plaintiff's lot, claimed under adverse possession, and paid the taxes on the land claimed by them, the payment by plaintiff, who was out of possession, of taxes on the same property, did not defeat defendants' rights.

2. APPEAL AND ERROR (§ 756*)—"BRIEF"—NATURE AND OFFICE.

A "brief" is supposed to be the vehicle of counsel to convey to the appellate court the essential facts of his client's case, a statement of the questions of law involved, the law he would have applied, and the application he desires made of it by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3091; Dec. Dig. § 756.*

For other definitions, see Words and Phrases, vol. 1, p. 874.]

3. APPEAL AND ERROR (§ 760*)—BRIEFS.

A brief should point out to the appellate court which of the objections and exceptions in the transcript appellant desires reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Mary Jane Bell, administratrix, with the will annexed of the estate of Solomon Bell, deceased, against Caroline Germain and others. From a judgment for defendants and from an order denying motion for new trial, plaintiff appeals. Affirmed.

Will D. Gould, for appellant. Denis & Loewenthal, Ward Chapman, and Borden & Carhart, for respondents.

TAGGART, J. Action to quiet title. Decree quieting title of defendants and awarding them costs. Plaintiff appeals from judgment and order denying her motion for new trial.

Plaintiff claims to own a lot 14 feet wide abutting on Los Angeles street in the city of Los Angeles the adjoining property on the north side belonging to the defendants Henderson and that on the south side to the defendants representing the estate of Eugene Germain, deceased. Eugene Germain, who has died since the appeal was taken, at the time of the commencement of the action, in addition to being in possession of the property, the title to which was vested in him, was also in possession of the 14-foot lot under a lease made to him by plaintiff's testator, which lease by its terms would not expire until more than a year after the date of the judgment entered in the case. The common source of title of all the parties is the decree of distribution entered in the estate of Jacob Bell, deceased, December 16, 1875. By partition and mesne conveyances the defendants Henderson and Germain acquired the respective properties owned by them in the years 1882 and 1883, while plaintiff's testator acquired the 14 feet claimed by the original decree of partition, he being one of the distributees in the estate named.

In the year 1884 the defendant Henderson caused to be erected on her property a 2-story brick building, the south wall of which was placed along the division line between her property and the 14 feet claimed by plaintiff, as to which the trial court found: That the said "south wall, as near as can now be determined * * * did not, and does not, encroach upon the said property so allotted to said Solomon Bell, if at all, to exceed seven one-hundredths (7-100) of a foot along the Los Angeles street front, and not to exceed twelve one-hundredths (12-100) of a foot along its easterly line." As to the Germain property the court found: "In the year 1889, the said Eugene Germain caused a large three-story and basement brick building to be erected upon his property, and caused the north wall of his said brick building to be built and placed along the division line between his said property and the said property allotted to said Solomon Bell as near as can now be determined, but at all events the said north wall did not, and does not, encroach upon the property so allotted to Solomon Bell, if at all, to exceed a distance of fifty one-hundredths (50-100) of a foot, on Los Angeles street front, and not to exceed sixty-two one-hundredth (62-100) of a foot at the rear of said wall." It is also found that the walls of these buildings remained, as so erected, up to the time of the death of Solomon Bell in 1902, and that he knew of their being so located. It is also specifically found that both the defendants for a period of 15 years prior to the death of Solomon Bell paid all the taxes on their respective properties as so occupied, and that such occupation was open, notorious, exclusive, and under a claim of right; also, that the cause of action against each of said defendants is barred by the statute of limitations; also, that the northerly line of the Germain building and the southerly line of the Henderson building have been for more than fifteen years last past continuously, and now are, the division lines established between the properties of said defendants respectively and the property claimed by plaintiff.

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*For other cases see same topic and section NUMBER in Dec & Am. Digs. 1907 to date, & Reporter Indexes

The judgment is in accordance with these findings, which are fully supported by the evidence, except it be that the payments of taxes were not continuously made for fifteen years, as may be implied in the finding of adverse possession, when taken in connection with the finding that the taxes were all paid. There is, however, evidence sufficient to sustain a finding that the defendants, and each of them, paid the taxes for a period in excess of five years continuously while occupying their respective properties to the extreme lines of their respective buildings. The payment of the taxes on the same property by plaintiff, who was out of possession, would not defeat the rights of the defendants under the circumstances of this case. Owsley v. Matson, 104 Pac. 985. This finding alone is sufficient to support the judgment, rendering it unnecessary to consider any other insufficiency of the testimony. The contention that defendant Germain's right was defeated by the application of the rule that, being the tenant of plaintiff's testator, he was estopped to deny his landlord's title, has no application to the facts of this case.

Finding 19, complained of as awarding to defendant Germain that which is not claimed by his answer, is not open to that criticism. This finding relates to the issue of possession under the lease from Solomon Bell to Eugene Germain which plaintiff, in effect, prays to have forfeited by a decree quieting her title. The finding recognizes the right of Germain to hold possession of the 14-foot strip under the lease until the expiration of the term thereof, subject to termination under the terms of the lease.

It is apparent that counsel for appellant has been somewhat misled in the preparation of his brief by the repeated requests of the Supreme Court and this court for brevity and succinctness in the presentation of cases. While "simplicity of statement" in the brief of counsel has met, and always will meet, with the approval of these courts, the effort in this direction should not go so far as to eliminate or exclude all specification or mention of the errors upon which an appellant relies for a reversal. The simplicity of presentation desired is that which avoids prolixity, verbosity and repetition; which omits theoretical disquisitions on abstract principles of law, needless presentation of questions of fact as to which the action of the trial court is final, the citation of innumerable authorities indicative of an examination of the subject which has never passed the digest stage, etc. A brief is supposed to be the vehicle of counsel to convey to the court the essential facts of his client's case, a statement of the questions of law involved, the law he would have applied, and the application he desires made of it by the court. When the brief is presented to an appellate court it should point out to that court which of the many objections and exceptions usually found in the transcript it is the wish of appellant to have the court review. It must be assumed for this purpose that the knowledge of the court does not include the facts of the particular case, or the special errors of the trial court which appellant relies upon to overturn the judgment or order. These should be pointed out clearly, even at the hazard of encroaching upon the ideal simplicity of statement which the appellate courts have approved. Voluminous and unnecessarily padded briefs are discouraged by the courts in order that they may dispatch business. When briefs fail altogether to present the matters mentioned, the court must elect between acting as counsel for the appellant, or passing upon only such questions as are sufficiently presented for consideration by the brief, and in accomplishing the purpose mentioned, to wit, the dispatch of business, the latter course has generally been adopted.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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12 Cal. App. 391

BAINES v. SHANK. (Civ. 731.)

(Court of Appeal, Second District, California. Jan. 5, 1910.)

1. Vendor and Purchaser (§ 341*)—Recovery of Payment—Action by Purchaser—Finding—Effect.

In an action by a purchaser against a vendor, the court found that defendant never represented to plaintiff that a certain map had been recorded, that defendant never represented to plaintiff that it was a true and complete map of lands described in the complaint, as required by law, and that plaintiff knew at the time of purchase that the map had not been recorded. *Held*, that the effect thereof could only be that the court found the sale was not made with reference to the map.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 341.*]

2. Vendor and Purchaser (§ 22*) — Sales With Reference to Maps.

Act March 15, 1907 (St. 1907, c. 231), prohibiting the sale of land or offering thereof for sale with reference to maps not filed or recorded, only includes sales wherein the property was designated as being shown on a certain map referred to in the contract.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 22.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Matthew Baines against E. S. Shank. From a judgment for defendant, plaintiff appeals. Affirmed.

Hugh J. Crawford, for appellant. John W. Shenk and E. R. Young, for respondent.

ALLEN, P. J. Appellant by his complaint, which contained three counts, alleged in the first the purchase by him of a certain 100-acre tract of land from defendant, upon the purchase of which he had paid $2,500; that the contract of purchase was evidenced by a receipt which upon its face stated that the money was received as "part and first payment on 100 acres of land at Delhi, Merced Co., Cal., being lots 19, 20, 22," etc., "of Sec. 8, Twp. 6 S., R. 11 E., M. D. B. & M., price $5,000; balance to be secured by two notes and mortgage, payable in equal installments and due on or before two and three years, at 7% interest; interest payable semiannually." That the lots designated were subdivisions delineated upon a map made under defendant's supervision, and with reference to which map the purchase was made; that such map was not recorded at the date of such alleged purchase and payment of money; that plaintiff ascertained after such contract was made the nonrecordation of said map. In his second cause of action, after alleging the contract and purchase, plaintiff alleges that the sum of $2,500 was deposited with defendant to be returned if a good and sufficient deed were not delivered within a few days; that plaintiff has always been ready and willing to perform his part of the agreement; that he has demanded performance upon the part of defendant, and defendant has made default in the delivery of such deed. By the third cause of action, after setting forth the contract and purchase, plaintiff alleges that the same was procured by fraud in that defendant represented the land had sufficient water for irrigation, when in truth and in fact it had none; and he seeks by this action to recover the $2,500 paid, with interest thereon from the time of payment. The answer of defendant denied all of the allegations of the complaint material in stating the cause of action, and upon the trial the court found in favor of defendant upon all of the issues, and rendered judgment accordingly, from which plaintiff appeals.

It is appellant's contention upon this appeal that the evidence is insufficient to support the findings. The transcript, prepared and filed under what is known as the alternative method of appeal, does not disclose any specifications of error, or specifications wherein any particular finding is unsupported; but, without reference to this defect, an examination of the transcript of the stenographic notes of the testimony develops that there is testimony in the record tending to support each and every finding of the court.

The first cause of action is based upon the theory that a sale of any lot of a subdivision made in violation of the act of March 15, 1907 (Laws 1907, p. 290), renders the sale void. This law has never received a construction by the Supreme Court of this state upon the point here involved, but a similar statute in various other states has received a construction by the Supreme Courts of those states, in which it has been uniformly held that the omission to record the map of a subdivision does not render the sale void as between the parties. It is unnecessary for us, as it was unnecessary for the Supreme Court of this state in Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890, to determine this precise question. The court finds here that it was not true, at the time said contract was entered into, nor at any other time, that defendant represented or pretended to plaintiff that said map had been recorded; that defendant did not at any time represent or pretend to plaintiff that said map was a full, true, and complete map of the lands described in said complaint as required by law; that plaintiff knew at the time of the purchase that the map had not been recorded. The effect of this finding can only be that the court found that the sale was not made with reference to the map. There is no specific reference to the map in the written contract, and there is evidence to show that this map played no part in the transaction, and was not relied upon by either party, but, on the contrary, that the purchase was made after a visit to the land and an inspection and examination as to its exterior boundaries and the location stakes marking the same. The statute upon which plaintiff relies prohibits the sale or offering by reference to maps, which can only be construed as intending to include sales wherein the property was designated as being delineated upon a certain map to which reference was made in the contract. There is ample evidence in the record to sustain the finding of the court that plaintiff had full knowledge of the fact that a certain blue print, upon which was delineated the numbered lots mentioned in the contract, and which was shown him before the purchase, was not and did not purport to be a copy of any recorded map, nor of any map actually prepared or intended for use, but was in fact a preliminary survey, and that the recordation of a map of said subdivision was not intended to be made until after certain rights of way for road purposes had been adjusted between defendant and adjoining proprietors.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is in evidence, and the court finds, that the reason why the execution of the deed to plaintiff was deferred was by reason of an agreement that the same should be deferred until such time as the rights of way should be secured, to the end that a map might be recorded which would correctly delineate the lots of the tract. It is in evidence that defendant offered to convey by metes and by bounds, so as to include the actual premises sold.

There is no evidence in the record tending to support the second and third causes of action, and the court properly found against plaintiff upon all of these matters.

The judgment has support from the findings, and the evidence is sufficient as a basis for each finding. We find no prejudicial error in the record, and the judgment is therefore affirmed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 445

HOLINESS CHURCH OF SAN JOSE v. METROPOLITAN CHURCH ASS'N et al.

(Civ. 694.)

(Court of Appeal, First District, California. Jan. 17, 1910.)

1. JUDGMENT (§ 142*)—DEFAULT JUDGMENT—RIGHT TO SET ASIDE.

Under Code Civ. Proc. § 473, providing that, when the summons has not been personally served on defendant, the court may allow him at any time within a year after judgment to answer to the merits, a defendant not personally served with summons is entitled as a matter of right to have the default judgment against him set aside when he applies therefor within the statutory time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

2. CORPORATIONS (§ 668*)—CIVIL ACTIONS—SERVICE OF PROCESS—CONSENT TO SERVICE ON SECRETARY OF STATE.

Under Civ. Code, § 405, requiring every foreign corporation to designate a resident on whom process may be served, and providing where no such person is designated a service on the Secretary of State is sufficient, a foreign corporation doing business in the state without designating a resident on whom process may be served consents to service on it by service on the Secretary of State, and such service gives the court jurisdiction to render judgment against it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2619; Dec. Dig. § 668.*]

3. PROCESS (§ 48*)—"PERSONAL SERVICE."

The expression "personal service" of process, generally speaking, means the actual delivery of the process to defendant in person.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 46; Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 6, p. 5363.]

4. CORPORATIONS (§ 668*)—SERVICE OF PROCESS—DISTINCTION BETWEEN PERSONAL AND CONSTRUCTIVE SERVICE.

Personal service is made on a foreign or domestic corporation by delivery, as authorized by Code Civ. Proc. § 411, of a copy of the summons, together with a copy of the complaint, on designated officers, and personal service is made on a foreign corporation by service on the resident designated, as required by Civ. Code, § 405, on whom process may be served; but other modes of service on corporations in the state, including service on the Secretary of State in an action against a foreign corporation which has not designated a resident on whom process may be served, are constructive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2624; Dec. Dig. § 668.*]

5. CORPORATIONS (§ 668*)—SERVICE OF PROCESS—NOTICE OF SERVICE ON SECRETARY OF STATE.

Civ. Code, § 405, requiring every foreign corporation to designate a resident on whom process may be served and in default of such designation a service on the Secretary of State is sufficient, does not require the Secretary of State on whom process is served to notify the foreign corporation failing to designate a resident on whom process may be served of the pendency of the action, or that through him the corporation has been regularly served with process.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2619, 2626; Dec. Dig. § 668.*]

6. JUDGMENT (§ 142*)—DEFAULT JUDGMENT—CONSTRUCTIVE SERVICE OF PROCESS.

Where process, in an action against a foreign corporation which had not designated a resident on whom process might be served as required by Civ. Code, § 405, was served on the Secretary of State, the service was constructive within Code Civ. Proc. § 473, providing that when summons has not been personally served the court may allow defendant at any time within a year after the judgment to answer to the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by the Holiness Church of San Jose against the Metropolitan Church Association and others. From an order refusing to set aside a default judgment for plaintiff, defendants appeal. Reversed.

E. M. Rosenthal and O. D. Richardson, for appellants. Charles W. Slack and Henry French, for respondent.

KERRIGAN, J. This is an appeal from an order refusing to set aside a default judgment.

On June 14, 1906, respondent commenced an action against the Metropolitan Church Association, a foreign corporation, and others, for the purpose of obtaining a judgment decreeing that respondent is the owner of certain described real property in Santa Clara county, and that the appellant Metropolitan Church Association is the holder of the title thereto in trust for the respondent. The summons, which was duly issued on the day the suit was commenced, was, according to the return thereon, served on March 16, 1908, by the sheriff of Sacramento county on said appellant, by delivering a copy thereof, attached to a copy of the complaint, to the Secretary of State. On June 24th following (the appellant in the meantime not having appeared or answered) a judgment of default was entered against it in favor of the respondent. The next day the appellant duly made a motion to open the default against it, and to be permitted to answer to the merits of the action. The affidavit filed by the appellant in support of this motion, which is undisputed, states that said corporation was never aware or had any knowledge of any attempted substituted service upon it through the Secretary of State of California until the day following the entry of the judgment, and said appellant did thereupon immediately, and has continued since, to take all available, prompt, and necessary steps to have this default and judgment against it set aside.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The ground of the motion is that the summons was not personally served upon the appellant, and it is based on that part of section 473 of the Code of Civil Procedure which reads as follows: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." The motion here was made immediately after the entry of judgment, and if the service of the summons in the case may be regarded as constructive and not personal, then the appellant, without any showing of mistake, surprise, inadvertence, or excusable neglect, was entitled as a matter of absolute right to have the judgment vacated and set aside, and the court was without any discretion in the premises. Gray v. Lawlor, 151 Cal. 352, 90 Pac. 691; Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191; Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939.

But respondent contends that appellant was personally served. It argues that foreign corporations doing business in this state are subject to every constitutional condition imposed upon them by the state, and that when the appellant corporation had been engaged in business here for a period of 40 days without having designated a person residing within the state, on whom process might be served, under section 405 of the Civil Code, as the section then read, it must be deemed to have assented to such service being made upon the Secretary of State as freely as though it had specially authorized it, and that therefore (if we follow the argument) the service of summons here was personal. Under the circumstances just related, the appellant must be deemed to have consented to the service upon it through the Secretary of State, and to the jurisdiction of the court to render judgment against it thereon; but it does not follow that the service was personal. The expression "personal service," generally speaking, means the actual delivery of the process to the defendant in person (First Nat. Bank of Casselton v. Holmes, 12 N. D. 38, 94 N. W. 764; Moyer v. Cook, 12 Wis. 335; McKenna v. State Ins. Co., 35 N. W. 519, 73 Iowa, 453); and such service, under section 411, subds. 1 and 2, Code Civ. Proc., is made upon a corporation, domestic or foreign, by delivering a copy of the summons, together with a copy of the complaint, on certain designated officers thereof, or, if upon a foreign corporation under section 405 of the Civil Code, by delivering copies of the complaint and summons to a person resident within the state designated for that purpose by such corporation. Other modes of service on corporations in this state, including the one in question, must, we believe, be regarded as constructive. Under section 405 of the Civil Code the Secretary of State is not obliged, nor is it his duty, to notify the corporation of the pendency of the action, nor that through him it has been regularly served with process; and, in the absence of a clear intention by the Legislature to that effect, such service cannot be deemed personal or the equivalent of personal service.

Here, according to the affidavit and the proposed verified answer, the appellant knew nothing of the pendency of the action until after the entry of judgment, divesting it of the legal and equitable title to the land which stood of record in its name. The portion of section 473 relied upon by appellant was intended to cover just such cases as this one. If the Legislature had intended that the delivery of process to the Secretary of State should be regarded as tantamount to personal service upon the corporation as distinguished from constructive service, doubtless it would have expressly so declared, as is done, we believe, in some states, and as is the case in this state in reference to foreign fire insurance companies doing business here. Section 616, Pol. Code.

The appellant was not personally served with summons, and, having made its motion within due time, was entitled, as contemplated by the third clause of said section 473, to be relieved from the judgment, and, compliance being made with the terms of said section 405, Civ. Code—which seems to be made necessary by the section following it—to file its answer, and to have a trial of the cause upon the merits.

The order appealed from is reversed.

We concur: COOPER, P. J.; HALL, J.

157 Cal. 348

MORGAN v. J. W. ROBINSON CO.

(L. A. 2,415.)

(Supreme Court of California. March 4, 1910.)

1. Appeal and Error (§ 933*)—Order Granting New Trial—Review.

An order granting a new trial generally will be affirmed on appeal, if it could properly be granted on any of the grounds assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3775; Dec. Dig. § 933.*]

2. Appeal and Error (§ 856*)—Order Granting New Trial—Review—Grounds.

Though an order granting a new trial declared that the motion was granted for one or more reasons only, the appellate court may consider any other assignment on which the motion should have been granted, to sustain the order, subject to the limitation that the court may limit its order granting the motion so as to exclude as a ground for its action the insufficiency of the evidence, provided the court so declares in the order itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3423, 3424; Dec. Dig. § 856.*]

3. Appeal and Error (§ 717*)—Order Granting New Trial — Review — Opinion of Trial Court.

On review of an order granting a new trial, the appellate court could not notice the opinion of the trial court, whether authenticated as a part of the bill of exceptions or not, but must look to the bill of exceptions and to the order granting the motion, and, if it might properly have been granted on the ground that the evidence on any material issue was not sufficient to sustain the verdict, the order must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2967; Dec. Dig. § 717.*]

4. New Trial (§ 72*)—Weight of Evidence—Conflicting Evidence.

A trial court, if satisfied that the verdict is against the weight of the evidence, should grant a new trial, though on the same conflict the appellate court would be bound by the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. § 72.*]

5. Appeal and Error (§ 933*)—Order Granting New Trial—Review—Presumptions.

On appeal from an order granting a new trial after verdict based on conflicting evidence, the appellate court must presume, in support of the order, that the trial judge believed the verdict contrary to the weight of the evidence, and based the order on such belief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3775; Dec. Dig. § 933.*]

6. Master and Servant (§ 226*)—Injuries to Servant—Assumed Risk—Negligence.

Plaintiff, a carpenter, employed to do certain work in an elevator shaft, was injured by the sudden operation of the elevator by another of defendant's servants without warning. Plaintiff and the elevator man had agreed that, before the elevator was moved, the operator would call out to plaintiff, and should not move the elevator until answered, "All right." He did move it without calling out and plaintiff was injured. *Held* that, though plaintiff assumed the risk of injury involved in working in the shaft, he did not assume the risk of the negligent use of the elevator by defendant, under the rule that an employé by voluntarily putting himself in a place of danger does not thereby necessarily assume the risk of injury from his employer's want of care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659–667; Dec. Dig. § 226.*]

7. Master and Servant (§ 183*)—Injuries to Servant—"Fellow Servants."

A carpenter engaged in the construction of a building and a man operating a freight elevator in a retail store are engaged in different departments of labor, and are not "fellow servants," under Civ. Code, § 1970, as amended by St. 1907, c. 97, limiting the fellow-servant rule to cases of servants of the same master engaged in the same department of labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 373; Dec. Dig. § 183.*

For other definitions, see Words and Phrases, vol. 3, pp. 2716–2730; vol. 8, p. 7662.]

8. Master and Servant (§ 137*)—Injuries to Servants—Negligence.

Where plaintiff, before entering an elevator shaft in defendant's building to do certain carpenter work, agreed with the elevator operator that he should not move the elevator without warning, nor until he had received plaintiff's reply "All right," the operator's movement of the elevator without such warning, resulting in plaintiff's injury, constituted actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 273; Dec. Dig. § 137.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Robert F. Morgan against the J. W. Robinson Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Charles Lantz, Ernest E. Wood, and Walton J. Wood, for appellant. Hunsaker & Britt and Hamilton A. Bauer, for respondent.

SLOSS, J. This is an action to recover damages for personal injuries. The J. W. Robinson Company was conducting a department store in a building situate on Broadway street in the city of Los Angeles. During the year 1906 it commenced the construction of a second building to adjoin the rear of the one already occupied by it, with the purpose of connecting the two. The work was done under a contract with one Low, who agreed, for a commission on the cost of labor and materials, to supervise the construction and attend to the buying of materials and the hiring of labor necessary in the construction of said new building by the Robinson Company. Morgan, the plaintiff herein, was employed by Low as a carpenter, and was engaged in work under Low's direction for a number of months. At the rear of the old building there was a freight elevator inclosed in a brick shaft. In the course of the construction of the new building it became necessary to enter said shaft for the purpose of doing certain carpenter work in connection with the bridging between the floors of the two buildings. Morgan and another carpenter named Patchen were directed by the foreman to drive a hole into the elevator shaft and do this work. They had been engaged in work inside the shaft for two or three days when Morgan received the injury upon which this action is based. Connected with the elevator were heavy metal counterweights which moved up or down in the direction opposite to that taken by the elevator. Morgan and Patchen were at work preparing wooden forms or moulds to hold the concrete which was to be put around a steel beam which went through the shaft. Morgan was seated upon this beam, which was in close proximity to the line of movement of the counterweights. The elevator had been at a standstill at the next floor above the carpenters. The operator started the elevator upward, whereupon the weights descended and struck Morgan, inflicting upon him the injuries complained of. The trial resulted in a verdict in his favor for $5,000. A motion for new trial was interposed by the defendant, and this motion was granted by the court. This appeal is by the plaintiff from the order granting the defendant's motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The theory of the plaintiff was that when he and Patchen commenced to work in the shaft, they had made an agreement or come to an understanding with Pfaeffle, the elevator operator, to the effect that Pfaeffle should give warning by shouting to them before starting his elevator, and that he had followed this course during the two or three days preceding the accident. On the occasion of plaintiff's injury, however, no such warning had been given, and, in consequence, Morgan had failed to put himself in a position of safety and had been struck by the descending weights. The defendant, on the other hand, contended that explicit instructions had been given to the elevator operator to the effect that the elevator was not to be operated while the carpenters were at work in the shaft, and that Morgan and Patchen had directed Pfaeffle to run his elevator in disregard of these instructions, which had been brought to their notice, stating that there was no danger, and that they would not interfere with the elevator. The motion for new trial was based on various grounds, including the insufficiency of the evidence. The order granting the new trial was general in its terms. It stated merely that defendant's motion for new trial "is ordered to be and the same is hereby granted."

There can be no question, under the settled rule of this court, that where an order granting a new trial is thus general in its terms, it will be affirmed if it could properly have been granted on any of the grounds assigned. White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 Pac. 110; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Thompson v. Cal. Cons. Co., 148 Cal. 35, 82 Pac. 367; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029. Even though the order declare in terms that the motion is granted for one or more reasons only, the appellate court is not precluded from considering any other assignment upon which the motion should have been granted. Kauffman v. Maier, supra. This rule is subject to the one limitation that the trial court may limit its order granting the motion so as to exclude, as a ground for its action, the insufficiency of the evidence (Weisser v. S. P. Ry. Co., 148 Cal. 426, 83 Pac. 439), but such exclusion, to be effectual, must be declared in the order itself. Weisser v. S. P. Co., supra; Ben Lomond Wine Co. v. Sladky, supra; Newman v. Overland Pac. Ry. Co., supra.

In the case at bar the transcript contains what purports to be a copy of the opinion of the court in granting the motion, and this opinion places the order solely upon a supposed error of the trial court in instructing the jury. It expressly declares the concurrence of the learned judge in the findings of the jury on disputed issues of fact. This opinion is not included in the bill of exceptions and is no part of the record, but even though it had been duly authenticated, it could not, under the authorities already cited, be considered for any purpose on this appeal. There is, therefore, no merit in the appellant's contention that we are here to treat that opinion as declaring the views of the trial judge on the question of the sufficiency of the evidence. We must look solely to the bill of exceptions and to the order granting a new trial, and if that order might properly have been granted upon the ground that the evidence on any material issue was not sufficient to sustain the verdict, the order must be affirmed.

On the question whether or not Morgan was informed when he went to work that the elevator operator had been directed not to run the elevator during the time the work was in progress, and had in the face of that information directed the operator to go ahead and run the elevator nevertheless, there is a clear conflict of evidence. The operator himself testified that the facts were as contended by defendant, whereas Morgan and Patchen testified to the contrary. While an appellate court will not review a finding or a verdict where the evidence shows a substantial conflict, the trial court is guided by very different considerations. Notwithstanding such conflict, the court below, if satisfied that the verdict is against the weight of the evidence, may, indeed should, grant a new trial, although upon the same conflict the appellate court would be bound by the verdict. Estate of Martin, 113 Cal. 479, 45 Pac. 813; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181. We must, therefore, in support of the order, assume that the judge below believed the verdict of the jury to be contrary to the weight of the evidence on this issue, and based the order on this belief. We cannot say, on the record before us, that this conclusion involved an abuse of discretion. The appellant does not question the correctness of the instruction which told the jury that if the facts were as testified to by Pfaeffle, plaintiff's conduct amounted to an assumption of the risk of injury resulting from the running of the elevator, and we have no doubt that it was correct as matter of law.

Inasmuch, however, as the case must be tried anew, it will be well to consider whether the court was in fact in error in giving the instruction which was treated by it in its opinion as furnishing a ground for granting the motion. That instruction reads as follows: "The plaintiff when he was injured was engaged in a dangerous undertaking, and he knew it was dangerous when he undertook it. The elevator man knew that the plaintiff was at dangerous work in the elevator shaft. Now, if nothing else was said and no other instructions were given by their superiors, and the plaintiff and the elevator man agreed that before the elevator was moved the elevator man would call out to the plaintiff and his associate and that he would not move it until they answered, 'All right,' and he did move it without calling out, and the plaintiff was injured by reason of such failure, then the plaintiff is entitled to recover."

If we could look to the opinion of the learned judge below, it would appear that he came to the conclusion that, under the facts supposed, the plaintiff assumed the risk of just such an occurrence as the one that caused his injury. It is now urged by respondent that the order appealed from should be affirmed for this reason. We think, however, that such a holding would involve an unwarrantable extension of the doctrine of assumption of risk. If all the circumstances—including the location of the plaintiff, the condition and method of operation of the elevator, and the previous relations between the plaintiff and Pfaeffle—were such as to impose upon Pfaeffle, as an "ordinarily prudent man," the duty of giving warning before starting the elevator, then his failure to give warning was negligence. That the plaintiff, by going into the shaft to work, assumed all risks naturally and obviously incident to the physical situation is clear. It is apparent that there must be a certain degree of danger involved in working in a shaft within which an elevator is being operated. That danger plaintiff was aware of, and it was assumed by him. But he was not bound to assume the risk which would result from the negligent use by defendant of the instrumentalities used in the place of work, and his testimony that he "took the chance" is not to be interpreted to mean that he assumed the risk of such negligence. The authorities seem clear to the effect that an employé voluntarily putting himself in a place of danger does not thereby necessarily assume the risk of injury from the want of care of his employer. Texas, etc., R. R. Co. v. Kelly, 98 Tex. 123, 80 S. W. 79; Schulz v. Chicago, etc., Ry. Co., 57 Minn. 271, 59 N. W. 192; Malcolm v. Fuller, 152 Mass. 160, 25 N. E. 83; Texas Mex. Ry. Co. v. Higgins, 44 Tex. Civ. App. 523, 99 S. W. 200; Vindicator Cons. G. M. Co. v. Firstbrook, 36 Colo. 498, 83 Pac. 313; Ill. Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161; Moran v. Harris, 63 Iowa, 390, 19 N. W. 278. In Texas Mex. Ry. Co. v. Higgins, supra, the rule is thus stated: "The risk assumed by a servant as incident to his employment precludes negligence of the master which adds to or augments the risk, unless such negligence and the superadded danger incident thereto were known to the employé, or he had such facts in mind as charged him with such knowledge. He has the right to presume and act upon the presumption that the master will exercise ordinary care in the conduct of his business to prevent anything being done which will increase the danger incident to his employment." Applying the doctrine to the facts of this case, the plaintiff did not assume the risk that he would be injured by Pfaeffle's negligent management of the elevator, unless he had reason to anticipate such negligence. Whether Pfaeffle was negligent, whether his negligence caused plaintiff's injury, and whether plaintiff was bound to foresee the likelihood that such negligence would occur, were all questions of fact, which might, on this record, have been found in favor of plaintiff. If so found, the defense of assumption of risk would have been negatived.

It is urged, however, that if the liability of defendant is to be rested on the negligence of Pfaeffle, the plaintiff is precluded from recovery by the fact that he and Pfaeffle were fellow servants. Such was the holding in Mann v. O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149, a case somewhat similar to the one at bar. But since the decision in the case just cited section 1970 of the Civil Code has been amended. St. 1907, p. 119. The accident to Morgan occurred after the amending statute had taken effect. As the law now reads, the exemption of an employer from liability for injuries sustained by a servant through the negligence of a fellow servant is limited by the proviso that liability shall exist when the injury results "from the wrongful act, neglect or default of a co-employé engaged in another department of labor from that of the employé injured." We need not here undertake to define with precision the term "department of labor." Whatever may be the exact meaning of the phrase, it can require no argument to show that a carpenter occupied in the construction of a building and a man operating a freight elevator used in a retail store are engaged in different "departments of labor." From these views it follows that the mere fact that Morgan went to work in the elevator shaft, knowing that there was an element of danger in so working, did not necessitate the conclusion that he thereby assumed the risk of any injury that might be sustained by him.

While the standard of care required under given circumstances is ordinarily a question of fact, and one for the determination of the jury, we should not, if this were the only question in the case, be inclined to hold that the court erred in declaring in the instruction quoted, that on the facts supposed, plaintiff was entitled to recover. Where the facts are such that the only reasonable inference is that of want of care, the court may properly charge that negligence is shown as matter of law. We think that the record before us leaves no room for doubt that Pfaeffle showed a lack of due care if, after having agreed with plaintiff to give warning before starting his elevator, he did start it without giving such warning. Nor, on the facts supposed and found by the jury, can it be said that Morgan had any reason to anticipate such negligence. But, inasmuch as the evidence may be different on another trial, we think it would be safer to submit to the jury the questions whether, in violating the alleged agreement, Pfaeffle was negligent, and whether plaintiff should have foreseen the likelihood of such violation.

There are other grounds on which, as respondent claims, the order might be supported. It will hardly be necessary to refer to these in detail. The alleged errors in admitting evidence, if they were errors, were too trivial to be regarded as prejudicial. The instruction that plaintiff and the operator were fellow servants was properly refused, for reasons above stated. The question of assumption of risk—concerning which an instruction requested by defendant was refused—was sufficiently covered by instructions given. The requested instruction defining contributory negligence might well have been given, although the failure to give it was perhaps, under the peculiar facts of the case, not harmful to defendant.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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157 Cal. 339

WESTERFELD et al. v. NEW YORK LIFE INS. CO. (S. F. 4,049.)

(Supreme Court of California. March 1, 1910.)

1. Appeal and Error (§ 1097*) — Law of Case—Doctrine.

Where upon appeal the Supreme Court states in its opinion a principle or rule necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and this, although in its subsequent consideration the Supreme Court may be clearly of the opinion that the former decision was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368; Dec. Dig. § 1097.*]

2. Appeal and Error (§ 1099*)—Former Appeal—Complaint—Amended Complaint.

Where the complaint upon which an action was tried prior to a former appeal failed to state a cause of action for damages, and a third amended complaint, in a subsequent trial, had not been changed as far as any possible claim for damages was concerned, but was directed to another matter, the amended complaint occupies no stronger position on a subsequent appeal than the original.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4375; Dec. Dig. § 1099.*]

3. Appeal and Error (§ 1097*)—Decision on Former Appeal—Law of Case.

The decision of the Supreme Court upon a former appeal, upon a matter properly presented, and one whose decision was proper as a guide to the court below on a new trial, is to be deemed the law of the case upon a subsequent appeal, though it may not have been absolutely necessary to the determination of the question whether the judgment appealed from should be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368; Dec. Dig. § 1097.*]

4. Fraud (§ 47*) — Pleading — Complaint—Compromise—Damages.

If the measure of damages for fraudulently inducing the compromise of a disputed claim be not the face of the claim, a complaint to recover such damages must contain some allegations by which the amount of the plaintiff's damage may be determined.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 42; Dec. Dig. § 47.*]

5. Insurance (§ 639*) — Pleading — Complaint—Value of Claim.

In an action on a life insurance policy, an averment in the complaint that, "except for the fraud and deception practiced upon them by defendant, plaintiffs would not have surrendered said policy for any sum less than the sum of $10,000" was not an allegation of the value of the claim upon the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 639.*]

6. Compromise and Settlement (§ 18*)—Rescission — Restoration of Consideration—Pleading.

Where plaintiffs had received a sum of money upon a compromise of a disputed claim, and the court on a former appeal held that an attempted rescission of the compromise could not be effectual without an offer to restore the amount so received, an amended complaint, which failed to allege that any such offer was made, but which affirmatively showed that it was not, was insufficient to show an offer of restoration.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 81; Dec. Dig. § 18.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Pauline Westerfeld and another, as executors of William Westerfeld, against the New York Life Insurance Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

See, also, 129 Cal. 68, 61 Pac. 667.

Van Ness & Redman and T. C. Van Ness, for appellants. Page, McCutchen, Harding & Knight and Page, McCutchen & Knight, for respondent.

SLOSS, J. This case comes before the court for the second time. The first appeals were by defendant from a judgment in favor of plaintiffs, and from an order denying a motion for new trial. Both judgment and order were reversed by this court. Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667. The appeals were first considered in department, and again, after a rehearing, in bank. The two opinions filed show most of the facts of the case sufficiently for the purposes of this appeal. Such additional facts as require consideration will be stated in the course of this opinion. After the cause had been remanded to the superior court the plaintiffs filed an amended complaint (designated as the third amended complaint). To this pleading the defendant interposed a demurrer, which was sustained. The plaintiffs not asking leave to amend, judgment was entered in favor of defendant. Plaintiffs appeal from the judgment.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The purpose of the action was to recover the amount of a policy of life insurance, claimed to have been issued by the defendant on the life of William Westerfeld. After the death of the insured, the defendant denied liability on the policy, and a compromise was effected between the said defendant and the plaintiffs, executors of the will of the insured, whereby the policy was surrendered to the defendant, and the sum of $2,666.66 was paid to plaintiffs in consideration of such surrender and of the release of all claims under said policy and one of earlier date. The right to recover, notwithstanding this release, was based on the contention of plaintiffs that they had been induced by fraudulent misrepresentations on the part of defendant to enter into the compromise agreement. Whether this action was founded on an attempted rescission of said compromise, or could be treated as an action for damages for the deceit practiced, was a question much discussed by counsel on the argument of the former appeal, and by the court in disposing of the appeal. The same question is again raised, the contention of appellants being that the third amended complaint is good in either aspect. Under the doctrine of the "law of the case" we think the decision in 129 Cal. 68, 58 Pac. 92, 61 Pac. 667, is conclusive against them on both branches of their argument. That doctrine has been recognized in this court from an early date. Dewey v. Gray, 2 Cal. 374. It has been recently defined in these terms: "The doctrine of the law of the case is this: That where upon an appeal the Supreme Court, in deciding the appeal, states in its opinion a principle or rule necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, * * * and this, although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." Tally v. Ganahl, 151 Cal. 418, 421, 90 Pac. 1049, 1050.

An examination of the opinions filed in disposing of the prior appeals in this case shows that the court decided: First, that the judgment recovered could not be sustained as one for damages for deceit, for the reason, inter alia, that the complaint did not allege such cause of action; and, second, that the plaintiffs could have no right of recovery based on a rescission of the contract of compromise, for the reason that they had not offered to return to defendant the $2,666.66 received by them under that contract.

Treating the subject of damages for deceit, the opinion of Commissioner Britt, which was adopted as the opinion of department 2, contains this language: "It is said in the first place that the action is to be treated, not as founded on the policy, but as in tort for deceit and to recover damages for the fraud practiced by defendant. The complaint, however, was not drawn upon that theory. It is, of course, true that a party who has been led by fraud into a settlement whereby he accepted less than is justly due him in extinguishment of legal claims may, on discovering the fraud, sue for the damage he has sustained without taking any steps to rescind the settlement; the law allows such action, * * * but it proceeds on the assumption that the plaintiff affirms the contract of compromise—abandons the cause of action which it superseded—and claims damage for the fraud which induced the new contract. In the present instance the plaintiffs distinctly aver in their complaint that they 'repudiated said settlement upon the ground that it was procured by fraud upon the part of defendant,' and demanded payment of the difference between the sum they had received and the 'amount due them under the terms of said policy issued February 19, 1894.' The frame of the complaint shows that the action is bottomed on the policy itself as a subsisting contract, and that in consequence of the fraud charged the release is treated as simply void."

After a rehearing and consideration of the case in bank, there was filed an opinion, prepared by Temple, J., which begins: "This case was decided in department, the opinion being written by Mr. Commissioner Britt. A rehearing was granted solely because it was thought by some members of the court that the complaint stated a cause of action for damages for deceit; it having been held in the department opinion that it did not. Upon mature consideration we think the decision rendered in department is right, and the opinion is adopted as the opinion of the court in bank, except as it may be deemed to have been qualified by this opinion." We find nothing in the bank opinion which we regard as qualifying the views expressed on the question under discussion. Indeed there are further expressions emphasizing the idea that the action is not one for damages for deceit. If the complaint on which the action was tried prior to the former appeal failed to state a cause of action for damages, the (third) amended complaint here in question occupies no stronger position. So far as any possible claim for damages is concerned, the pleading has not been changed. The amendments are directed entirely to the matter of rescission; the attempt being to show grounds for a failure to offer restoration of the money received by plaintiffs.

A reading of the above-quoted extracts from the opinions of Justice Temple and Commissioner Britt would seem to indicate clearly that the author of each opinion intended to decide that the complaint did not allege a cause of action for damages for deceit. The appellants, however, find in some language in Montgomery v. McLaury, 143 Cal. 89, 76 Pac. 964, warrant for the contention that the reversal on the former appeal was based, not on the insufficiency of the pleading, but upon an error in instructing the jury on the measure of damages. But if we were to grant the validity of this contention, the appellants would not be helped. The discussion of Mr. Commissioner Britt on the insufficiency of the complaint viewed as one for damages is based on the position that the action for damages and one based on rescission are necessarily inconsistent; that an action for damages for the deceit practiced in inducing the plaintiffs to enter into the compromise agreement could be sustained only on the theory that they affirmed that compromise agreement, whereas the entire framework of their complaint shows that they disclaimed and repudiated it. If this was not the real ground of the decision, such ground must be found, as is stated in Montgomery v. McLaury, supra, in the declaration that the trial court erred in instructing the jury on the measure of damages in an action to recover damages for deceit. The claim upon the policy surrendered by plaintiffs being disputed, the court, both in department and in bank, plainly and distinctly held that the measure of damages for the fraud inducing a surrender of the policy was not the face of the policy, but something less. It was the value of the disputed policy under all the circumstances. Quoting from the opinion of the Court of Appeals of New York in Gould v. Cayuga, etc., Bank, 99 N. Y. 333, 2 N. E. 16, Britt, C., thus defines the measure of damages for deceit in inducing a compromise of a contested claim: "What the plaintiff sold and what the defendant bought was not a conceded, but a disputed, claim, worth, therefore, ordinarily something less than its face for purposes of sale, transfer, or cancellation; how much less depending upon the continued solvency of the debtor, and the probability of its successful enforcement, and that upon the underlying facts of the case, and depending also upon the probable extent and expense of the anticipated litigation." This view was approved by the court in bank, and its soundness is not questioned in Montgomery v. McLaury. In any event, whether sound or not, the rule must be taken as binding on this appeal as the law of the case. It was a matter properly presented to the court for decision and one whose decision was proper as a guide to the court below on a new trial. Under these circumstances the decision of the point is to be deemed to be the law of the case on this appeal, even though it may not have been absolutely necessary to the determination of the question whether or not the judgment and order appealed from should be reversed. Table, etc., Co. v. Stranahan, 21 Cal. 549; Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212; Porter v. Muller, 112 Cal. 355, 356, 44 Pac. 729.

If the measure of damages for fraudulently inducing the compromise of a disputed claim be not the face of the claim, it is obvious that a complaint to recover such damages must contain some allegations by which the amount of plaintiffs' damage may be determined. A complaint should either allege that the disputed policy which the plaintiffs surrendered was worth a certain amount, or, at least in general terms, that by reason of the deceit and the consequent surrender plaintiffs have been damaged in a certain sum. There is, however, no such allegation in the complaint under consideration. The only averment which could be regarded as having any bearing upon the question of the amount of damages is one that "except for the fraud and deception practiced upon them by defendant, plaintiffs would not have surrendered said policy for any sum less than the sum of $10,000." This, of course, is no allegation of the value of the claim upon the policy. Whether or not the court on the former appeal held in terms that the complaint was insufficient as one seeking damages, we think that conclusion necessarily follows from the principles of law declared on that appeal, and now and here binding upon this court.

Viewed as an action based upon a rescission of the compromise contract, the plaintiffs are confronted by a similar difficulty. On the former appeal it was distinctly and unequivocally held that inasmuch as the plaintiffs had received the sum of $2,666.66 upon a compromise of the disputed claim, an attempted rescission of that compromise could not be effectual without an offer to restore the amount so received. It was further held that such offer was an essential part of the cause of action, and must have been made before the institution of the action. The third amended complaint now before us not only fails to allege that any such offer was made, but affirmatively shows that it was not. There are certain allegations which were evidently inserted for the purpose of showing a waiver of such offer or an excuse for the failure to make it, but we think they are not sufficient to accomplish this end. The allegations are that defendant waived an offer to restore the money by reason of these facts: That prior to the commencement of the action plaintiffs notified the defendant that unless the sum of $7,333.33 (the difference between the face of the policy and the amount paid in compromise) was paid to them a suit would be instituted against defendant to recover the sum, and thereupon defendant informed the plaintiffs that it was not then prepared to take any action with regard to plaintiffs' said claim against it, but that if plaintiffs would omit from the complaint in the action which they were about to commence all reference to fraud, and file a simple suit to recover the sum of $10,000 upon the policy, defendant would investigate the merits of the claim, and if it appeared to the defendant that plaintiffs had been defrauded, a settlement would be made, and that within 60 days from the commencement of said action defendant would notify plaintiffs whether said claim would be recognized, and defendant further proposed to plaintiffs that if they would proceed as suggested by defendant, it would stipulate that they might, in case defendant refused to pay said claim, file an amended complaint in said action, changing the cause of action alleged in said original complaint in any manner they might desire, and the action which should be set forth in the said amended complaint should be deemed to have been commenced at the date of the filing of said original complaint; that plaintiffs accepted said offer and filed on March 26, 1897, a complaint to recover $10,000 upon the policy, and defendant gave to plaintiffs a written stipulation in relation to the amending of said complaint as aforesaid. Thereafter defendant notified plaintiffs that it had investigated the merits of their claim, and that the facts were not as asserted by plaintiffs, and that the plaintiffs might proceed with their action against defendant. Thereupon plaintiffs filed their first amended complaint upon which this action was heretofore tried. We are unable to see that these facts in any way excused plaintiffs from offering to restore the amount received by them under the disputed claim. The stipulation proposed by defendant did no more than to delay the institution of an action based upon the alleged fraud. It preserved every right of the plaintiffs by the provision that an amended complaint might be filed which should have the same effect as if filed at the date of the commencement of the action. Upon the refusal of defendant to concede the justice of plaintiffs' claim the situation of the parties was exactly as if no action had ever been brought. The defendant had evidenced its intention of standing upon the compromise as a binding agreement. If plaintiffs desired to rescind that agreement, they were bound to perform the necessary preliminary step of offering to restore what they had received under it. They were in no wise hampered in doing this by the stipulation which they had made. Under the terms of that stipulation any new cause of action set up by them was to have been treated as though commenced at the time of filing the original complaint. The purpose of this stipulation evidently was to permit them to introduce a new cause of action without commencing a new proceeding. They could and should then have notified defendant of their rescission, made their tender, and upon its refusal filed their amended complaint, which would have been as effective as if filed in the first instance. What is herein said, together with the declarations of the court on the former appeals, furnishes a sufficient answer to the point that an offer of restoration contained in the third amended complaint itself is sufficient.

For these reasons we think the demurrer was rightly sustained. The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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12 Cal. App. 458

VINE v. VINE. (Civ. 605.)

(Court of Appeal, Third District, California. Jan. 21, 1910.)

1. Divorce (§§ 203, 291*)—Complaint—Causes of Action—Construction.

A complaint for divorce was in two counts. The first stated a sufficient cause for divorce for cruelty, but contained no reference to any community property, and made no mention of any minor child or children. The second followed the phrase, "For further and separate cause of action," and attempted to state a cause for divorce for willful neglect and alleged the existence of the community property and children, but failed to state sufficient facts to authorize a divorce decree for willful neglect. *Held* that, there being sufficient evidence to support a decree for plaintiff for cruelty, the clause quoted and the allegations with reference to willful neglect could be treated as surplusage, rendering the complaint sufficient to sustain a decree of divorce, and disposing of the property and children.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 594, 595, 775; Dec. Dig. §§ 203, 291.*]

2. Pleading (§ 403*)—Defective Complaint—Cured by Answer.

Deficiencies in a complaint may be cured by defendant's answer and cross-complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1345; Dec. Dig. § 403.*]

3. Appeal and Error (§ 907*)—Findings—Presumption.

It will be presumed on appeal, in the absence of anything shown to the contrary, that evidence in support of all the material findings was received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Carrie Vine against O. J. Vine. Judgment for plaintiff, and defendant appeals. Affirmed.

Edwards & Smith, for appellant. W. W. Huston and N. C. Caldwell, for respondent.

BURNETT, J. The appeal is from the judgment on the judgment roll alone. It is claimed that the court erred in overruling the demurrer to the second amended complaint. The latter contains what purport to be two causes of action. The demurrer was to each separate count and to the complaint as a whole. The so-called second count manifestly fails to state a cause of action. The first count clearly states sufficient facts to justify a divorce on the ground of cruelty, but there is no reference therein to any community property and no mention of any minor child or children of the parties. The decree granted plaintiff a divorce on the ground of cruelty and also of willful neglect, and disposed of certain community property and also awarded to plaintiff the custody of a minor child.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The contention of appellant is stated by him as follows: "The fact that all the allegations relative to the property and custody of the minor child are set forth in the second count and are not referred to in the first count, a judgment relative to the same could not stand if the second alleged cause of action did not state facts sufficient to constitute a cause of action although the first count might state sufficient facts. In other words, in this case, if the trial judge had sustained the demurrer to the second alleged cause of action, and plaintiff did not amend, his complaint would have ended with paragraph 5 of the first cause of action, and there would be no allegation relative to any property, nor as to the custody of the minor child, both of which the court disposed of in its judgment."

But passing by the claim of respondent that these latter considerations are incidental to an action for divorce and under a general prayer for relief may be determined without an allegation in reference to them, where the evidence justifies it, we are convinced that without prejudice to any substantial right of appellant the phrase "for a further and separate cause of action" may be disregarded and the complaint considered as the statement of a single cause of action. Thus the pleading answers every requirement and supports the judgment in every particular except the recital and finding as to willful neglect. This latter, however, may be rejected as entirely immaterial, since the judgment is just as effectual without it. The following statement of the Supreme Court in Murray v. Murray, 115 Cal. 277, 47 Pac. 40 (37 L. R. A. 626, 56 Am. St. Rep. 97), is in point here: "It is contended that a portion of the complaint introduced with the words 'for a second and separate cause of action, plaintiff avers,' etc., and which contains virtually all the allegations of the pleading relating to the fraudulent transfers from Owen to James Murray, is insufficient as a statement of a cause of action, in that it fails to allege the husband's failure to provide for the wife's support. The complaint is loosely drawn; but we think it apparent that it contains but one cause of action, and that the portion thereof to which appellants point this objection is not a real attempt to state a second transaction intended as an independent ground for plaintiff's suit but is only a detail of matters tending to show the extent, form, and nature of the relief to which she is entitled upon her single cause of action, viz., her husband's desertion and his failure to maintain her, and that the words designating it 'a separate cause of action' should be disregarded as an error which does not affect the substantial rights of the parties. Code Civ. Proc. § 475."

But aside from the foregoing, the answer and cross-complaint of defendant and the plaintiff's answer thereto supply the deficiency in the complaint when the so-called second count is excluded, and as we must assume, in the absence of anything shown to the contrary, that evidence of all the material findings was received without objection, it must be held that upon appellant's theory of the original pleading the error of the court in overruling the demurrer to the second count was rendered entirely harmless.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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12 Cal. App. 429

ROBINSON et al. v. LINSCOTT et al.

(Civ. 680.)

(Court of Appeal, First District, California. Jan. 11, 1910. Rehearing Denied by Supreme Court March 12, 1910.)

1. HIGHWAYS (§ 118*) — CONSTRUCTION — EXPENSE—APPLICATION OF GENERAL FUND OF COUNTY.

There is no conflict between Pol. Code, § 2643, subd. 10, permitting the cost of a road more than three miles long to be charged to the general county fund when too great to pay out of any of the road funds of the county, and section 2 of the highway act of February, 1883 (St. 1883, c. 10), under which municipalities constructing and maintaining their own streets and highways cannot be included within any county road district, and exempting them from paying for work and improvements in roads outside their corporate limits, or section 2653, providing for the levy on property of a road tax each year by the county board of supervisors.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 118.*]

2. STATUTES (§ 159*)—CONFLICTING STATUTES—WHICH PREVAILS.

In case of conflict between statutes, the last enacted must prevail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

3. HIGHWAYS (§ 122*) — TAXATION — DOUBLE TAXATION.

Pol. Code, § 2643, subd. 10, providing the cost of constructing a road more than three miles long may be charged to the general county fund when too great to pay out of any of the road funds of the county, section 2653 providing for the levy on property of a road tax each year by the county board, and section 2 of the highway act of February, 1883 (St. 1883, c. 10), compelling municipalities therein to construct and maintain their own streets and highways, do not present a case of double taxation.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 122.*]

4. HIGHWAYS (§ 46*)—AUTHORITY OF COUNTY BOARD—PURCHASING OR ACQUIRING ROAD.

The provision in Pol. Code, § 2643, subd. 10, authorizing the county board to acquire or construct a road more than three miles in length, charging the cost to the general county fund, authorizes the board to purchase or acquire a private road already constructed.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 46.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Certiorari by Horace R. Robinson and others against James A. Linscott and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Wyckoff & Gardner and Benj. K. Knight, for appellants. Cassin & Lucas, for respondents.

KERRIGAN, J. This is an appeal by the defendants, the board of supervisors of Santa Cruz county, from a judgment in a proceeding in certiorari, annulling certain proceedings of said board in reference to the acquisition of a public road.

The proceedings annulled were instituted by certain freeholders and residents of two certain road districts in Santa Cruz county for the purpose of laying out and opening a new public road in said districts of the length of about 10 miles to constitute a direct route from Pajaro valley through the mountains in a northerly direction to connect near Wright's with the road from San Jose to Santa Cruz. Pursuant to the requirements of section 2643 of the Political Code, under the provisions of which section these proceedings were conducted, three viewers were appointed. They filed their report, in which they recommended the opening of the road, and estimated the damages to the different property owners over whose land the road would pass. After a full hearing of the matter the board passed a resolution, and determined by a unanimous vote, all the members being present, to acquire said road, and that as the proposed road was to be more than three miles long, and the cost thereof would be in excess of $5,000, and too great to be borne by any of the road funds of the county, the cost of its construction should be paid out of the general county fund, and they so directed. Thereupon plaintiffs commenced these proceedings. They are residents and taxpayers of said county, and the properties on which they pay taxes are situated within the limits of two named municipal corporations in that county.

Under the provisions of what is commonly called the "Vrooman Act," these municipalities, like all others in the state, must construct and maintain their own streets and alleys, and, according to section 2 of the highway act of February, 1883 (St. 1883, p. 20), they cannot be included within any road district of the county, and are exempt from paying for work and improvements on roads situated without their corporate confines. This section 2 reads as follows: "Sec. 2. * * * Provided, further, that nothing herein contained shall be deemed to authorize the levy or collection of a road poll tax, or property road tax, within municipalities existing under the laws of this state, wherein work and improvements upon the streets is done by virtue of any law relating to street work and improvements within such municipality. Nor shall any such incorporated city or town be by the supervisors of the county included or embraced within any road district by them established under this act." The money in the general fund consists in part of taxes collected on property within the corporate limits of said municipalities; and plaintiffs contend that the contemplated expenditure would be not only in conflict with the section just quoted, but also would be double taxation, and that, therefore, section 2643 of the Political Code, authorizing such expenditure, is unconstitutional. Subdivision 10 of that section reads as follows: "* * * Whenever it is determined by a two-thirds vote of the board of supervisors of any county that the public convenience and necessity, demands the acquisition or construction of a road in excess of three miles in length the cost of which will be too great to pay out of any of the road funds of the county, the board of supervisors may by a resolution passed by a two-thirds vote of the board of supervisors determine to acquire or construct such road and thereafter may proceed to acquire or construct such road, and if the cost of such road when constructed shall exceed five thousand dollars, such cost may be charged to the general county fund, the general road fund or the district fund of the district or districts benefited."

No constitutional question is involved. The matter is wholly one of statutory regulation. Nor is there, in our opinion, any conflict between subdivision 10 of section 2643 and section 2 of the act of 1883, or section 2653 of the Political Code (providing for the levy of a road tax), but, if there be a conflict, subdivision 10 must prevail, because that subdivision was added to section 2643 on March 23, 1903 (St. 1903, p. 70), 20 years after the passage of either of the other sections.

Nor do the sections referred to by plaintiffs present a case of double taxation. When all the provisions relied upon by plaintiffs are carefully read, it is plain that the Legislature intended that the work and improvements on streets and roads lying within municipalities and road districts should be paid for by them respectively, but that where a road will be more than three miles long and will cost in excess of $5,000, and in the opinion of two-thirds of the members of the board of supervisors is a public necessity or will be of general public benefit, then the cost of its acquisition or construction should and may be paid from the general county fund; and in such a case there is no double taxation, although the amount paid by a given individual for road and street purposes may be thereby increased. This view is fully sustained by the case of Johnson v. Williams, 153 Cal. 368, 95 Pac. 655, decided since the commencement of this action. There it was claimed that because the city of Sacramento, a municipal corporation, was compelled to construct and maintain its own streets and bridges, that under section 2 of the act of 1883 it was exempt from taxes to pay for roads and bridges situated outside its corporate limits, and that section 4088 of the Political Code could not be construed as authorizing the issuance of bonds chargeable against the whole county. That section provides that any "county may incur * * * bonded indebtedness * * * for the purpose of building or constructing roads, bridges or highways." There the roads and bridges to be constructed and repaired were all outside the boundaries of the city of Sacramento. In all essential respects that case and this one are alike, and the Supreme Court, in banc, held that the Legislature could authorize the costs of public roads to be paid out of the county general fund, saying: "It is undoubtedly within the power of the legislative department to authorize recourse by a county to its general fund, consisting almost entirely of taxes collected from all parts of the county, for work on its public roads and highways lying outside of the limits of municipalities within the county, and our statutes show several instances of the exercise of this power, the validity of which has never been challenged. Section 2712 of the Political Code authorizes a portion of the cost of constructing or maintaining, or repairing any bridge, or the cost of purchasing a toll road, to be paid under certain circumstances by the supervisors from the county general fund. Subdivision 10 of section 2643 authorizes the cost of waterworks, oil tanks, etc., for the sprinkling of roads and the cost of sprinkling to be charged to such fund. The same subdivision authorizes the expense of a road three miles in length, the cost of which is too great to be paid out of the road fund, to be paid from the general county fund. Section 2647 of the Political Code contains a similar provision as to one-half the cost of fences constructed on certain public highways. There is no double taxation caused by such an expenditure to the owners of property within a municipality. What they are thereby caused to pay for the expense of public highways lying outside of the municipality is nothing more than their proportion of such expense as the legislative power deems should be borne by the whole county. The whole matter is purely one of statutory legislation." On the power of the Legislature in matters of taxation, see, also, In re Madera Irrigation Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Modesto Irrigation Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237; Lent v. Tillson, 72 Cal. 428, 14 Pac. 71.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

About six miles of the proposed highway is located along a private road which had already been constructed, and the owners thereof consented to give to the public the land over which it ran, but demanded the cost of the construction of the road as damages, part of which was allowed by the viewers. In reference to this matter plaintiffs contend that the board of supervisors had no authority to purchase or acquire a road already constructed. The answer to this contention is found in the plain language of the section, which in terms authorizes the board to "acquire or construct such road." It would be remarkable legislation if the county was compelled to parallel an already existing private road and could not purchase it. In the present case serious loss would be entailed upon the county, for the viewers and the board—on the theory that the road would be of benefit to the land through which it passed—placed the damages at several thousand dollars less than the cost of construction.

No other point need be discussed.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 515

ROBINSON v. WILLIAMS. (Civ. 601.)

(Court of Appeal, Third District, California. Jan. 27, 1910.)

VENUE (§ 5*)—WHERE ACTION MUST BE BROUGHT.

Code Civ. Proc. § 392, provides that an action for the recovery of real property or of an estate or interest therein or for the determination in any form of such right or interest must be tried in the county in which the property is situated. Section 395 provides that in other cases the action must be tried in the county in which defendant resides. Plaintiff's assignor agreed to sell certain land to defendant, the purchase price to be payable in installments, and it was provided that in the event of the vendee's failure to comply with its terms the agreement should become void, and the vendor entitled to any payments made. The complaint alleged that the vendee had failed and refused to pay, and that the vendor had conveyed to plaintiff all his right, title, and interest in and to the land, and plaintiff prayed for a decree foreclosing defendant's interest and decreeing plaintiff to be the owner of the lands, and that the moneys, previously paid by the vendee should be adjudged to belong to plaintiff. *Held*, that the action was properly brought in the county where the land was situated, and not in that of defendant's residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 7; Dec. Dig. § 5.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Chester E. Robinson against Charles M. Williams. From an order denying a motion for a change of venue, defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Frank G. Finlayson, for appellant. E. O. Edgerton and H. P. Brown, for respondent.

BURNETT, J. The appeal is from an order denying defendant's motion for a change of venue to the county of Los Angeles. The action was begun in Kings county wherein is located the real property in controversy. Defendant, at the time of the commencement of the action, resided and ever since has resided in the said county of Los Angeles, and his contention is that the case is one where the defendant is entitled to have the cause tried in the county of his residence. The decision depends upon the proper application of sections 392 and 395 of the Code of Civil Procedure to the scheme of the complaint. The former provides that, "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided in this Code: 1. For the recovery of real property or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property," etc., and, according to section 395, "In all other cases, the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." It follows, therefore, and it is conceded, that if the gist of the action involves the determination in any form of a right or interest in or to the said real property the order of the court below denying the motion must be affirmed.

The complaint sets forth a written agreement, of date June 1, 1906, executed by the defendant and plaintiff's assignor, one F. E. Robinson. Therein said Robinson agreed to sell to defendant the said real property for the sum of $10,000, payable as follows: $1,010 upon the execution and delivery of the agreement (receipt of which by the vendor was acknowledged in said agreement) and the balance in six annual installments. Of these installments $1,398 was payable on or before September 1, 1907. It was also provided in said agreement that in the event of the vendee's failure to comply with its terms the said agreement, at the option of the vendor or his assigns, should become void, and the vendor should be thereupon released from any obligation to convey said property "or to refund any of the payments theretofore made under this agreement, but second party shall thereby forfeit all right to said conveyance and to said payments." It is further alleged: "That there became due by the terms of said contract from said defendant, Charles M. Williams, to said F. E. Robinson, on the 1st day of September, 1907, the sum of $1,398, together with interest thereon at the rate of 7 per cent. per annum from the 1st day of June, 1906, to the 1st day of September, 1907. That said F. E. Robinson demanded of Charles M. Williams the payment of said $1,398, together with interest as aforesaid, from the said 1st day of September, 1907; but notwithstanding said demand, said defendant, Charles M. Williams, failed and refused, and ever since has failed and refused to pay said money." That on the 20th day of December, 1907, said F. E. Robinson, for a valuable consideration, granted, sold, and conveyed to plaintiff herein all his right, title, and interest in and to the lands described in the above-mentioned contract. "Wherefore, plaintiff prays judgment against said defendant that a decree be entered declaring that said defendant, Charles M. Williams, has no right, title, or interest in or to any of the lands or premises described in said contract, and that all moneys theretofore paid by said defendant Charles M. Williams under the terms of said contract be adjudged to belong to plaintiff; and that it be further decreed that plaintiff is the owner and is entitled to the possession of all of the lands described in said contract."

The claim of appellant is that "this action is not such an action as is governed by any of the provisions of section 392, because the cause of action set forth, or attempted to be set forth, in the complaint filed herein is twofold; i. e., a real or local and a personal or transitory action were joined in the same complaint." In this we think appellant is clearly in error. The real purpose of the complaint is to have it declared that the said agreement is no longer operative, and that defendant has no further claim to a conveyance. In effect the action is one to have it adjudged that a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may constitute a cloud upon said property and thereby injure the plaintiff, be canceled and all rights thereunder foreclosed. The determination of the right to retain the said payment is a mere incident to a judgment declaring that said agreement has been annulled by defendant's failure to comply with its terms.

Furthermore, the nature of an action is to be determined by the kind of relief that can be granted under the complaint. Whether plaintiff's assignor could maintain an action to have it determined that he is entitled to keep the money already in his possession need not be passed upon, but it is clear that in the complaint before us we find no warrant for a judgment decreeing that plaintiff is entitled to said money. He brings the action as assignee, and the only interest assigned is "all his right, title, and interest in and to the lands described in the above-mentioned contract." The conveyance of the lands, manifestly, would not transfer any right to the money which had theretofore been paid to the grantor. The reference to the money in the prayer of the complaint is therefore entirely beside the question, and must be disregarded. The foregoing views find support in the decisions of the Supreme Court.

In Fritts v. Camp, 94 Cal. 393, 29 Pac. 867, it is held, as stated in the syllabus, that: "An action to enjoin the defendants from dumping mining débris into a creek above the plaintiff's land, to his injury, under an adverse claim of an easement to flow and deposit the débris upon the plaintiff's premises, which the complaint alleges to be without right, and which the answer seeks to justify, is in effect an action to quiet the plaintiff's title as against the defendants' claim of the easement, within the meaning of section 5 of article 6 of the Constitution, requiring actions to quiet title to real estate to be commenced in the county in which the real estate, or any part thereof affected by the action, is situated."

In McFarland v. Martin, 144 Cal. 774, 78 Pac. 240, it is said: "The contention of the respondent that if at the trial the plaintiff should fail to establish his right to a conveyance he might, under his prayer for general relief, show himself entitled to an accounting of the affairs of the partnership and that they, therefore, are entitled to a change of the place of trial upon the ground that the complaint will thus authorize a judgment in a personal action is unavailing upon this appeal. The nature of the action is to be determined from the character of the complaint and from the character of the judgment which might be rendered upon a default thereto. * * * The present case is substantially the same in its facts as was the case of Booker v. Aitken, 140 Cal. 471, 74 Pac. 11. In that case the defendant held the title to certain real property which the plaintiff alleged had been acquired under such circumstances (setting forth the same in his complaint), that he held it in trust for the estate of the plaintiff's testator, and prayed that it be so adjudged, and that the defendant execute a conveyance of the same. The action was brought in the county in which the property was situated, and it was held that the fact that the defendant was a resident of another county did not give him a right to have the place of trial changed to such county."

In Grocers, etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 Pac. 120, it is similarly held that "an action by a purchaser for a specific performance of a contract for the sale of land and to compel a conveyance under an allegation that the purchase price has been paid pursuant to agreement from the proceeds of sales of fruits and lands made by defendant for which proceeds an accounting is sought, with judgment for a surplus alleged is in its nature an action to determine a right or interest in real property under subdivision 1 of section 392 of the Code of Civil Procedure, which, wherever commenced, must be tried upon demand by the defendant in the county where the land is situated. The accounting of profits to determine payment of the purchase money and to obtain judgment for any surplus is merely incidental to the real cause of action and relief sought, and does not change the nature of the action." Therein is reviewed the principal case (Smith v. Smith, 88 Cal. 572, 26 Pac. 356) upon which appellant herein relies, and it is pointed out that in said case personal property consisting of 26,000 sheep, with horses, wagons, harness, and camp equipage, together with real estate in Tuolumne and Merced counties, was by conveyance absolutely transferred to the defendant. In that action plaintiff "sought to have the transfer declared to be a mortgage, and alleged that the property so mortgaged had earned and paid funds more than enough to extinguish the mortgage indebtedness, and thus sought an accounting, a personal judgment for the excess and a reconveyance of the property transferred." Hence it was properly declared that the cause of action was twofold, owing to the very nature of the original transaction.

The cases cited by appellant are all easily distinguishable from the one before us, and to hold with his contention would be in opposition to the plain provisions of the statute. The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

12 Cal. App. 461

HILL v. MARYLAND CASUALTY CO.

(Civ. 729.)

(Court of Appeal, Second District, California. Jan. 22, 1910.)

1. INSURANCE (§ 670*)—EMPLOYERS' LIABILITY INSURANCE—FINDINGS.

A firm dissolved, adjusting all the firm assets and liabilities, except an indemnity policy, which it was agreed should be deposited with a third person to be held for the firm's protection until the termination of a servant's action against the firm. The deposit was not made, but the policy was retained by S., one of the partners, who thereafter, and while the action was pending on appeal, without the consent or knowledge of plaintiff, the other partner, delivered the policy to defendant, the insurer, together with a full release signed with the firm name. Thereafter S. died, and plaintiff sued to recover the amount of the judgment in the servant's action, which he had paid. *Held*, that a finding that, while defendant had notice of the dissolution, it had none of the agreement for the deposit of the policy, could not be construed as a finding on the question as to whether or not defendant had notice of the agreement that the policy should be held to protect the partners against any judgment which might be rendered against them in the servant's action, which notice was the material issue in the case, and failure to find thereon was error of law, requiring a reversal of an order denying plaintiff's motion for new trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1787; Dec. Dig. § 670.*]

2. INSURANCE (§ 665*)—EMPLOYERS' LIABILITY INSURANCE—SUFFICIENCY OF EVIDENCE.

In an action on an employers' liability insurance policy issued to a firm, a finding that defendant insurer had no notice of an agreement between plaintiff and his copartner on dissolution of the firm that the policy should be held by a third person to protect the firm against any judgment that might be recovered in a servant's personal injury action then pending against them *held* not supported by the evidence.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1707, 1709; Dec. Dig. § 665.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by J. A. Hill against the Maryland Casualty Company, a corporation. Judgment for defendant, and, from an order denying a new trial, plaintiff appeals. Reversed.

Haas, Garrett & Dunnigan, for appellant. Percy R. Wilson (Constan Jensen, of counsel), for respondent.

SHAW, J. Action to recover from defendant upon a policy of employers' liability insurance. Plaintiff and one Anton Swensen were partners engaged in the construction of what was known as the Third street tunnel in the city of Los Angeles. While so engaged defendant issued to the copartnership a policy of employers' liability insurance, whereby it agreed to indemnify the copartnership against liability for damages sustained by its employés on account of injury received by such employés while engaged in the prosecution of the work, the same to be paid when claim for damages so received was reduced to judgment and the judgment satisfied. On January 21, 1900, while the policy was in full force and effect, one Powley, an employé of the copartnership, was killed. His heirs instituted suit for damages, obtained judgment in the trial court, which on appeal was affirmed and thereafter duly satisfied by plaintiff.

On March 1, 1901, prior to the rendition of the judgment in the trial court, Hill and Swensen dissolved partnership, adjusting all of their partnership liabilities and assets, save and except as to the claim for damages in the Powley suit and the policy of insurance held by them as indemnity for such liability. At the same time they agreed that the policy of insurance should be held for their protection against any judgment which might be rendered in the Powley suit, and to that end it should be deposited in the hands of a third person to hold pending the final termination of such action. Such agreed deposit, however, was not made, but the policy was retained in the possession of Swensen, who on March 31, 1902, in consideration of $3,300 then paid to him by defendant, and while the Powley suit was pending on appeal, and without the consent or knowledge of Hill, delivered the policy to defendant, together with a full release thereof to which he had affixed the partnership name of Hill & Swensen. Swensen immediately left for Mexico, where he died on June 16, 1903. Plaintiff did not learn of the transaction between defendant and Swensen until after the latter's death, and did not receive any part of the proceeds of the settlement. The action was to recover the amount of the judgment rendered against Hill & Swensen in favor of the heirs of Powley. The court gave judgment for defendant. Plaintiff moved for a new trial, which was denied, and the appeal is from the order denying the same.

The grounds urged in support of a reversal of the order are errors of law in that the court failed to find on material issues, insufficiency of the evidence to support the findings, and newly discovered evidence.

It appears from the findings that on March 1, 1901, the tunnel having been completed, Hill and Swensen dissolved partnership, at which time the partnership assets, other than the policy of insurance, were divided between them, and as to all liabilities other than the claim of Powley's heirs they agreed in writing that each would pay one-half thereof; that at the time of the dissolution it was agreed between Hill and Swensen that the policy of insurance should be placed in the keeping of one Warren Gillelen to be held by him for the protection of the partners against any judgment which might be rendered against said copartnership in the suit then pending against them by the heirs of Powley, deceased, and that no other agreement was made between Hill and Swensen concerning the deposit or disposition of the policy of insurance; that the policy was in fact not so deposited, but possession thereof was, with the knowledge of plaintiff, retained by his copartner, Anton Swensen.

It is alleged in the complaint that at the time of the dissolution it was agreed "that said policy of insurance should be retained as the joint property of said copartners solely and for the purpose of liquidating any judgments that might be obtained in any of said suits brought to recover damages for accidents, as hereinbefore set out, and both of said partners agreed that said policy should be deposited with a third person and held solely for said purpose, and that neither said Swensen nor said Hill should have any right or power to use or dispose of said policy for any other purpose," and that defendant had notice of this agreement and notice that said policy was segregated by said partners for the purpose of liquidating any judgments that might result from said suits.

As to the disposition of the policy made by Hill and Swensen at the time of the dissolution of the copartnership, the court found that no other agreement as to the policy was made between the said copartners, other than that the same "should be deposited with one Warren Gillelen, to be held by him for the protection of the partners against any judgment which might be rendered against said copartners in said suit then pending against them by the children of said W. F. Powley, deceased." Fairly interpreted, we construe this finding to mean that it was agreed between Hill and Swensen: First, that the policy of insurance, whereby defendant had for a consideration covenanted to protect them from liability for damages resulting from the death of Powley, should not be sold or otherwise disposed of, but should be held for their joint and several protection against any judgment which might be obtained in the pending action against them on the part of the heirs of Powley; second, that, as a means of accomplishing the purpose agreed upon, it should be placed in the hands of Warren Gillelen. As this was the only agreement made, the chief point in the controversy, then is whether or not defendant had notice thereof. Upon this point the court found that, while defendant had notice of the dissolution of the copartnership shortly after it was made and prior to the settlement with Swensen, it "did not at any time have notice of the agreement or arrangement made between said partners, Swensen & Hill, for the deposit of said policy of insurance with said Warren Gillelen, and the defendant did not at any time have any knowledge of any agreement made between the said partners concerning the deposit of said policy of insurance." This finding is directed solely to the alleged fact that the policy was to be deposited with Gillelen, as to which fact only the court finds defendant did not have notice. It cannot be construed as a finding upon the question as to whether or not defendant had notice of the agreement that the policy should be held to protect Hill & Swensen against "any judgment which might be rendered against said copartners in said suit then pending against them by the children of said W. F. Powley, deceased." It by no means follows that, because defendant was without notice of the incidental agreement for depositing the policy with Gillelen, it was likewise without notice of that which constituted the material part of the agreement, namely, that the policy should be held for the purpose as found by the court. Notice of this agreement was the material issue in the case and the one upon which it is conceded plaintiff's right to recover depended. He was entitled to a direct finding covering the same. Failure to find thereon constituted an error of law for which the order denying plaintiff's motion for a new trial must be reversed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Even though it should be held that this finding as to notice was responsive to the issue raised, we are of the further opinion that thus construed it is unsupported by the evidence. The evidence of plaintiff tended to prove that, on numerous occasions while the Powley suit was pending on appeal, Marshall A. Frank and C. O. Hawley, both of whom were agents of defendant, endeavored to purchase the policy of insurance and obtain from both Hill and Swensen a release of any obligations thereunder, that Swensen was willing to sell the same and sign a release as to such obligations, but that plaintiff refused so to do. Plaintiff testifies that, on one of these occasions, "I told Mr. Frank that me and Mr. Swensen had dissolved partnership, and that we had agreed to leave that policy for the protection of the two of us, to protect that judgment. I says: 'If the Supreme Court decides in your favor, well and good. It won't cost you a five-cent piece. If it don't,' I says, 'all I want is the protection that policy affords to me.'" This was denied by Frank, and, if this was all the evidence, the finding should be sustained upon the ground of a substantial conflict of evidence bearing upon the issue; but Hill also says that he had the same conversation practically, with Mr. Hawley, who, as stated above, was likewise a recognized agent of defendant. We have looked in vain for any testimony on the part of Hawley which can be regarded as a denial of this conversation claimed to have been had with him by plaintiff. There was other testimony on the part of plaintiff as to a conversation had with Swensen, Hawley being present, when both Swensen and Hawley were urging him to assent to a release of defendant from its obligations under said policy of insurance, and wherein Hawley, in response to plaintiff's refusal to execute such release, stated that the company would fight any suit instituted to recover upon the policy and take the same to the Supreme Court. It is apparent that Hawley, when questioned as to these conversations, endeavored to and did evade giving direct answers. He does admit that he had such a conversation with plaintiff, but says: "I don't think I ever talked with the two of them (i. e., Hill and Swensen) at one time regarding this." Hawley also says that Hill told him several times that he did not want to sell the policy. It is apparent from Hawley's testimony that he well understood Hill's opposition to any disposal of the policy.

While the testimony of Hill, if contradicted, might be entitled to but little weight, it is nevertheless, in the absence of contradiction, when considered with facts found, sufficient to constitute prima facie evidence that defendant had notice of an agreement between Hill & Swensen under the terms of which the latter was deprived of the power and authority to act for the copartnership in releasing defendant from its obligation.

The order is reversed.

We concur: ALLEN, P. J.; TAGGART, J.

12 Cal. App. 466

PEOPLE v. ROMERO. (Cr. 111.)

(Court of Appeal, Third District, California. Jan. 22, 1910.)

1. LARCENY (§ 45*)—CATTLE THEFT—UNRECORDED BRANDS—EVIDENCE.

In a prosecution for larceny of a calf, evidence of the unrecorded brand on the mother was admissible as identification and to show ownership of the cow.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 136; Dec. Dig. § 45.*]

2. Witnesses (§ 277*) — Cross-Examination of Accused—Contradiction.

Where accused had testified in chief that the calf alleged to have been stolen belonged to him, it was proper to permit the state on cross-examination to ask him concerning a prior conversation with W. concerning the calf, in which he asked W. to ask prosecutor not to be too hard on him, for impeachment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979–984; Dec. Dig. § 277.*]

3. Criminal Law (§ 855*)—New Trial—Misconduct of Jury—Drinking Liquor.

That a juror drank liquor during recess of the court is insufficient to vitiate the verdict, where fellow jurors testified that the juror while sitting and deliberating as such was sober, intelligent, and in fit condition to understand and deliberate on the evidence, and determine the verdict.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 855.*]

Appeal from Superior Court, Modoc County; Chas. M. Head, Judge.

Charles Romero was convicted of grand larceny, and he appeals. Affirmed.

James H. Stewart and James Wylie, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. The defendant was convicted of the crime of grand larceny. He appeals from the judgment on the verdict and from the order denying his motion for a new trial. He claims that the evidence was insufficient to establish his guilt; his contention being based principally upon the fact that the evidence was circumstantial. The larceny charged was the felonious taking of a sucking calf about eight months old. The criticism of the evidence is addressed to two facts: First, that proof of the ownership of the mother of the calf depended upon the marks and brands upon the cow which had not been recorded as required by the statute; and, second, the circumstance that, while the defendant was killing and dressing the calf, the cow stood in the road bellowing and apparently showing much distress at the loss of her young, and, when driven away, broke from the pasture where she had been placed and returned the next morning and resumed her demonstrations of grief.

It seems to have been the theory of defendant's counsel that the marks and brands found on the cow were no evidence of ownership because they had not been recorded. In People v. Bolanger, 71 Cal. 17, 11 Pac. 799, it was held that an unrecorded mark is some evidence of ownership. But they were referred to by the witnesses as one of the means of identifying the animal as well as tending to show ownership. The marks and brands were shown to belong to the prosecuting witness who claimed the ownership of the cow, and there was evidence tending to prove ownership other than by these marks and brands as means of identification.

Ownership of the calf did not wholly depend upon the evidence given by the mother, to which no objection was offered, although the witnesses seem to have attached some importance to her demonstrations in confirming them in their belief, otherwise formed, that the calf killed by defendant belonged to his neighbor. Van Loan. We think there was sufficient evidence to support the verdict.

The defendant was a witness in his own behalf. After the defendant had rested, the court permitted him to be recalled for further cross-examination by the district attorney. The following proceedings occurred:

"By Mr. Jamison: Q. Did you have any conversation with Wade Williams, here in Alturas, Modoc county, Cal., on Main street of said town, or near the bridge over Pit river, at which conversation only yourself and Wade Williams was present and within hearing of it, in the latter part of October, 1906, just after you had been arrested for grand larceny on the charge of stealing a calf belonging to E. Van Loan, in which conversation, after asking Wade Williams to go your bond, you said to him: 'Tell old Charlie'—meaning the older brother of Wade Williams—'not to be too hard on me,' or words in substance and to that effect? Mr. Wylie: We object to that question on the ground that it is irrelevant, incompetent, and immaterial. This is his own witness, and he cannot impeach his own witness. The Court: I understood that he was recalled on cross-examination for further cross-examination. Mr. Wylie: We were through with him. He was examined in chief by us, then cross-examined, and we had closed our case and rested. He is not our witness now. We were through with him when we closed our case. (Argument by respective counsel.) The Court: The rule is very strict against compelling a defendant to be a witness against himself, and it is about adjourning time. I will think this matter over until to-morrow morning. (Court gives usual admonition to jury.) Court now takes a recess until to-morrow morning at half past nine o'clock.

"Court is called to order Thursday, April 15, 1909, Judge Head presiding. Present the defendant and his counsel; also the district attorney, jury, and officers of court. Charles Romero, the defendant, is on the witness stand for further cross-examination. Mr. Jamison: I will say this: Since last evening I have examined into the question that the gentlemen raised on the other side, that in any circumstances we would not have the right to ask the defendant the question propounded; and I am not satisfied that I am right in insisting that I ask the question. I will withdraw the question. The Court: Very well. Mr. Romero, you are excused from the witness stand. Mr. Jamison: That is all. The people rest."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The Supreme Court held in People v. Arrighini, 122 Cal. 121, 128, 54 Pac. 591, 593, that a defendant in a criminal case "cannot be cross-examined as to other matters (i. e., matters as to which he had not testified in chief) for the purpose of discrediting him by an attack upon his character." Nor could the defendant in this manner be compelled to testify against himself. It appears from the record, however, that the defendant had testified in chief that the calf belonged to him and in effect that he had not stolen it, for he testified that he "had stolen nothing." Having so testified, we think the question was a proper one. In any case, we think it quite clear that the jury were not influenced to defendant's prejudice by what took place.

Misconduct of a juryman is urged as ground for a new trial; the claim being that he indulged too freely in intoxicating drinks during the trial. There were some depositions submitted in support of this ground urged for a new trial, that, when not on duty as a juryman, Hayes did drink to excess, but several jurymen deposed that at no time during the proceedings while evidence was being taken or when the jury retired to consider their verdict was Hayes intoxicated, but, on the contrary, he was "sober during the trial and in all ways perfectly able to consider the evidence introduced at the trial of said cause and to intelligently exercise his judgment thereon." The trial judge occupies such relation to the trial before him as to be best able to judge of the actual condition of the juryman where the evidence is conflicting upon that point. People v. Sullivan, 129 Cal. 557, 62 Pac. 101. The fact that a juror drank intoxicating liquor during recess of the court will not vitiate the verdict if it appears from the affidavits of his fellow jurymen, as here, "that the juror while sitting or deliberating as a juror was sober, intelligent, and in a fit condition to understand and deliberate upon the evidence and determine the verdict." People v. Deegan, 88 Cal. 602, 26 Pac. 500.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

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12 Cal. App. 500

A. P. HOTALING & CO. v. BROGAN.

(Civ. 636.)

(Court of Appeal, Third District, California. Jan. 26, 1910.)

1. AFFIDAVITS (§ 11*)—SIGNATURE OF AFFIANT—NECESSITY.

An affidavit need not be signed by affiant.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 43; Dec. Dig. § 11.*]

2. ATTACHMENT (§ 88*)—SUFFICIENCY OF AFFIDAVIT.

Under Code Civ. Proc. § 538, providing that the clerk shall issue a writ of attachment upon receiving an affidavit by or on behalf of plaintiff, an affidavit in an attachment suit by a corporation showing that the affiant was president of the corporation, and personally made the affidavit, "in its behalf," and subscribed and swore to it, is sufficient, though the corporate name was attached to it, and it was subscribed with the corporate name before affiants.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 221–223; Dec. Dig. § 88.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by A. P. Hotaling & Co. against J. T. Brogan. From an order discharging a writ of attachment, plaintiff appeals. Reversed.

P. B. Lynch and Theodore A. Bell, for appellant. Joseph M. Raines, for respondent.

CHIPMAN, P. J. A writ of attachment issued in this case, which, upon motion of defendant, was discharged on the ground that the affidavit required by section 538, Code Civ. Proc., "is not properly or at all subscribed or sworn to on behalf of the said plaintiff." Plaintiff appeals from the order.

The affidavit reads, giving the title of court and cause: "State of California, City and County of San Francisco—ss.: R. M. Hotaling of the plaintiff corporation in the action above named, being duly sworn, deposes and says." (Then follows statement of the indebtedness to plaintiff and other facts required by the statute.) "And this deponent further says" (then follow still further facts required to be stated) "that affiant is the duly elected, qualified and acting president of the plaintiff corporation, and makes the affidavit in its behalf. A. P. Hotaling & Co., by R. M. Hotaling, President. Subscribed and sworn to before me this 29th day of March, 1909. Thomas S. Burns, Notary Public in and for the City and County of San Francisco, State of California." Section 538, Code Civ. Proc., provides that the clerk shall issue the writ of attachment "upon receiving an affidavit by or on behalf of plaintiff." All of the facts necessary to a sufficient affidavit appear in the body of the document here, leaving the sole question whether it sufficiently appears that the affidavit was made "by or on behalf of plaintiff."

In judging of its sufficiency in the particular called in question, we must refer to the entire affidavit. It plainly appears that R. M. Hotaling was, when he made the affidavit, the president of the corporation, and that he made it "in its behalf." That he was the person sworn and the person who made the affidavit and deposed to the facts embodied in it clearly appears from the body of the document which the notary certifies was subscribed and sworn to. It was not necessary that the affidavit be signed. Ede v. Johnson,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

15 Cal. 53; Pope v. Kirchner, 77 Cal. 152, 19 Pac. 264; State v. Washoe Co., 5 Nev. 320. The corporation could not make the affidavit, and the fact that its name is attached to it is of no importance, and involves no ambiguity upon the question as to who in fact made it. That the affiant affixed the corporate name, followed as it is, "By R. M. Hotaling, President," does not change the fact, clearly appearing, that he, Hotaling, personally made the affidavit and was the one who subscribed and swore to it. Taking the document as a whole there can be no doubt as to the essential statutory requirement appearing that a sufficient affidavit must be made "by or on behalf of the plaintiff." Nor do we doubt that the test suggested by respondent is here met, namely, that the affidavit must "be so clear and certain that an indictment for perjury may be sustained upon it if false."

Blyth & Fargo Co. v. Swensen et al., 7 Wyo. 303, 51 Pac. 873, is cited by both parties. In that case the affidavit read: "Plaintiff in the action above named, being duly sworn, deposes and says," etc., and is signed: "The Blyth & Fargo Co., by Sherman Fargo, Managing Agent. Subscribed and sworn to before me * * * John W. Sammon, Clerk." The court said: "It is not the affidavit of the plaintiff, for, being a company, it cannot take an oath. It is not the affidavit of the agent, for nowhere in the paper is it purported that the agent makes any statement whatever. The language is that 'the plaintiff deposes and says.'" In the case here, however, it appears clear enough that the plaintiff did not make the affidavit, but Hotaling made it; that he was a proper person to make it; and that he made it, as the statute authorized him to do, on behalf of the plaintiff.

We are well satisfied that the affidavit was sufficient, and the order is therefore reversed.

We concur: BURNETT, J.; HART, J.

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12 Cal. App. 471

PEOPLE v. SACRAMENTO BUTCHERS' PROTECTIVE ASS'N et al. (Cr. 96.)

(Court of Appeal, Third District, California. Jan. 22, 1910. Rehearing Denied by Supreme Court March 23, 1910.)

1. INDICTMENT AND INFORMATION (§ 137*)—VACATION—GROUNDS.

The trial court has no jurisdiction to entertain or grant a motion to set aside an information on any ground not specified in Pen. Code, § 995.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 480; Dec. Dig. § 137.*]

2. INDICTMENT AND INFORMATION (§ 137*)—VACATION — GROUNDS — INSUFFICIENCY OF PRELIMINARY TESTIMONY.

That the evidence presented before a magistrate was insufficient to establish probable cause for believing that the offense for which defendant was examined and held had been committed, and that he committed it, could not be properly urged or determined on a motion to vacate the information under Pen. Code, § 995, authorizing the court to grant such a motion only on the ground that accused had not been legally committed by the magistrate, or that the information had not been subscribed by the district attorney.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 483; Dec. Dig. § 137.*]

3. INDICTMENT AND INFORMATION (§ 140*)—VACATION—EVIDENCE SUSTAINING COMMITMENT—PRESUMPTION.

On the filing of an information corresponding with the terms of the commitment as to the nature of the offense indicated therein, it will be presumed that the evidence was sufficient to justify the magistrate in making the order.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 474, 475; Dec. Dig. § 140.*]

4. CRIMINAL LAW (§ 209*) — PRELIMINARY PROCEEDINGS—"COMPLAINT."

Under Pen. Code, §§ 811, 812, providing for the verification of facts by complainant prior to the issuance of a warrant of arrest by a magistrate, the instrument on which the warrant is authorized is not a "complaint" in the sense of a pleading, but is more like a deposition only, stating the facts verified by the informant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 415; Dec. Dig. § 209.*

For other definitions, see Words and Phrases, vol. 2, pp. 1363–1366.]

5. CRIMINAL LAW (§ 241*)—COMMITMENT—COMPLAINT.

A commitment of accused to answer an information is not alone based on the so-called "complaint," but on all the depositions taken before the magistrate; the information in turn being founded on the order of commitment, which order was not fatally defective because it did not describe the offense, but declared only that the offense "in the within depositions mentioned" has been committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 501, 502; Dec. Dig. § 241.*]

6. CRIMINAL LAW (§ 241*) — PRELIMINARY PROCEEDINGS — COMMITMENT — DESIGNATION OF OFFENSE.

Where commitment does not designate some offense of which the superior court has jurisdiction as having been committed by accused by a specific description referring therein to the alleged crime for which accused is ordered held under its generic description, the depositions on which the commitment is issued must show the commission of the offense to which the commitment refers, or disclose probable reason for defendant's connection with its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 502; Dec. Dig. § 241.*]

7. CRIMINAL LAW (§ 241*)—COMMITMENT—DESIGNATION OF OFFENSE.

Where a commitment undertakes to describe the offense for which accused is held for trial on a felony charge, such offense need not therein be stated with the technical nicety and precision required in an indictment or information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 502; Dec. Dig. § 241.*]

8. INDICTMENT AND INFORMATION (§ 41*)—AUTHORITY TO FILE—COMPLAINT—INDORSEMENT.

The district attorney has authority to file an information, though the commitment order was not indorsed on the complaint or on any of the other depositions taken by the magistrate.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 152; Dec. Dig. § 41.*]

9. CRIMINAL LAW (§ 241*) — PRELIMINARY PROCEEDINGS—COMMITMENT—"MADE."

Under Pen. Code, § 1428, requiring a justice of the peace to keep a docket in which must be entered each action and all proceedings therein, an order holding accused to answer is in fact and law "made" when it is entered on the justice's docket, so that a failure to indorse the same on the complaint or depositions does not deprive the order of its validity nor affect defendant's substantial rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 501; Dec. Dig. § 241.*

For other definitions, see Words and Phrases, vol. 5, pp. 4269, 4270.]

10. MONOPOLIES (§ 31*)—RESTRAINT OF TRADE — REGULATION OF PRICES — INDICTMENT — "TRUST."

St. 1907, c. 530, was entitled an act to define a trust and to provide criminal penalties and punishment of corporations, persons, firms, and associations, or persons connected with them, and to promote full competition in commerce and all classes of business in the state. Section 1 defines a "trust" (1) as a combination of capital, skill, or acts of two or more persons, etc., to create or carry on restrictions in trade or commerce, and (3) to prevent competition. An information charged accused as the managing agent of a meat company, pursuant to a combination and conspiracy into which they had previously entered with a butchers' association and the individual members thereof to execute and carry out certain agreements, the effect of which would be to destroy free competition in the retail meat business in Sacramento, and in furtherance of this design compelled R., who was engaged in such business there, to pay accused and the meat company higher prices for meats than accused and the company required the members of the association, each of whom were likewise engaged in such business, to pay for the same character of meats. *Held* to state all the elements of an offense within the first and third subdivisions of the law, and not defective for failure to allege that the meat company, accused, or the association were able to control the meat market; the gravamen of the offense being the combination to prevent competition in prices.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*

For other definitions, see Words and Phrases, vol. 8, pp. 7116–7124, 7822.]

11. MONOPOLIES (§ 31*)—RESTRAINT OF TRADE —INFORMATION.

The information was not defective for failure to disclose the identity of the persons referred to therein as "certain and divers persons, firms, partnerships, corporations and associations of persons constituting and composing" the association, "the names of whom are unknown except as herein stated," etc.; such persons being sufficiently identified by the allegation that they were members of the association to apprise defendant of the particular persons with whom he was charged with having been in league in maintaining an unlawful conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

12. INDICTMENT AND INFORMATION (§ 124*)—JOINDER OF PARTIES—CONSPIRATORS.

Where a conspiracy is charged, it is not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 327, 328; Dec. Dig. § 124.*]

13. MONOPOLIES (§ 31*)—INFORMATION—ACTS OF AGENT.

Where an information for conspiracy in restraint of trade in violation of the anti-trust act (St. 1907, c. 530) charged that accused, as managing agent of a meat company, and the company itself entered into an alleged combination and conspiracy with a butchers' association and the members thereof to restrict competition in the fresh meat business, the information sufficiently charged that accused acted in the transactions in question in his representative capacity as agent of the meat company and not independently thereof.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

14. MONOPOLIES (§ 29*)—ACTS OF AGENT—DEFENSES.

Where accused, as agent of a meat company, joined a conspiracy in restraint of trade, his act was that of his principal, so that, if he acted in excess of authority or without his principal's knowledge or sanction, such act was matter of defense.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. § 29.*]

15. MONOPOLIES (§ 31*)—RESTRAINT OF TRADE —INFORMATION.

An information for conspiracy in restraint of trade need not allege the dates on which the acts of the alleged conspirators were committed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

16. MONOPOLIES (§ 31*)—RESTRAINT OF TRADE —INFORMATION.

An information for conspiracy in restraint of trade need not allege the acts constituting the actual accomplishment of the object or purpose of the combination or conspiracy; such acts being mere probative facts and not the gist of the crime.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

17. CRIMINAL LAW (§ 86*)—OFFENSE—JURISDICTION.

Const. art. 6, § 5, after specifically providing the jurisdiction of the superior courts as to numerous subjects, declares, generally, that such courts shall have jurisdiction of "all cases of misdemeanors not otherwise provided for." Pen. Code, § 1425, confers on justices of the peace jurisdiction of all misdemeanors punishable by fine not exceeding $500 or imprisonment not exceeding six months, or both; and Sacramento City Charter (St. 1893, c. 7) art. 4, subd. 3, providing for the city justice court of such city, substantially follows section 1425 as to the justice's jurisdiction. *Held*, that since neither a justice court, generally, nor the justice court in Sacramento, has jurisdiction of the offense of violating the anti-trust act (St. 1907, c. 530), punishable by a fine of not less than $50 nor more than $5,000 or for imprisonment not less than six months or more than a year, or both, such offense committed in Sacramento was within the exclusive original jurisdiction of the superior court of Sacramento county, and this though the statute did not designate the jail or prison in which a sentence of imprisonment should be executed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 125; Dec. Dig. § 86.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

18. Criminal Law (§ 90*)—Courts—Police Courts—Jurisdiction—Misdemeanors.

Pol. Code, § 4426, regulating the jurisdiction of police courts in cities, does not confer on such courts any further jurisdiction as to misdemeanors than is conferred on justices of the peace generally by Pen. Code, § 1425.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 130; Dec. Dig. § 90.*]

19. Criminal Law (§ 90*)—Punishment—Misdemeanors.

The Legislature may confer on justices and police courts jurisdiction of all misdemeanors, regardless of the extent of punishment authorized; such courts being limited in the execution of their judgments of imprisonment to imprisonment in a local or county jail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 133; Dec. Dig. § 90.*]

20. Criminal Law (§ 27*)—Offenses—Felony or Misdemeanor.

Whether an offense is a felony or a misdemeanor is not determined by its characterization, but by the extent and mode of punishment prescribed or inflicted, where the superior court is clothed with a discretion in determining whether the sentence shall be executed by imprisonment either in the state's prison or a county jail, as provided by Pen. Code, § 17.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29, 31; Dec. Dig. § 27.*]

21. Criminal Law (§ 1159*)—Appeal—Verdict—Review of Evidence.

Where there is a substantial conflict in the evidence, a conviction will not be set aside on appeal because the verdict is not justified by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

22. Monopolies (§ 31*)—Criminal Combination—Conviction—Evidence.

In a prosecution for entering a combination in restraint of trade, in violation of the anti-trust act (St. 1907, c. 530), evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

23. Monopolies (§ 31*)—Restraint of Trade—Evidence.

Where defendants were indicted for a conspiracy in restraint of trade, the charge being that defendant meat company discriminated against R. in the sale of fresh meat in favor of the members of a butchers' association, evidence that R. was also discriminated against in the meat company's sale to him of smoked and cured meats, which discrimination was not disputed, was admissible as corroborative of the conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

24. Monopolies (§ 31*)—Combinations—Restraint of Trade—Evidence.

In a prosecution of a butchers' association and a meat company for conspiracy in restraint of trade, the association's by-laws were admissible to show the identity of the members of the association, its nature and purposes, and the object of its connection, if any, with the meat company, and, if possible, to prove the conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

25. Witnesses (§ 372*)—Cross-Examination—Interest.

In a prosecution for conspiracy in restraint of trade, the state was properly permitted on cross-examination of defendant's witnesses to ask whether they had contributed money toward the employment of counsel for the defense or had otherwise aided therein to show their interest in the proceeding.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1193–1195; Dec. Dig. § 372.*]

26. Conspiracy (§ 47*)—Proof—Circumstantial Evidence.

A criminal conspiracy may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 106; Dec. Dig. § 47.*]

27. Conspiracy (§ 48*)—Offenses—Instructions.

The court charged that common design is the essence of a conspiracy, and, while it is necessary to establish a conspiracy to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose, "it is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be and the detail of the plans and means by which the unlawful combination was to be effective"; but it is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. *Held*, that the meaning of the words quoted, in connection with the remainder of the instruction, was that no explicit or formal agreement need be proved, if it be satisfactorily proved that two or more persons came to a mutual understanding to accomplish a common and unlawful design, and was, therefore, not objectionable.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 109; Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 2, pp. 1454–1461; vol. 8, p. 7613.]

28. Monopolies (§ 31*) — Restraint of Trade—Instructions.

In a prosecution for conspiracy in restraint of trade, an instruction that if the jury should find from the evidence, beyond a reasonable doubt, that pursuant to a common understanding or agreement, express or tacit, between S., a member of a butchers' association, and defendant K., he agreed to and did charge R. more for the meat purchased by him of defendant company than was charged by defendant company to any other member of such association, with intent to lessen competition, the jury should convict, was proper; it being undisputed that S. was a member of the association and on several occasions remonstrated with defendant against his sale of fresh meat to R., and K. having testified that in making sales to R. he was governed by the desires of the members of the association.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

29. Monopolies (§ 10*) — Restraint of Trade—Criminal Conspiracy — Statutes.

St. 1907, c. 530, prohibiting combinations in restraint of trade, is not unconstitutional nor in conflict with Pen. Code, § 182, defining criminal conspiracies.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

J. O'Keefe was convicted of violating an act prohibiting combinations in restraint of trade, and he appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

L. T. Hatfield and J. W. Lilienthal, for appellant. U. S. Webb, Atty. Gen., J. Chas. Jones, Asst. Atty. Gen. (E. S. Wachhorst, Dist. Atty., and Frank F. Atkinson, Asst. Dist. Atty., of counsel), for the People.

HART, J. The defendant O'Keefe was convicted of violating certain provisions of an act of the Legislature of 1907 (St. 1907, p. 984, c. 530), entitled "An act to define trust and to provide criminal penalties and civil damages and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote full competition in commerce and all classes of business in the state." This appeal is by O'Keefe from the judgment and the order of the trial court denying him a new trial.

The information charges that the appellant, as the managing agent of the Western Meat Company, in pursuance of a combination and conspiracy into which they had previously entered with the Sacramento Butchers' Protective Association and the individual members thereof to execute and carry out certain contracts and agreements, the effect of the excution of which would be to destroy free competition in the retail meat business in said city of Sacramento, required and compelled one Albert Robinson, who was engaged in carrying on the retail meat business in said city, to pay to the appellant and said Western Meat Company higher prices for meats than the appellant and said company required the members of said Butchers' Protective Association, each of whom was likewise engaged in the retail meat business, to pay for the same class or character of meats. The refusal of the court to grant appellant's motion to set aside the information, the order overruling the demurrer to the information, insufficiency of the evidence to justify the verdict, alleged errors in admitting and rejecting certain evidence, alleged erroneous instructions given to the jury, and want of jurisdiction in the superior courts of criminal prosecutions under the act upon the provisions of which the information here is based, are the general reasons upon which a reversal of the judgment and the order is urged.

The act concerned here is what is commonly known as the "Cartwright anti-trust law," and, as its title and provisions clearly indicate, its purpose is to prevent such business combinations as will result in restrictions in trade or commerce, or, in other words, in the destruction of free competition in the manufacture, sale, and purchase of merchandise and other commodities for domestic use. Section 1 of said act reads, in part, as follows: "Section 1. A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or by any two or more of them for either, any or all of the following purposes: (1) To create or carry out restrictions in trade or commerce. * * * (3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. * * *"

1. The order denying the motion to set aside the information was proper. The grounds of the motion, stated in general language, are: That the defendant had not been legally committed by a magistrate; that the alleged offense set forth in the information is not the offense stated in the "complaint" filed in the magistrate's court, in that the offense sought to be charged in said complaint is a misdemeanor, while the information purports to charge a felony, and further that the "complaint" does not charge the alleged offense to have been committed against any particular person, while the information charges that the purported offense alleged therein was against one Albert Robinson; "that no order has been indorsed on the complaint holding defendant O'Keefe to answer to the charge contained in said complaint;" that no evidence was adduced before the magistrate authorizing the order holding O'Keefe to answer to the charge alleged in the "complaint." In addition to these, the motion advances some other grounds upon which it is claimed the information should be set aside; but they are not, in our judgment, of sufficient importance to require special notice. The only grounds specified by the Code upon which, upon a proper showing a trial court is authorized to set aside an information, are the following: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate; (2) That it was not subscribed by the district attorney of the county." Section 995, Pen. Code.

Under the familiar rule of construction, "expressio unius est exclusio alterius," a trial court is without jurisdiction to entertain or to grant a motion to set aside the information upon any ground other than those expressly specified in the designated section of the Penal Code. Assuming, therefore, that the evidence presented to the magistrate was altogether insufficient to establish probable cause for believing that the offense for which the defendant was examined and held had been committed and that he committed it, that question could not properly be urged and decided on a motion of the character of the one under consideration. Upon the filing of an information corresponding with the terms of the commitment as to the nature of the offense indicated in the latter, the presumption at once arises that the evidence of which said commitment is predicated was in all respects sufficient to justify the magistrate in making the order (Western Meat Co. v. Superior Court, 9 Cal. App. 538, 99 Pac. 976), and, as the Attorney General has very clearly pointed out in his brief, if the evidence taken before the magistrate was not sufficient to warrant the order of commitment, that question should have been inquired into and determined through some other proceeding than a motion to set aside the information. People v. Beach, 122 Cal. 37, 54 Pac. 369; People v. Lee Look, 143 Cal. 219, 76 Pac. 1028; Redmond v. State, 12 Kan. 172; People v. Cole, 127 Cal. 549, 59 Pac. 984; Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619

The point sought to be made by the appellant that there is a variance between the allegations of the "complaint," so-called, and those of the information, cannot be maintained. The instrument upon which the warrant of arrest is authorized to be issued by a magistrate in the case of an indictable offense is not a "complaint" in the sense that it is a pleading, but is practically a deposition only, setting forth the facts stated by the informant, sufficiently showing the commission of an offense and its perpetration by the defendant to justify the issuance of a warrant of arrest by the magistrate. Sections 811, 812, Pen. Code. The commitment is based upon all the depositions, and not alone upon the so-called "complaint," and the information is in turn founded upon the order of commitment. It is true that the order of commitment in the case at bar does not itself specifically designate or describe the offense for which the defendant was held, declaring only "that the offense in the within depositions mentioned has been committed," and it is, of course, also true, in the absence of a specific description in the order of commitment itself of some offense of which the superior court has jurisdiction, referring therein to the alleged crime for which the accused is ordered held under its generic description only, that if the depositions do not show the commission of the offense to which the commitment refers, or, showing it, do not disclose probable reason for the defendant's connection with its commission, then the commitment is without a prop to uphold it. But, as stated, the presumption prevails, on a motion to set aside an information, that the evidence or depositions taken by the magistrate sufficiently show that the offense mentioned in the commitment was committed by the defendant. In other words, as we have shown, upon such a motion as the one now under examination, the superior court cannot review and overrule the finding of the magistrate that the evidence taken before him was sufficient. People v. Beach, supra; People v. Lee Look, supra; People v. Sehorn, 116 Cal. 507, 48 Pac. 495; People v. Cole, supra.

If, however, the contention is that the so-called "complaint" or the deposition upon which the warrant was issued is necessarily made a part of the order of commitment by appropriate and sufficient words of reference, and, as thus viewed, the commitment designates or describes a distinctly different offense from that alleged in the information, thereby vitiating the latter (People v. Nogiri, 142 Cal. 596, 76 Pac. 490), it is clear that the point is not well taken. Said deposition, in our opinion, states an offense under the provisions of the anti-trust law against the defendant, and, while perhaps such offense is more fully and clearly stated in the information—a requisite strictly applied to criminal pleadings, but not to depositions before a magistrate—the offense charged in both documents is one and the same and for the violation of precisely the same provisions of the law. Redmond v. State, 12 Kan. 172, and People v. Lee Look, supra. No authority has been cited, and, indeed, none can be found, holding even where the commitment itself undertakes to describe the offense for which a defendant is held for trial upon a felony charge, that such offense must be stated therein with the technical nicety and precision required in an indictment or an information, and if the deposition upon which the warrant of arrest was issued in this case is to be treated as a part of the order of commitment (and certainly it cannot be so regarded), the inartificiality of its allegations or its insufficiency in stating with technical accuracy the offense for which the defendant was ordered committed (if these shortcomings could truly be attributed to it) cannot be the basis of a motion to set aside the information, if the latter charges the same offense.

It is further claimed that the district attorney was without authority to file the information because the order of commitment was not indorsed on the "complaint" or upon any of the other depositions taken by the magistrate. But the point is without merit. People v. Wilson, 93 Cal. 377, 28 Pac. 1061; People v. Wallace, 94 Cal. 499, 29 Pac. 950; People v. Tarbox, 115 Cal. 57, 46 Pac. 896. In People v. Wallace, supra, the court says: "When, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action upon his part is necessary in order to authorize the district attorney to file an information against a defendant for the offense named in the order, citing People v. Wilson, supra. The law requires the justice to keep a docket in which must be entered each action, and all proceedings therein (Pen. Code, § 1428); and we are of opinion that an order holding a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse upon the complaint or the depositions taken in no manner deprives the order of its validity, or affects any substantial right of a defendant."

2. The information substantially follows the language of the statute, and clearly states an offense under said statute. Briefly stated, the information accuses the defendant and the Western Meat Company (a corporation), of which he is the managing agent in the city of Sacramento, of having entered in-

to a combination and conspiracy with the Sacramento Butchers' Protective Association and other persons, whose names are alleged to be unknown, for the purpose of destroying full and free competition in the retail meat business, by entering into and carrying out "contracts and understandings" made in furtherance of such combination and conspiracy, and as the result thereof, and in the execution of said combination and conspiracy, sold to one Albert Robinson, a dealer in meats in said city of Sacramento, certain meat at a higher price than said O'Keefe, as agent of and for said company, sold the same class of meat to other persons, composing said association, and that by reason of said "compacts and understandings, plans, and schemes," so carried out by said alleged conspirators, said Robinson was compelled to, and did, pay to said company a higher price for meat purchased by him of the company than was paid by said other persons, constituting the said Butchers' Protective Association; that because of said agreement, compacts, plans, and schemes, so executed and carried out by said company, said O'Keefe and said association, and the members of said association, said alleged conspirators did then and there create and carry out "restrictions in trade and directly and indirectly preclude a free and unrestricted competition among the persons, firms, partnerships, and associations of persons constituting and composing the said Sacramento Butchers' Protective Association and other persons, purchasers, consumers, and dealers in the buying and selling of such article and commodity of merchandise, produce and commerce, to wit, meat," etc.

It will thus be observed that the information is, as we have already stated, substantially in the language of the statute, and, while the rule that an offense may properly be stated in the language of the statute defining such offense cannot be uniformly followed, it is in our opinion applicable in this case. We cannot conceive of any other elements which could be required to be alleged in order to state an offense under the first and third subdivisions of section 1 of the anti-trust law than those involved in the allegations of the information here. If the evidence shows, as the information clearly charges, that the defendants had entered into and formed a combination by the terms of which members of the Sacramento Butchers' Protective Association were privileged to purchase meat from the Western Meat Company at prices lower than those at which other persons engaged in the retail meat business were to be allowed to purchase such meat, thus practically confining the business of selling meat at retail to those only who were, fortunately, members of said association, then a plain and palpable violation of not only the spirit, but of the letter, of the statute is disclosed. It was not necessary, as counsel for appellant contend, to allege in the information that the meat company, the defendant O'Keefe, and the Butchers' Protective Association were in a position to control the market with respect to meat. As we have stated, the object of the statute is to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein, and if the purpose of such combination is to restrict trade or destroy competition in the sale and purchase of "merchandise, produce, or any commodity," or if such combination tends to restrict trade or to prevent free competition therein, such combination is against the letter and paramount object of the law. It is, therefore, not necessary to prove, and much less to allege in the information in order to state the offense denounced by the statute, that the defendants or any of the persons referred to in the information as being connected with the alleged combination were in a position to control the market in the sale and purchase of the commodity to which the charge relates.

As is said by the Supreme Court of Missouri, in the case of State v. Armour Packing Co., 173 Mo. 390, 73 S. W. 653 (61 L. R. A. 464, 96 Am. St. Rep. 515): "The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. * * * If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character."

In U. S. v. E. C. Knight Co., 156 U. S. 16, 15 Sup. Ct. 255 (39 L. Ed. 325), Chief Justice Fuller, speaking for the court, says: "Again all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." See State v. Slutz, 106 La. 182, 30 South. 298; State v. Thompson, 69 Conn. 720, 38 Atl. 868; U. S. v. McAndrews (C. C.) 149 Fed. 836; Bailey v. State, 42 Tex. Cr. R. 289, 59 S. W. 901.

It is further objected that the information is deficient in that it fails to disclose the identity of the persons referred to therein as "certain and divers persons, firms, partnerships, corporations and associations of persons constituting and composing said Sacramento Butchers' Protective Association, the names of whom are unknown except as herein stated," etc. The further contention is made that it does not appear from the information but that O'Keefe acted in the transactions with Robinson independently and without the knowledge and sanction of the Western Meat Company.

Neither of these propositions can be sustained. We have seen that the rule of criminal pleading is that the offense may be stated in the language of the statute if the latter fully and clearly describes the offense denounced as such by its provisions. There is nothing wanting in the language of the law under which the appellant was prosecuted and convicted to fully and accurately define the offense sought to be described therein. The information directly charges that the "persons, firms, partnerships," etc., whose names are alleged to be unknown, are members of the Sacramento Butchers' Protective Association, with which, it is further alleged, the appellant was connected in the inauguration and prosecution of the combination and conspiracy which the statute declares that it is unlawful to maintain. This was sufficient to so identify such persons as to apprise the appellant of the particular persons with whom he is charged with having been in league in the maintenance of an unlawful conspiracy.

In State v. Slutz, supra, it is said: "It is equally true that all the conspirators, whether known or unknown, need not be prosecuted at the same time, but an indictment charging a person known with having a conspiracy with other persons unknown or with other persons whose names are given, but who are not joined as defendants, is good." See 4 Ency. Plead. & Prac. pp. 709, 710; 8 Cyc. p. 663, note 99; State v. Thompson, 69 Conn. 720, 38 Atl. 868.

In other words, where conspiracy is charged, it is manifestly not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one. The gist of the offense is in the formation of the combination with others to do some unlawful act, and where the information, as here, charges a party with having entered into such a conspiracy with others, not made defendants, it is sufficient to refer to the latter in the accusatory pleading as "persons unknown." The "persons, firms, partnerships," etc., thus referred to in the information in the present case, are not made defendants as individual persons, but only so in so far as they constitute in the aggregate the Sacramento Butchers' Protective Association.

The information with clearness charges that O'Keefe, as manager and agent of the Western Meat Company, and said company itself, entered into the alleged combination and conspiracy with the Butchers' Protective Association and the members of said association. There is, therefore, no merit in the contention that, for aught that appears to the contrary from the allegations of the information, O'Keefe's alleged part in the conspiracy charged was without the knowledge or indorsement or assent of the company of which he was agent, If, as agent of the company, he joined the conspiracy, then certainly his act was that of the company, for the company acted through him, and his act attached to and became that of the company, as the act of a person actually committing a murder necessarily attaches to another who had been in the conspiracy to commit the murder, but who himself did no physical act toward the consummation of the object of the conspiracy. For the purposes of the information, the showing therein was sufficient to connect both the company and O'Keefe. But if, by becoming a member of the conspiracy, O'Keefe acted in excess of his authority as such agent, it then became a matter of defense for the meat company that he had thus exceeded his authority or acted in the premises without its knowledge or sanction.

In the case of Standard Oil Company v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015, where the company and its agent were jointly indicted under the antitrust law of Tennessee, the Supreme Court of that state uses the following language: "We are of the opinion that, independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents, who engage in the conspiracy, must be held to be parties to it, and be counted in computing the necessary number to constitute it. There are respectable authorities which tend to this conclusion"—citing People v. Duke, 19 Misc. Rep. 292, 44 N. Y. Supp. 336; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Eddy on Corporations, § 362. See, also, U. S. v. McAndrews (C. C.) 149 Fed. 823.

There is no substantial ground upon which the information may be held to be insufficient because the dates upon which the acts of the alleged conspirators committed in the prosecution of such conspiracy occurred are not definitely stated and fixed in the information. While in no manner vitiating the information, there was, in our opinion, no real necessity for alleging the acts constituting the actual accumplishment of the object or purpose of the combination or conspiracy. They constitute mere probative facts, since the gist of the crime of conspiracy is in its formation for an unlawful purpose, and, therefore, the averments of the information with reference to the times at which such acts were committed may be treated as surplusage. In other words, the legislative power of the government very properly treated combinations formed for the purpose of restricting trade or for any other unlawful purpose very much in the light in which a loaded gun is regarded—a dangerous instrument to be lying around loose—and upon the same principle which sustains local legislative measures declaring it to be a misdemeanor for one to have in his possession burglarious tools and instruments, deals with such combinations so that prevention may be accomplished before a cure becomes necessary. Therefore, the acts constituting the actual execution of the purpose of a criminal conspiracy are only evidence of the existence of such conspiracy, which is the ultimate fact to be proved in order to establish the wrongful act against which the statute inveighs.

3. It is further contended and argued with much earnestness that the superior court is without jurisdiction of criminal cases arising under the anti-trust law, but that such cases are cognizable alone in the justices' or police court. This contention is untenable, as we think we can without difficulty show.

The argument upon this point arises out of the failure of the Legislature to expressly declare, in the penal section of the statute, whether a violation of the provisions of the law constitutes a felony or a misdemeanor, or to expressly designate the jail or prison in which a party, upon conviction, may be imprisoned in the event the court, in the exercise of the discretion vested in it, elects to impose the penalty of imprisonment. The section referred to provides that any person, firm, partnership, etc., violating either or all of the provisions of "this act," shall be "punished by a fine of not less than fifty (50) dollars nor more than five thousand ($5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment." It is clear, from the nature and extent of the penal punishment which is authorized to be inflicted by the section mentioned, that neither the justices' courts nor the "police court" of the city of Sacramento, if such a court as the latter exists, have jurisdiction to try criminal cases arising under the statute. That this is true will readily become obvious upon reading section 5 of article 6 of the Constitution and from an examination of the statutes establishing the jurisdiction and powers of the inferior courts of the city of Sacramento as to misdemeanors.

The section of the Constitution adverted to, after specifically outlining the jurisdiction of the superior courts as to numerous subjects, provides generally that those courts shall have jurisdiction "of cases of misdemeanor not otherwise provided for." The jurisdiction of the class of misdemeanors to which the one in the case at bar belongs is not, as seen, expressly fixed, and, as we have stated, the penalty authorized to be imposed therefor is beyond the power of the justices' courts or of the "police court" of the city of Sacramento to impose, as will presently more clearly be made to appear. Hence, by the terms of the Constitution itself, the superior court of the county of Sacramento has exclusive jurisdiction of the crimes defined in the statute involved here.

The criminal jurisdiction of justices' courts is expressly confined, by the provisions of section 1425, Pen. Code, to "all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment, not exceeding six months, or by both such fine and imprisonment." The jurisdiction thus in general language conferred in criminal cases on justices' courts is in addition to the jurisdiction vested in such courts of other expressly enumerated offenses, for none of which, however, does the penalty exceed a fine of $500 or imprisonment for six months, or both.

There is no distinct court known and designated as the "police court" of the city of Sacramento, exercising the jurisdiction ordinarily given to municipal police courts. The city justice's court of said city exercises the jurisdiction and performs all the functions of a police court under the authority and power vested in it by section 1425, Pen. Code, supra, and not from any power which may be supposed to have been given it by the charter of the city of Sacramento, approved by the Legislature of 1893. St. 1893, p. 564. But even upon the assumption that there resided in the Legislature at the time of its approval of said charter the power to create by such means or through such instrumentality municipal courts or judicial tribunals of any character or to thus confer upon the city justices' courts judicial functions or duties in addition to those prescribed by statute—a power which it has been held did not exist in the Legislature at that time (Ex parte Sparks, 120 Cal. 395, 52 Pac. 715)—the provision of said charter with respect to the jurisdiction of the court thus sought to be set up or upon which new judicial functions were thus attempted to be conferred would not confer upon such court jurisdiction of the offenses denounced by the statute concerned here. Said provision (article 4 subd. 3, of said charter) substantially follows and copies all of section 1425, Pen. Code, and includes the following general language of said section: "And all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment."

Section 4426, Pol. Code, can have no application here, because, as we have seen, there does not exist in the city of Sacramento a police or any other municipal court, strictly speaking, and if there did exist there such a court the section referred to would clothe it with no more power as to misdemeanors than is conferred upon justices' courts generally by section 1425, Pen. Code.

Counsel for appellant declare that they are sustained in the point now under review by the case of Union Ice Co., etc., et al. v. H. H. Rose (Cal. App.) 104 Pac. 1006. But counsel cannot point out the remotest analogy between the case at bar and the one cited favorable to their contention upon the point under consideration. The cited case involved an application to the District Court of Appeal of the Second District for a writ of prohibition to restrain the respondent, a police court judge in the city of Los Angeles, from further attempting to entertain jurisdiction of a criminal prosecution inaugurated under the anti-trust law, upon the ground that the trial of the case was not, under the provisions of said law, within the jurisdiction of said court, and the appellate court, upholding the constitutionality of an act of the Legislature of 1901 (St. 1901, c. 81), creating police courts for cities of the 1½ class, to which the city of Los Angeles belongs, merely holds that the police courts so created, having been given, by section 2 of said act, jurisdiction of all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in cities where such police courts are held, are thus invested with jurisdiction to try cases involving offenses created by the Cartwright law. No one will undertake to challenge the soundness of that conclusion. Nor will the proposition be disputed that the Legislature has the right and the power to confer upon justices' and police courts jurisdiction of all misdemeanors, whatever may be the extent of the punishment authorized to be inflicted in the event of a conviction thereof; such courts being limited, of course, in the execution of their judgments of imprisonment to imprisonment in a local or county jail.

But it is at once perceivable upon reading the opinion in the cited case that it has no application here. There is, as we have shown, no police court in the city of Sacramento to which the provisions of the statute of 1901, supra, can apply. Besides, the court in that case in effect expresses the opinion that in those cities where the justices' and police courts are limited in their jurisdiction to the trial of misdemeanors for which no greater penalty than that prescribed by section 1425, Pen. Code, and section 4426, Pol. Code, is prescribed, the jurisdiction of criminal prosecutions under the anti-trust law is exclusively in the superior courts.

Nor does the fact that the Legislature omitted to specifically designate the jail or prison in which a sentence of imprisonment shall be executed under the statute here render any the less manifest the soundness of the proposition that jurisdiction of these cases is alone in the superior courts of those counties where jurisdiction thereof is not otherwise expressly apportioned or assigned. We are not called upon here to inquire whether the Legislature contemplated, in the enactment of the anti-trust law, that more than a county jail sentence of imprisonment should, under any circumstances, be imposed for a violation of its provisions, or intended to give to the superior courts the power to determine in any case whether an infraction of the law shall, by the nature of the punishment inflicted therefor, operate as a felony or as a misdemeanor. Pen. Code, § 17; People v. Gray, 137 Cal. 268, 70 Pac. 20; In re Sullivan, 3 Cal. App. 193, 84 Pac. 781. Nor (the court in the present case having treated the offense of the appellant as a misdemeanor by the nature of the punishment imposed) are we required to speculate as to what may be the effect, if any, upon the question of the validity of the penal section of the statute of a want of uniformity in the nature of the punishments imposed which may arise by reason of the jurisdiction in some instances being alone in the superior courts and in others exclusively in police courts. It is, nevertheless, true, as declared, that no proposition could be further removed from the realm of disputation than that, from the very nature and extent of the punishment prescribed, the justices' courts of the city of Sacramento are without jurisdiction of this class of misdemeanors. We judicially know that the judgments of imprisonment of justices' courts in criminal cases cannot be executed in any other than the county jail, except in those cases where, in certain cities, a justice's court performs the functions of a police court by taking cognizance of cases arising under city ordinances. We further know, judicially, that the judgments of the superior courts in criminal cases are, save in a few exceptional cases, executed either by imprisonment in a state prison or by the infliction of the death penalty. We can, therefore, judicially know and thus readily determine when a statutory offense is cognizable in the superior or the justice's court by reference to the nature and extent of the punishment prescribed, whether the statute designates such offense as a felony or a misdemeanor or as neither, or whether or not it specifies the jail or prison in which the judgment is to be executed. The truth is that, in the determination, whether a certain offense is a felony or a misdemeanor, no material aid is necessarily afforded by the mere characterization of the prohibited and penalized act as either the one or the other, since the nature and extent and mode of the punishment prescribed (or inflicted, where the superior court is clothed with a discretion of determining whether the sentence shall be executed by imprisonment either in a state prison or the county jail) is the sole test. Section 17, Pen. Code. For illustration, if a statute should denounce a certain act as a felony, but limited the power of punishment therefor to imprisonment in the county jail for a term not exceeding six months or a fine not exceeding $500, or by both such fine and imprisonment, it would readily appear, notwithstanding its designation by the statute as a felony, that, from the nature of the punishment prescribed, the act so denounced and designated could be nothing more than an ordinary misdemeanor, of which justices' courts have exclusive jurisdiction. Therefore, in the case at bar the nature of the punishment prescribed, being in excess of the punishment which a justice's court possesses the power to impose, fixes the jurisdiction in the superior court of Sacramento county as clearly and as unquestionably as though such jurisdiction were conferred in express terms.

4. The contention that the evidence does not justify the verdict is not sustained by the record. We shall not undertake an elaborate or detailed examination of the evidence as it is presented by the record and upon which the jury felt justified in adjudging the appellant guilty of the crime charged against him. It will suffice to say that the most that can be said of the evidence is that upon the question of the defendant's guilt there exists therein a substantial conflict, and in that state of the record the verdict only represents the exercise of a power which resides exclusively within the province of the jury.

We may, however, point to these facts which not only stand undisputed, but some of which the appellant himself admitted at the trial: That there existed in the city of Sacramento at the time of the trial an organization known as the Sacramento Butchers' Protective Association, which was composed of a large majority, if not all, with the exception of Albert Robinson, of the retail meat dealers in said city; that said Robinson was not a member of said association; that when he (Robinson) first applied to appellant to supply him with fresh meats to be sold in said city by retail, said appellant stated to him that, before he could give him a definite answer with regard to the proposition, he (appellant) would be required to first confer with the main office at San Francisco; that appellant did finally furnish Robinson with fresh meats, but uniformly charged him, variously, a cent and a cent and a half and two cents per pound more for meats than he charged the members of the association for the same kind of meats. Appellant was a witness for himself and admitted charging Robinson more for meats than he required members of the association to pay for the same class of meats, and the only explanation he had to offer for thus discriminating against Robinson was that he had a right to do so and had been so advised by his attorney. There was other testimony received which tended to establish the truth of the charge against the appellant. It was, for instance, shown that numerous complaints involving protests against selling meats to Robinson by the meat company were made to appellant by certain members of the Butchers' Association, and these complainants, except in the case of one who claimed that Robinson's place of business was situated nearer his place of business than the rules of the association permitted, were usually satisfied after inspecting Robinson's bills, disclosing that he was paying higher prices for meats than they were compelled to pay. It was, moreover, shown by the witness Brier, the stenographer who reported the testimony at the preliminary examination of the appellant, that at said examination O'Keefe was a witness and as such stated, among other things, that he (O'Keefe) "did not wish to encourage Robinson's trade, and also in his testimony said that he consulted with members of the Sacramento Butchers' Association about selling Robinson meat"; that O'Keefe further testified at said examination that "Robinson paid more for his meat than was paid by anybody else purchasing beef from his corporation at that time * * *"; that the "defendant also testified in his examination that the prices on meat sold by him to Robinson from January 4th to 11th, inclusive, were higher than the prices on the meats sold by him during that time to members of the Sacramento Butchers' Protective Association"; that he stated that "he did not propose to give any satisfaction to Robinson; that he knew that Robinson was not a member of the association; that he knew the other dealers getting meat here were members of that association; stated that he talked with members of the association about selling Robinson meat prior to the time Robinson came to see him in reference to buying meat from the Western Meat Company and prior to the time of selling Robinson meat; stated that it was his intention to consult as many of the members as he could before selling Robinson meats; that he would be governed by the desires of the association in dealing with Robinson; and that in his dealings with Robinson he was governed by the desires of the members of the association," etc.

There is considerable more testimony shown by the record corroborative of that of which the foregoing is a mere synopsis; but we have referred sufficiently to the proof adduced by the people to show that the jury were justified in reaching the conclusion that the charge alleged in the information was established by the degree of proof required in criminal cases. As we have before stated, the gist or gravamen of the crime charged in the information is the formation by the parties named therein of the conspiracy for the purpose of destroying free competition in the retail meat business in the city of Sacramento, and, therefore, except in so far as it serves as evidence of the crime charged, the actual execution of the conspiracy is immaterial. It is enough, in other words, to show that the purpose of the combination into which the parties referred to in the information entered was to carry out contracts and agreements and understandings between them in restraint of trade. Therefore, while it is not for this court to analyze the evidence with the purpose of ascertaining and passing upon its probative force and effect, it may well be suggested that with the uncontradicted evidence of the appellant's admissions, considered with the other circumstances to which we have briefly referred, what possible ground is there presented here for holding or even doubting that the conclusion of the jury that the purpose of the combination was to circumvent legitimate competition in the business of retailing meats in the city of Sacramento is not justified? It is idle and no answer to this position to say, as is the fact, that the appellant and each of the members of the Butchers' Protective Association positively denied that there ever was any "understanding, compact, or agreement" between the members of said association and the Western Meat Company or O'Keefe, as the manager of said company, "whereby it was understood or agreed in any manner, shape, or form that the Western Meat Company was to charge persons who did not belong to that association a higher or a different price for fresh meats than would be charged members of the Butchers' Protective Association"; for thus there is, plainly, brought about that conflict only which, under our system, forecloses interference by reviewing courts with the verdict of a jury or the findings of a court.

5. There are many alleged errors assigned in the rulings of the court upon questions involving the admission and rejection of evidence. All these we shall not undertake to specially review, for it will be sufficient to say that we have been unable, after a careful examination of these assignments, to find in any of the rulings, even if it might well be conceded that some of them were erroneous, anything prejudicial to the substantial rights of the appellant. But most of the objections interposed by appellant to the admission of certain testimony in their very nature bear upon the weight rather than upon the question of the competency or relevancy of such testimony. We may, however, point out a few of the overruled objections interposed by the defendant, and of which advantage is sought to be taken by appellant on this appeal, as illustrating the nonprejudicial effect of the rulings generally of the trial court, assuming that they or some of them were not strictly correct.

Certain witnesses, introduced by the people, testified that Robinson bought smoked and cured meats from the company and was charged therefor prices at which the same kind and quality of such meats were sold to other retailers, including the members of the Butchers' Association. There was no complaint, nor was there any dispute upon the proposition that the company discriminated in prices against Robinson in the sale of smoked and cured meats. The charge was, as the evidence clearly discloses, that the discrimination complained of was made on the sale of fresh meats. The testimony with regard to smoked or cured meats was, in some measure—whether large or small is unimportant—corroborative of the evidence of the conspiracy charged, showing that the meat company discriminated in favor of the members of the Butchers' Association and against Robinson in the sale of fresh meats. In other words, it emphasized to some extent the direct proof of the existence of the conspiracy by showing that as to those meats in which the members of the association did not deal the meat company did not discriminate against Robinson, but sold him such meats at normal prices. If such were not the purpose and effect of the testimony concerning cured or smoked meats, then it had none at all, and therefore, if erroneously admitted, could not have been prejudicial.

Objection was also made and overruled to the introduction in evidence by the people of the by-laws of the Butchers' Protective Association. We think the ruling was proper. The by-laws were not only proper for the purpose of disclosing the identity of the members of the association, but also to show the nature and purposes of the association and the object of its connection, if any, with the Western Meat Company. Indeed, if the by-laws tended in any manner to disclose the criminal conspiracy charged in the information, they were competent evidence for that purpose. Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; 10 Am. & Eng. Ency. of Law, p. 863. But if the by-laws failed to show, or contained nothing tending to disclose, the conspiracy charged, then, clearly, they were harmless as evidence, and their admission into the record could have had no prejudicial effect upon the rights of the appellant.

The further claim is made that the court erred to the detriment of the defendant by allowing the people to inquire of the members of the association, upon cross-examination, whether they contributed money toward the employment of counsel for the defense or otherwise aided the defendant in the preparation and maintenance of his defense. The object of this cross-examination was, of course, to show that the members of the association were more than ordinarily interested in the defense and were, therefore, partisans. It is not necessary to refer to authorities to show the manifest propriety of the cross-examination which appellant condemns. It is always proper for a party against whom a witness has given damaging testimony to show out of the mouth of the witness himself, if he can, or by other sources, if necessary, that such witness has an unusual interest in the outcome of the case, thus putting the jury in possession of a circumstance which may materially aid them in determining how much weight, if any, the testimony of such witness is entitled to.

Thus we have referred to some of the many objections against the validity of the judgment and order here based upon the rulings of the trial court upon the evidence, and, as suggested, they fairly represent the general character, in their effect upon the rights of the appellant, of those other objections to which we must forbear giving special attention.

6. Many of the instructions of the court are assailed as involving erroneous statements of the law applicable to the case. We shall not specially view all these assignments. The charge of the court, in its entirety, is full, clear, and fair upon all the vital points in the case.

The instructions by which the jury were told that the crime of conspiracy could be proved by circumstantial as well as by direct evidence were perfectly proper. No reason exists for requiring the proof of the crime of conspiracy to be by means of direct rather than by circumstantial evidence. No one has ever challenged the proposition that it is competent to prove any ultimate fact by circumstantial evidence. Indeed, it would be impossible to prove many cases of conspiracy or of any other crime without the aid of such evidence.

The italicized part of the following instruction is particularly criticised: "The common design is the essence of the charge, and while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, *it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the detail of the plans or means by which the unlawful combination was to be made effective.* It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators."

The evident and rational meaning of the portion of the foregoing instruction put in italics, when read with the remainder of said instruction, is that "no explicit or formal agreement" need be proved, if it be otherwise satisfactorily proved that two or more persons, in any manner, come to a mutual understanding to accomplish a common and unlawful design. In other words, the instruction in effect, and with reasonable clearness, declared to the jury that it is immaterial how or in what manner a conspiracy may be formed, so long as it sufficiently appears from the evidence that it was formed for an unlawful purpose. Several other instructions of similar import to the foregoing are complained of; but, in view of what we have said with regard to the quoted instruction, they need not be specially noticed.

The instruction to the effect that, if the jury should find from the evidence beyond a reasonable doubt that, in pursuance of an understanding or agreement, either express or tacit, between one F. J. Salcedo, a member of the Butchers' Association, and the defendant, whereby O'Keefe agreed to charge and did charge Albert Robinson more for the meat purchased by him of said defendant than was charged by said defendant to any member of said association, with the intent to lessen competition, it would be the duty of the jury to convict the defendant, was pertinent and based upon the testimony of the witness Brier and that of said Salcedo. It is not disputed that Salcedo was, at the times mentioned in the information, a member of the Butchers' Association, and it further appears that on several different occasions he personally remonstrated with the defendant against the sale of fresh meats to Robinson. It will be remembered that it was proved that the defendant himself admitted, while on the witness stand at the preliminary hearing of the charge against him, that in his dealings with Robinson "he was governed by the desires of the members of the association."

We have thus given attention to some of the more important objections to the charge of the court. As declared, the instructions as a whole with clearness correctly declared to the jury the rules by which they were to be governed in considering the evidence.

Some intimation is thrown out by counsel for the appellant that the law against trusts and unlawful combinations is out of joint with the Constitution and as well conflicts with the law on the subject of criminal conspiracies as defined by the Penal Code. The specific ground for the constitutional objection to the law is not pointed out, and we do not think any such objection can be shown. Nor can we perceive any incompatibility, if such an objection could be successfully urged against the anti-trust law, between the latter and the Code section pertaining to the crime of conspiracy. The essence or gist of conspiracy here, as is true of the crime as it is defined by section 182, Pen. Code, is in the formation and maintenance of the conspiracy for the purpose of accomplishing some unlawful object, or also under the Code, for the purpose of accomplishing a lawful object by unlawful means. As we have before declared, in the case at bar the actual acts constituting the crystallization of the object of the conspiracy constitute evidence only of the unlawful combination or agreement to co-operate together for the purpose of destroying free competition in trade, and the only distinction, which is none at all, so far as the crime itself is concerned, between the conspiracy charged here and that with which the Code section deals, is that the former is made to apply to a different object from any mentioned in the Code.

We have found nothing in the record demanding a reversal of either the judgment or the order, and both are, therefore, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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12 Cal. App. 521

Ex parte SNOWDEN. (Cr. 143.)

(Court of Appeal, Second District, California. Jan. 27, 1910.)

1. MUNICIPAL CORPORATIONS (§ 592*) — STREETS—REGULATIONS.

A city ordinance, prohibiting driving at a rate greater than 30 miles per hour in a city, is not contrary to the declaration of policy of the state in punishing speeding upon public highways, because the Motor Vehicle Act (Act March 22, 1905; St. 1905, c. 612), as amended by St. 1907, p. 915, prohibits all motor vehicles from traveling on any of the streets at a greater rate than 15 miles an hour.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311–1314; Dec. Dig. § 592.*]

2. MUNICIPAL CORPORATIONS (§ 592*)—POLICE POWER—ORDINANCES.

The mere fact that the state in the exercise of the police power has made certain regulations does not prohibit a municipality from exacting additional requirements, so long as there be no conflict between the two; and, so long as the requirements of the municipal bylaw are not in themselves pernicious as being unreasonable or discriminatory, both will stand.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311–1314; Dec. Dig. § 592.*]

3. MUNICIPAL CORPORATIONS (§ 592*)—POLICE POWER—ORDINANCE.

Motor Vehicle Act (Act March 22, 1905; St. 1905, c. 612), as amended by St. 1907, p. 915, prohibits motor vehicles from traveling on any streets at a greater rate of speed than 15 miles an hour. A city ordinance provided that wherever the rate of speed should be in excess of 30 miles an hour, the violation should be a misdemeanor, punishable in all cases by imprisonment. The punishment imposed by the motor vehicle act consisted of fine or imprisonment, or both. *Held*, that the effect of the ordinance was to impose a punishment for a more flagrant violation of the rights of the public than the Legislature had seen fit to punish, and did not violate the rule that municipalities may not by ordinance prescribe a different penalty for the same offense dealt with by an act of the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311–1314; Dec. Dig. § 592.*]

4. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCES—FORM AND REQUISITES.

The fact that a city ordinance purports to amend another ordinance does not render it the less a complete enactment in itself, where it is such in fact, since the title to an ordinance is not required by law, and if it should be given one, it is no part of the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 112.*]

5. MUNICIPAL CORPORATIONS (§ 703*)—POLICE POWER—USE OF HIGHWAY.

An ordinance regulating the speed of vehicles in streets is not an attempt to interfere with the reasonable exercise of the right of passage over a public highway.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509–1513; Dec. Dig. § 703.*]

6. MUNICIPAL CORPORATIONS (§ 703*)—POLICE POWER—REGULATION OF HIGHWAY.

A city ordinance limiting the speed of vehicles in the streets was not discriminatory, as it is the right of every municipality to regulate rates of speed of travel on its own streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509–1513; Dec. Dig. § 703.*]

7. MUNICIPAL CORPORATIONS (§ 703*)—ORDINANCES—POLICE POWER.

An ordinance limiting the speed of vehicles in the streets of a city was not invalid because it made speed limitations inapplicable to vehicles operated by the fire and police departments.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509–1513; Dec. Dig. § 703.*]

8. MUNICIPAL CORPORATIONS (§ 703*)—POLICE POWER—ORDINANCES.

An ordinance, making it a misdemeanor, punishable by imprisonment, to operate a vehicle at a speed in excess of 30 miles an hour, is not invalid on the theory that only motor vehicles can make such a speed, and hence that the provision discriminates against the operators of motor vehicles.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509–1513; Dec. Dig. § 703.*]

9. MUNICIPAL CORPORATIONS (§ 592*)—ORDINANCES—VALIDITY.

A city ordinance made it an offense, punishable by imprisonment from 10 to 50 days, for one to operate a vehicle on a street at a speed in excess of 30 miles an hour, and for second and subsequent offenses 30 days to six months. *Held*, that the penalty was not so excessive as to be invalid as out of harmony with the laws of the state, as under the state law one who had exceeded the rate of 20 miles might have been penalized in the sum of $100 and imprisonment for 30 days.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 592.*]

Application of J. H. Snowden for a writ of habeas corpus to obtain his release from the police of the city of Los Angeles, on a charge of violating the traffic ordinance of such city. Writ discharged, and prisoner remanded to custody.

Frank James, for petitioner. Guy Eddie, Pros. Atty., and W. W. Dodge, Deputy Pros. Atty., for respondent.

PER CURIAM. Petitioner is in the custody of the chief of police of the city of Los Angeles charged with violating section 26, Ordinance No. 15,775, of that city, known as the "Traffic Ordinance," as the same was amended by ordinance No. 18,435, by driving an automobile upon and along one of the streets of Los Angeles at a rate of speed greater than 30 miles per hour.

In support of his contention that he is illegally detained, the petitioner urges that the ordinance is void for the following reasons: (1) It is in conflict with the state motor vehicle act (St. 1905, c. 612), as amended March 23, 1907, because it attempts to enact regulations at variance with the provisions of that act, and prescribes a different penalty for an act made a crime and punishable under a general law; (2) that the ordinance discriminates against owners and drivers of motor vehicles; and (3) that the ordinance is unreasonable, and the punishment imposed thereby excessive and out of harmony with the laws of the state prescribing penalties for misdemeanors.

The motor vehicle act as approved March 22, 1905, and amended in 1907 (St. 1907, p. 915), provides for the registration of motor vehicles and the issuance of license certificates to their owners and operators, and the regulation of the rates of speed at which such vehicles may be operated upon the public highways of the state, etc. For streets and highways within the boundaries of incorporated cities and towns it provides a maximum rate of speed of one mile in six minutes, where the contiguous territory is "closely built up," and one mile in four minutes elsewhere in such cities and towns. Graduated penalties for first and subsequent violations of the law are prescribed in the form of fines or imprisonment, or both. The act also limits the power of the local authorities to pass, enforce, or maintain any ordinance, rule, or regulation with reference to motor vehicles, except in accordance with certain express conditions stated in the act, and declares all ordinances, rules, and regulations in force at the time of the passage of the act which do not conform to such limitations to be of no validity or effect.

The ordinance complies with the requirement of the act that the penalties for violation of the speed laws by motor vehicles shall be similar to, and no greater than, those fixed for other vehicles, by making the provisions of the ordinance in this respect applicable generally to all vehicles. Tested by the other limitations of the act, the ordinance does not attempt to exclude or prohibit any licensed owner or operator of a motor vehicle from making any use of the highway permitted by the act itself; it contains no provision affecting the registration or numbering of motor vehicles; prescribes no slower rate of speed for them; and does not regulate their use of the streets of the city in any manner contrary to or inconsistent with the provisions of the act. It divides the city into two districts, and fixes a maximum rate of speed for one of them at 12 miles per hour, and for the other at 20 miles per hour, and provides penalties of fines or imprisonment, or both, graduated in severity for first and subsequent offenses, for all violations of its speed regulations where the speed attained does not exceed 30 miles per hour. In cases in which the rate of speed is in excess of 30 miles per hour, section 26 declares the violation to be a misdemeanor and punishable in all cases by imprisonment in the city jail; the terms being, for the first offense, from 10 to 50 days; for the second and subsequent offenses, 30 days to 6 months.

Conceding, but not deciding, that the motor vehicle act is operative in the city of Los Angeles, it prohibits all motor vehicles from traveling on any of the streets of that city at a greater rate of speed than 15 miles per hour, so that it cannot be said that in prohibiting driving at a higher rate than 30 miles per hour the city is acting contrary to the declaration of policy of the state in punishing speeding upon public highways. The effect of section 26 of the ordinance is only to impose a punishment for a more flagrant violation of the rights of the public than the Legislature has seen fit to punish. This section does not attempt to legalize that which the state has declared unlawful, nor has it violated the rule that municipalities may not by ordinance prescribe a different penalty for the same offense which was declared in In re Sic, 73 Cal. 142, 14 Pac. 405, and which has been approved in several later cases. Ex parte Stephen, 114 Cal. 282, 46 Pac. 86.

It is well settled that the mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there be no conflict between the two, and so long as the requirements of the municipal by-law are not in themselves pernicious as being unreasonable or discriminatory, both will stand. Ex parte Hong Shen, 98 Cal. 681, 33 Pac. 799; Ex parte Hoffman, 155 Cal. 114, 99 Pac. 517. The decision in Ex parte Hoffman, relied upon by petitioner, is not inconsistent with the position that the ordinance before us is valid, but rather sustains the view that it is. It was there held that an ordinance which established a higher standard for pure milk than that fixed by the state law was not void because in conflict with the general law. Says Henshaw, J., writing the opinion: "The state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the state, urban and rural, but it may often, and does often, happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities, so that it becomes proper, and even necessary, for municipalities to add to state regulations provisions adapted to their special requirements. Such is the nature of the legislation here questioned." Elsewhere in the opinion it is said: "If the city of Los Angeles had provided that milk might be vended which contained less percentum of milk fats than that exacted by the state law, there would be presented a plain case of conflict. The municipality would be endeavoring to legalize that which the state had declared to be unlawful. But what the city has in fact done has been to impose not fewer, but additional, qualifications upon the milk which may be vended to its consumer."

The power of the city to pass such an ordinance is not open to question. The provisions of the freeholders' charter of the city as it stood at the time of the passage of the original ordinance were sufficient to authorize its passage. But if it were conceded that they were not, the amendments to the charter adopted in 1909, prior to the passage of ordinance No. 18,435, expressly confer such authority on the city. The last-named ordinance is a complete enactment in itself. That it purports to amend ordinance No. 15,775 does not affect the matter, since a title to an ordinance is not required by law; and, if it be given one, this is no part of the ordinance.

The ordinance does not attempt to interfere with the reasonable exercise of the "right of passage over public highways" so strenuously contended for by petitioner; it merely endeavors to regulate and prevent abuse in the exercise of that right. The distinction between the two is quite obvious. The "right of passage" of motor vehicles is not specially restricted because the owners or operators thereof are required to conform to local traffic regulations made applicable to all kinds of vehicles. All other travelers are required to conform to the local ordinances of the communities in which they travel, and it is no discrimination against one class that they, along with all others, should be required to adapt themselves to the rules governing the local residents of a city in the use of its streets. There is nothing unusual or discriminatory in this effect of the ordinance, as it is the universally acknowledged right and province of each municipality to regulate the rates of speed of travel upon its own streets. Dillon's Municipal Corporations (4th Ed.) § 393; 28 Cyc. 907. Of course, it could not be, and is not, contended that this power extends to the exclusion of the motor vehicle from the use of the streets of a municipality.

The ordinance is not invalid because one of its sections makes the speed limitations inapplicable to the vehicles operated by the fire and police departments of the city. The cases cited by petitioner under this head do not sustain the contrary of this, while in the case of State v. Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305, it was held that an ordinance which prescribed a maximum rate of speed of six miles per hour, without excepting the city fire department from its operation, was unreasonable and invalid to that extent, although otherwise a valid exercise of the police power, which might be enforced as to all others violating its provisions. The exemptions made by section 15 of the ordinance were proper, and did not invalidate the ordinance.

Petitioner contends that, notwithstanding the ordinance by its terms includes all kinds of vehicles, the speed limit fixed by section 26 is so high that only motor vehicles can make the speed necessary to violate this provision, and therefore the section discriminates against the operators of motor vehicles. Respondent suggests that the effect of this argument is to establish that the motor vehicle act is special legislation, and discriminative in favor of operators of motor vehicles, not by implication or inference, but expressly, as indicated by its title as well as its terms, and therefore the act itself is invalid, measured by the same rule. We are inclined to the view that there is enough difference between power-impelled and animal-drawn vehicles to justify their separate classification for purposes of legislation, but we are not required to pass upon this question, nor to assume that there is such a difference that we can say that an ordinance including both was intended to affect only one. The purpose of the ordinance would be accomplished, the protection of human life and limbs as well as property, by deterring every vehicle, whatever its kind, from passing through the streets at an excessive rate of speed.

The reasonableness of a regulation such as we are here considering depends upon its purpose and the conditions requiring it to be made. It is intended to prohibit, not to punish. The offense created by its violation is malum prohibitum, and not malum in se, and the penalty must in such cases rest largely in the sound discretion of the legislative branch of the government, and be such as is necessary to prevent the act which is prohibited. It being deterrent and not punitive in character, there is no element of compensation for a breach to be considered. It is apparent, from the fact that section 26 was added after the penalties of fine or imprisonment had been on trial some time, that these provisions had proven ineffective. Not because of the mildness of the penalties before provided, as the terms of imprisonment were equally severe with those contained in section 26, but because, we must assume, the alternative of fine had been imposed by the courts instead of the imprisonment. The ordinance had failed to deter the rapid operator from violating the law, and as a remedy for this the legislative branch withdrew from the courts, in aggravated cases, the power to impose a fine. We find no point at which the reasonableness of the exercise of this discretion is open to attack.

The penalty attached to the charge upon which petitioner is held is not so excessive as to be out of harmony with the laws of the state. For the first offense he might, under the state law, had he exceeded the rate of 20 miles per hour, have been penalized in the sum of $100 and imprisonment for 30 days in the county jail. Under the provisions of section 26 of the ordinance, for exceeding the rate of 30 miles per hour he may be imprisoned not less than 10 nor more than 50 days in the city jail. That the hazard to life and property increase with the speed of the machine and the corresponding difficulty of keeping it under control must be conceded. Indeed, it would seem not unreasonable to say that, where the state Legislature, after a careful consideration of the subject, has declared that 15 miles per hour is a proper maximum for speed in an incorporated city, and a municipality has extended this limit to 20 miles per hour, the person who drives his machine through the streets of a city at a rate in excess of 30 miles per hour is guilty of wantonly defying all law and restraint.

We have not examined all the sections of the Penal Code to ascertain whether any of the misdemeanors therein mentioned are made punishable by imprisonment for the first offense, without the alternative of a fine. The only sections of the Penal Code, to which our attention has been called, which purport to regulate the conduct of a person who, for love of sport, or speed, is willing to imperil the lives of others are sections 348 and 349. The first of these makes it a felony for the captain of a steamboat carrying passengers, who, either from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, allows the boilers of his boat to be overstrained so as to burst and thereby endanger human life. Section 349 makes it a felony for an engineer or person having charge of a boiler to do practically the same thing. No injury to a human being is necessary to establish the offense in either case. The endangering of human life is alone sufficient. In such cases no intent is requisite, as they, like the matter before us, come within the purview of the last clause of section 20 of the Penal Code: "In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."

If the carrying of passengers by the owner of an automobile for hire at a rate in excess of 30 miles per hour were to be declared by the Legislature to so endanger their lives as to justify the classification of this act with that of the steamboat captain, covered by section 348—that is, to be a felony—we are of opinion that it could not well be said that such legislation was unreasonable or out of harmony with the other penal legislation of the state. The imperiling or endangering of the lives of citizens upon the streets of a city by the same act may, we think, be made punishable with imprisonment in the city jail for from 10 to 50 days without subjecting the ordinance doing this to the criticism that it is out of harmony with the other penal laws of the state because imposing an excessive punishment.

The ordinance being valid on the grounds stated, it becomes unnecessary to consider the question whether or not it can be sustained as legislation relating to a "municipal affair" under section 6, art. 11, of the state Constitution. The writ is therefore discharged, and the prisoner remanded to the custody of the chief of police.

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12 Cal. App. 498

Ex parte KAWAGUCHI. (Cr. 127.)

(Court of Appeal, Third District, California. Jan. 24, 1910.)

1. Criminal Law (§ 238*) — Commitment—Sufficiency of Evidence.

Evidence *held* sufficient to support a magistrate's order of commitment for trial under Pen. Code, § 872, providing that if it appears from the magistrate's examination that a public offense has been committed, and there is sufficient cause to believe accused guilty, the magistrate must order that he be held for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 493; Dec. Dig. § 238.*]

2. Habeas Corpus (§ 30*)—Scope of Remedy.

Habeas corpus cannot be made to serve the office of a writ of error, and hence where there was competent evidence before a committing magistrate tending to establish an offense, and sufficiently showing the connection of the person committed with the perpetration thereof, it is immaterial, upon his application for habeas corpus for insufficiency of the evidence, that hearsay evidence was also admitted.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

3. Criminal Law (§ 238*)—Preliminary Examination—Evidence—Corpus Delicti.

Upon a magistrate's preliminary examination, evidence that a homicide had been committed, and that the coroner upon holding an inquest had examined decedent's body and found a number of knife and gunshot wounds, an admission of accused that he had inflicted a knife wound on decedent, and testimony of another that he was well acquainted with decedent, and that the body over which the inquest was held was his, sufficiently proved the corpus delicti so as to warrant reception of evidence by the magistrate tending to connect accused with the commission of the alleged crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 493; Dec. Dig. § 238.*]

Application by T. Kawaguchi for a writ of habeas corpus. Writ denied, and petitioner remanded.

McCurdy & McCurdy and S. Luke Howe, for appellant. Frank Atkinson, Deputy Dist. Atty., for the People.

HART, J. The petitioner is held in custody by the sheriff of Sacramento county under an order of commitment for the crime of murder; said order having been made on the 27th day of December, 1909, by the justice of the peace of Sacramento township, in said county, acting in his ex officio capacity of magistrate. The petitioner now claims that the magistrate was without jurisdiction to commit him for trial for the alleged reason that the evidence upon which said commitment is founded is insufficient to disclose that a public offense was committed, or, if such offense is sufficiently shown, that there is not enough evidence to establish "sufficient cause to believe the defendant (petitioner) guilty thereof." Pen. Code, § 872.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A copy of the stenographer's transcript of the testimony received by the magistrate at the examination of the charge accompanies the petition here and is made a part thereof, and it is very clear, from an examination of said testimony, that the contention of the petitioner cannot be sustained. The testimony discloses that the homicide occurred at Courtland, in Sacramento county, on or about the 12th day of May, 1909. The deceased, one Nagatani, and the petitioner and two other Japanese, who were jointly charged with the petitioner for the crime of murder in the deposition upon which the warrant of arrest was issued, had been, on the day of the homicide, drinking together at the boarding house of one Arinobu, at Courtland, and that at that time they were all apparently on friendly terms with each other. Finally, all these parties left the drinking place together, going out of the building and to the rear thereof. Subsequently all but the deceased returned to the boarding house, and, when Arinobu made inquiry as to the whereabouts of the deceased, he was told by the petitioner and one Daimaru that he had been killed. The petitioner then admitted to Arinobu that he had inflicted a knife wound in the abdomen of the deceased. The coroner testified that, upon holding an inquest to determine the cause of the death of Nagatani, he examined the dead body and found therein a number of knife and gunshot wounds. Arinobu testified that he was well acquainted with the deceased, and declared that the dead body was that of Nagatani.

The foregoing is a brief résumé of the facts proved before the magistrate, and obviously they are sufficient to support the order of commitment.

Counsel for petitioner point out a mass of hearsay, and therefore incompetent, testimony which was given before the magistrate, and insist that such testimony is insufficient to justify the order of commitment. If all the testimony upon which the commitment was ordered was identically of the same character as that to which we refer, there might perhaps be some basis for the claim that the order committing the petitioner for trial was without authority or beyond the power of the magistrate, for the law does not contemplate that a party shall be put upon his trial for a felony under an information having for its sole support a commitment based entirely upon hearsay or incompetent evidence. Such evidence is in fact no evidence at all. But, as we have shown, there is competent evidence disclosed by the transcript tending to establish the offense and sufficiently showing the petitioner's connection with the perpetration thereof, and, therefore, we are, manifestly, not concerned in this proceeding with the rulings of the magistrate admitting hearsay evidence. In other words, the remedy here applied for cannot be made to serve the office of a writ of error.

The suggestion that the corpus delicti was not sufficiently proved to warrant the reception of evidence by the magistrate tending to connect the petitioner with the commission of the alleged crime is without merit, as must be manifest from the facts which we have shown were proved at the examination of the charge.

The magistrate was fully warranted in committing the petitioner for trial for the crime of murder upon the evidence presented before him, and the writ must, therefore, be discharged, and the petitioner remanded. Such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

12 Cal. App. 503

PACIFIC UNION CLUB v. COMMERCIAL UNION ASSUR. CO. (Civ. 666.)

(Court of Appeal, Third District, California. Jan. 26, 1910.)

1. APPEAL AND ERROR (§ 917*)—SUSTAINING DEMURRER TO ANSWER—REVIEW.

The court, on appeal from a judgment for plaintiff rendered after sustaining a demurrer to the answer, must assume, under the admissions of the demurrer, that defendant could prove the allegations of the answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706–3709; Dec. Dig. § 917.*]

2. INSURANCE (§ 421*) — FIRE INSURANCE — CONSTRUCTION OF CONTRACT.

Where a policy insured against all direct loss by fire except as thereinafter provided, and then declared that insurer should not be liable for loss caused directly or indirectly by earthquake, the exception was loss by fire caused directly or indirectly by earthquake, and not loss caused directly or indirectly by earthquake alone.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 421.*]

3. INSURANCE (§ 427*) — FIRE POLICY — ACTIONS—NATURE.

An action on a fire policy exempting insurer from liability for loss by fire caused directly or indirectly by earthquake, etc., is an action on contract and not in tort, and the rule of proximate cause in actions for breach of contract, and not for torts, governs in determining whether, under the contract, the excepted peril directly or indirectly induced the happening of the peril insured against.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1139–1143; Dec. Dig. § 427.*]

4. DAMAGES (§ 23*)—BREACH OF CONTRACT—PROXIMATE DAMAGES.

The rule that the damages recoverable for breach of contract are only such as may reasonably be supposed to have been within the contemplation of the parties when making the contract, as the probable result of a breach, and that other damages are too remote, applies where plaintiff seeks to recover under a covenant in the contract as well as where defendant seeks to evade liability under the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. § 23.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. INSURANCE (§ 427*) — FIRE INSURANCE — CONSTRUCTION OF CONTRACT — PROXIMATE CAUSE.

A policy insuring against all direct loss by fire, except as thereinafter provided, and then declaring that insurer shall not be liable for loss caused directly or indirectly by earthquake, makes insurer liable for loss by fire where an earthquake broke the water mains, causing the water to escape so that the fire department of the city had no water with which to extinguish the fire occurring the next day; the earthquake not being, in legal contemplation, the cause of the fire, for none of the parties contemplated that earthquake might cut off the water supply.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1139–1143; Dec. Dig. § 427.*]

6. INSURANCE (§ 146*) — CONTRACTS — CONSTRUCTION.

In case of doubt, the words of a contract of insurance must be construed in favor of insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294–298; Dec. Dig. § 146.*]

7. INSURANCE (§ 146*) — FIRE INSURANCE — CONTRACTS—CONSTRUCTION.

Exceptions in a fire policy must be liberally construed in favor of insured and strongly construed against insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292–298; Dec. Dig. § 146.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Pacific Union Club against the Commercial Union Assurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Otto Irving Wise, for appellant. Pillsbury, Madison & Sutro, for respondent.

CHIPMAN, P. J. Action on fire insurance policy issued by defendant upon plaintiff's property situated in the city of San Francisco. A demurrer to the amended answer was sustained, and, defendant declining to further amend, judgment passed for plaintiff in the sum of $1,765, from which defendant appeals. The fire which is alleged to have destroyed plaintiff's property occurred April 19, 1906, the day following the earthquake of April 18th of that year.

The company insured the plaintiff for the term of 12 months "against all direct loss or damage by fire except as hereinafter provided," and among other exceptions was the following: "This company shall not be liable for loss caused directly or indirectly by invasion, earthquake, riot, civil war or commotion. * * *" Basing its defense upon this exception, it is alleged in the answer as follows: "Defendant alleges that in and by the policy of insurance in this action sued upon it was provided, and by and between the plaintiff and the defendant stipulated and agreed, that the defendant company should not be liable for loss caused directly or indirectly by earthquake. And defendant alleges that on the 18th day of April, 1906, the city of San Francisco was visited by a severe earthquake shock between the hours of 5 and 6 o'clock a. m., and by other and similar shocks following said first-mentioned shock; that on the said 18th day of April, 1906, and at the time of the happening of said earthquake shock and of the fires hereinafter referred to following thereupon, there was in said city of San Francisco a fire department fully and sufficiently equipped with fire engine and hose and other proper and sufficient appurtenances for the extinguishing of fires in said city, and there was up to the time of the first of said shocks a water system in use in said city, with water mains, pipes, and hydrants throughout said city and in and along the streets thereof with an abundant supply of water for the extinguishment of fires and for the extinguishing of all of the fires following upon said earthquake shocks, including those immediately caused thereby and other fires resulting therefrom, and all other fires occurring upon said 18th day of April, 1906. And defendant alleges that all of said fires, and each thereof, could and in the usual and ordinary course of events would have been extinguished if said water supply had been available at the time of the breaking out of said fires, and each thereof, and thereafter during said 18th day of April, 1906; but defendant alleges the fact to be that the said earthquake shocks, or some one or more thereof, broke the mains and piping through which said supply of water was brought to and into said city of San Francisco, and shut off said supply of water from said city and from the portion of said city wherein the property described in the complaint was situate, and wherein the fire by which said property was destroyed had its origin, and that by reason of the breaking of said pipes and the shutting off of the water the said fire department was without water to play upon said fires and upon said last-mentioned fire, by reason whereof said fires and said last-mentioned fire spread throughout said city, and said last-mentioned fire reached to said property of the plaintiff and destroyed said property. And defendant alleges that said fire would not have spread and said property would not have been destroyed and said loss would not have resulted if said water supply had not been cut off as in this amended answer set forth."

Assuming, as we must, under the admissions of the demurrer, that defendant could have proven that the cutting off of the water supply caused the loss, but for which no loss would have occurred, the sole question is: Was the loss in legal contemplation caused either directly or indirectly by the excepted peril, earthquake?

Respondent states that the theory upon which the trial court held the amended answer to be insufficient was that it sought to make the "absence of an extrinsic saving power," namely, the water supply, cut off by earthquake, the cause of the loss. It is appellant's contention that "where, as here, there is independently of the first antecedent cause (the lack of water) another cause (the earthquake) but for which such first antecedent cause of the immediate cause (the fire) would not have been operative in bringing about through such immediate cause the final result, and but for which such final result would not have occurred, then, in that case, the independent cause (in this case the earthquake) must, in legal contemplation, be considered the efficient proximate cause to which the result is attributable."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In simple phrase, as we understand the contention, the earthquake broke the water mains and deprived the city of water to fight the fire, and the fire subsequently found its way to plaintiff's property and destroyed it, and hence the earthquake became "the efficient proximate cause to which the result is attributable." Appellant seeks to support this view by quite a number of adjudged cases of most of which McAfee et al. v. Crofford, 13 How. 447, 14 L. Ed. 217, is a typical example. Plaintiffs in error, assisted by others, carried off and frightened away certain slaves who were working for defendant in error on his plantation. By reason of the forced absence of these slaves defendant suffered the loss of much cordwood, through flood, and also damage to and loss of his crops by intrusion of cattle and hogs. The case went to the Supreme Court, and it was there held, affirming the verdict of the jury for defendant in error, that the taking and frightening away of the slaves, the agency through which the damage complained of would have been obviated, could in law have been considered the cause of the losses suffered, and that whether such was or was not the fact was a question for the jury. The application is thus made: The slaves were the saving agency which, if used in the ordinary and expected way, would have averted the injury, as here the water system and water supply would have obviated the injury had it not been cut off, and the plaintiffs in error were related to that case as the earthquake is to the case here. These are cases of recovery based upon the tortious acts of the persons sued.

Other cases are cited where companies were held liable for fire losses for breach of their contract to have water available to extinguish fires. In New York Express Co. v. Traders' Ins. Co., 132 Mass. 377, 42 Am. Rep. 440, the court said: "So far as the question what constitutes proximate cause is concerned, the same considerations apply equally in actions of contract as in actions of tort." In that case the insurance was against loss by fire. The vessel in which the goods were lost met with a collision and was sunk. "With the collision fire instantaneously broke out"; but the fire did not reach the goods, which were lost wholly from the sinking of the vessel. The fire, however, so disabled the engine that the pumps could not be operated, and but for this the water flowing into the breach made by the collision could have been pumped out and the vessel driven into shallow water, and, also, but for which water could have been pumped and the fire extinguished. The court said: "If means and appliances were at hand by which that result (the loss) could have been avoided, and the intervention of a new agency, namely, that of fire, prevented their use, then the fire was the proximate and immediate cause of the loss. It added a new element of destruction which rendered it impossible to control or prevent the consequences which would naturally follow from the collision." It was in this connection that the court stated the rule as to what constitutes proximate cause. It may be doubted whether the fire as an antecedent cause in that case may be likened to the earthquake in the present case, for the fire and collision were nearly, if not in fact, coincident, and the effect of the fire was shown to have been so immediate and direct as to differentiate the case from this case in which the alleged antecedent cause preceded the immediate cause many hours. However, the exception here is, as we think, loss by fire caused directly or indirectly by earthquake, and not loss directly or indirectly by earthquake alone. In Yoch v. Home Mutual Ins. Co., 111 Cal. 503, 510, 44 Pac. 189, 190 (34 L. R. A. 857), it was decided that the words, in a policy of fire insurance, "except as hereinafter provided," in connection with the words "loss or damage by fire," against which the insurance is made, "may be disregarded as a limitation upon the causes of fire against which the insurance is made rather than as a qualification of the contract of insurance." And in Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103, the court held that inasmuch as the insurance was against direct loss or damage by fire, occasioned by or through earthquake, there must be read into the exception clause the words "by fire," making the policy cover "loss or damage by fire occasioned by or through any volcano, earthquake, hurricane, etc., for it must be that the sole purpose of the exception is to specify certain losses by fire not insured against." We cannot accept the rule to be in this state as stated in the Massachusetts case, supra. The action in the present case is upon contract and does not sound in tort and the rule of proximate cause in actions for breach of contract and not for torts is to be invoked to determine whether under the contract the excepted peril directly or indirectly induced the happening of the peril insured against.

The distinction is clearly pointed out in Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 56, 87 Pac. 1093, 1095, 7 L. R. A. (N. S.) 913, as follows: "It is the well-settled rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote. In this lies the distinction between damages for tort; the rule as to tort being that the injured person may recover for all detriment proximately caused thereby 'whether it could have been anticipated or not.'" Civ. Code, § 3333. See, also, Westwater v. Grace Church, 140 Cal. 339, 73 Pac. 1055; Travelers' Ins. Co. v. Melick, 65 Fed. 184, 12 C. C. A. 544, 27 L. R. A. 629. We see no reason why the rule should not equally apply where the plaintiff seeks to recover under a covenant in the contract, and where the defendant seeks to evade liability under the contract. The following cases illustrate the application of the rule where consequential damages were sought by the plaintiff but were held to be too remote: Friend & Terry Lumber Co. v. Miller, 67 Cal. 464, 8 Pac. 40, failure of a vendor to deliver building material and piles; Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659, failure to make an abstract on time; Elder v. Kutner et al., 97 Cal. 490, 32 Pac. 563, impairment of credit resulting in inability to sell land or contract a loan; Kenyon v. Western Mine Tel. Co., 100 Cal. 454, 35 Pac. 75, failure to be appointed to an office because a telegram had not been promptly delivered. Here we have a policy indemnifying against "loss by fire" with the exception where the "loss," or, as we think was contemplated, "loss by fire," was "caused directly or indirectly by earthquake." The averments are that the earthquake broke the water mains, and the water so escaped that the fire department of the city had no water with which to extinguish the fire occurring the next day. It seems to us clear that the averments fail to show that the earthquake was, in legal contemplation, the cause of the fire.

In the case of Commercial Union Assurance Company, Plaintiff in Error, v. Pacific Union Club, Defendant in Error, 169 Fed. 776, 95 C. C. A. 242, the same parties as here, and where the pleadings were not essentially different from the pleadings here, the United States Circuit Court of Appeals for the Ninth Circuit, in a decision rendered May 3, 1909, reached the same conclusion as the trial court in the present case. The opinion is by Mr. Justice Ross and is printed in respondent's brief. We quote: "The insurance was against all direct loss or damage by fire, with the exception that for such loss—that is to say, loss by fire 'caused directly or indirectly by earthquake'—the company should be liable." The court took the same view of the contract as did the court in Williamsburgh City Fire Ins. Co. v. Willard, supra, and read into the exception clause the words "by fire." "What did the parties mean by this express language of their contract? Is it at all reasonable to suppose that where the company stipulated for exemption for loss by fire 'caused directly or indirectly by earthquake' it meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the water supply of the city in the event its use be prevented by the breaking of the water mains by an earthquake shock? As well might it also be said that the company meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the fire department of the city of San Francisco in the event its use be prevented by the destruction of its apparatus, or the killing or disabling of its men or horses by an earthquake shock or shocks. * * * No question of water supply appears to have entered into the contract in question. It contains no clause imposing any obligation on the insurer in respect to water, or specifying any consequences to result from a lack of such supply by the city or any other third party. * * * We think the court below was right in its ruling that the matters set out in the amended answer constitute no defense to the action." Suppose the effect of the earthquake had been such as to render the streets impassable for the fire engines, although the water mains were not disturbed; or that, as suggested by respondent, a "riot" (which is one of the excepted perils mentioned in the policy) of such violence had occurred that the firemen were called out to assist the police in quelling it, and, while so engaged, a fire happened which could not be but would have been extinguished but for the riot, and the fire therefore spread and destroyed the insured property. It certainly could not be contended that the excepted perils would include such a case. Or, suppose by the "invasion" of an enemy (and invasion is one of the excepted perils) the water mains leading to the city had been cut and a fire ensued which could not be extinguished for lack of water, could it be said that such an occurrence practically worked a suspension of this and all similar policies and would shield the insurer? The insurance being against "loss by fire" when "caused directly or indirectly by invasion," it is unreasonable to suppose that the policies contemplated that an enemy might cut the water mains; that a fire might occur thereafter which the fire department could not extinguish because the water supply had been cut off. Such consequence is too remote to be deemed to have been contemplated by the parties.

Reduced to its simplest form, the contention of appellant is that because the earthquake destroyed the water mains, thus preventing the water to be used to extinguish the fire, the earthquake was the cause of "the absence of an extrinsic saving force" which could not be applied to extinguish the fire. We cannot, however, regard the earthquake as the indirect cause of the fire loss. Respondent cites, as illustrative, Ionides v. Universal Marine Ins. Co., 14 C. B., N. S. 259, a case of marine insurance. A ship with a cargo of coffee was insured against perils of the sea, but, warranted free from all consequences of hostilities, went ashore. The light at Cape Hatteras, existing there for many years, had been extinguished by the rebel authorities to impede and harass the United States shipping, and, in consequence thereof, the captain of the ship, intending to round the cape and then to steer due north, being out of his reckoning, and believing that he had passed the cape, ran the ship ashore at Hatteras Inlet, where she was finally lost. The question was whether the loss was a peril of the sea, or whether because of the absence of the light which had been extinguished by the enemy and the insurer thus brought within the warranty. The court held, except as to certain of the cargo which was saved, that the cargo was lost by peril of the sea. After stating that, in the construction of the contract of insurance, the proximate or immediate cause of the loss alone is that to which we can look, as the established law in Europe and America, Byles, J., in his opinion, said: "Then, what were the three things which combined to cause the loss—assuming that the captain would have seen the light if there, and so would have been warned in time to save the vessel? First, the original meritorious cause (and in popular language the cause of the loss) was the captain's being out of his reckoning. He was some 50 miles to the westward of his course, without knowing it. The absence of the light was, as I before observed, merely the absence of an extrinsic saving power. Could that be said to be the cause of the ship's destruction? Suppose a man throws himself into the Serpentine, and the means of rescuing him are not at hand, and he is drowned. Could it be said in that case that the man was drowned because of the absence of the saving power? Apply that here. The absence of the light at Cape Hatteras was but the absence of a warning, leaving the proximate and immediate cause of the loss, the miscalculation of the captain, which is plainly a loss by the perils of the sea." The case of Brown v. St. Nicholas Ins. Co., 61 N. Y. 332, was one of marine insurance upon the cargo of a canal boat, the policy containing a clause that if the boat was "prevented or detained by ice, or the closing of navigation, from terminating the trip," the policy should cease. The boat was proceeding down the Delaware river, on its way to the Chesapeake and Delaware canals, where a storm separated her from the towing tugs, and she was driven ashore, where ice formed around her so that the tugs could not reach her, and she became frozen in, and so remained until a thaw came. A wind then arose, and through it and the ice she was driven upon another boat, broke in two, and sank. The court held that the proximate cause of the loss was the original stress of the weather which drove the boat ashore, and that the fact that the ice formed and prevented the tugs from reaching her did not bring the insurers within the exception in its policy. Referring to the Ionides Case, the court said: "The failure of the tugs to reach the boat was, in the words of Byles, J., the 'absence of an extrinsic saving power.'" We are unable to discover any force in appellant's distinction which it seeks to draw, between rescuing the subject of the loss from the peril and preventing the operation of the destructive peril upon the subject of the loss. Respondent cites, in further illustration of its contention, Northwest Transp. Co. v. Boston Marine Ins. Co. (C. C.) 41 Fed. 793. In that case a vessel was stranded in a fog, and before she could be got off a storm arose, and, to save the cargo and ship, the master scuttled her, causing the loss in question. It was held that the proximate cause of the loss, arising from the scuttling, was the storm, and not the stranding, and that the loss was within the policy. It was urged by the answer in that case that the stranding should be regarded as the proximate or efficient cause of the disaster which befell the vessel, because such stranding never ceased to operate until the loss was complete—because it created the necessity for the scuttling—and should therefore be regarded as the causa causans of the loss, for the reason that if the vessel had not been stranded she would probably have sustained no injury from the storm, or would not have been compelled to resort to scuttling as a means of safety. The opinion is instructive. The court said: "A correct application of the doctrine of proximate and remote cause establishes, in my opinion, the proposition that the storm rather than the stranding should be considered the proximate efficient cause, and the loss resulting from the voluntary scuttling of the vessel. * * * The storm which created the necessity for scuttling the vessel was in no sense set in operation by the stranding, but was a distinct, independent, and intervening cause, nearest to, and therefore properly chargeable with, the disaster."

Appellant makes the point that the words "directly or indirectly" mean "proximately or remotely," and therefore appellant is not liable for a loss of which an earthquake is the remote cause. Each of the parties refers to certain provisions of the policy to support the contention of each that the true meaning of the words used is to be found in the policy itself. It would not be profitable to explore the cases in order to find just when "direct" is held to mean "proximate," or "indirect" to mean "remote." In Williamsburgh City Fire Ins. Co. v. Willard, supra, the court held, as we have seen, that the excepted peril, earthquake, as well as the other excepted perils grouped with it, was intended to be such only when operating as a direct or indirect force in causing or starting the fire (see Yoch v. Home Mutual Ins. Co., supra); and that it was unnecessary to determine whether or not the loss was proximately caused by earthquake, since it was not the direct cause of the plaintiff's loss.

If we resort to other parts of the policy to determine the meaning of the words used in the clause describing the excepted perils, we should only find ourselves in doubt in which case the well-settled rule would require us to construe the words in favor of the insured. Besides, there is this further rule, as quoted in Berliner v. Insurance Company, 121 Cal., at page 461, 53 Pac. 920 (41 L. R. A. 467, 66 Am. St. Rep. 49), from Equitable Ins. Co. v. Osborn, 90 Ala. 201, 207, 9 South. 869, 870 (13 L. R. A. 267): "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make exceptions unfairly devour the whole policy."

We are unwilling to accept as sound the argument of appellant which may be said to rest primarily upon the assumption that earthquake, as an excepted peril, must be regarded as the cause of the fire, although concededly it is not by the pleadings in any way connected with starting it. We are quite satisfied to follow the rule laid down in Hunt Bros. Co. v. San Lorenzo Water Co., supra, namely, "that the damages that can be recovered for a breach of contract are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of the breach." We cannot bring ourselves to believe that either one of the parties to the contract here ever dreamed, much less contemplated, that earthquake might cut off the water supply of the city, and, if this should happen, that this and all like policies furnished no promise of indemnity from loss by fire occurring during such dearth of water.

A number of cases have quite recently been tried in the United States Circuit Court for the United States—Judge Deitrich presiding—in which the insurance companies made successful defense where they were able to show that the fire was directly traceable to the earthquake. In others they failed where, as here, the defense was that the earthquake indirectly caused the loss by cutting off the water supply, but had nothing to do with starting the fire. Numerous other cases have been tried in our state courts as well as in the United States courts, and this construction of the policies has held good in all of them. We have found but little difficulty in reaching the same conclusion.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

12 Cal. App. 515

PACIFIC UNION CLUB v. PALATINE INS. CO. (Civ. 667.)

(Court of Appeal, Third District, California. Jan. 26, 1910.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Pacific Union Club against the Palatine Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Otto Irving Wise, for appellant. Pillsbury, Madison & Sutro, for respondent.

CHIPMAN, P. J. Appellant states in its opening brief that the facts in this case are identical with those in Pacific Union Club v. Commercial Union Assurance Company (this day decided) 107 Pac. 728.

Upon the authority of that case, the judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(157 Cal. 356)

STOUT v. McNAB et al. (S. F. 5,098.)

(Supreme Court of California. March 7, 1910.)

1. **Gifts (§ 78*)—Causa Mortis—Pleading.**

The complaint in an action for the cancellation of an assignment of an insurance policy to a son alleged that plaintiff's testator during his last illness, in pursuance of a desire to divide his property among his heirs by gift to them before death, signed and delivered such assignment to his attorneys with directions to obtain the insurance company's consent to the assignment, but before the consent was given testator changed his intention and resolved to give such son other property and that the assignment was never delivered to such son, but that such son has asserted a claim to the policy, and that the attorneys, after testator's death, gave notice to the company that they claimed the proceeds of the policy for the son, as assignee. At the close of the trial, by leave of court, and with the avowed purpose of making the complaint conform to the proofs and to the theory on which the case was tried, the complaint was amended by adding the allegation that deceased retained possession of the policy during his life, and that he made, signed, and delivered the assignment to the attorneys with directions as aforesaid, without consideration, and with intent to make a gift of the policy to take effect only in case of death. The policy, which was made an exhibit, provided that any assignment thereof would be void unless assented to in writing by the company. *Held*, that the complaint showed a gift of the policy causa mortis, though the place where such amendment was interpolated left it uncertain as to whether testator's intent or the attorney's was alleged.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 151; Dec. Dig. § 78.*]

2. **Gifts (§ 55*)—Causa Mortis.**

The fact that the written assignment, which was made a part of the complaint, expressly declared the assignment to be "absolute and unconditional," does not necessarily show that the gift was not made in view of death but was a gift inter vivos, and irrevocable, as a gift causa mortis must be as absolute in its terms, so far as the donor and donee are concerned, as a gift inter vivos, the difference between them being that the former is revocable and the latter is not—the words used were merely evidence of testator's intent, but not conclusive.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 120; Dec. Dig. § 55.*]

3. **Gifts (§ 78*)—Causa Mortis—Findings.**

An objection that the finding of the court that the assignment was prepared and given to the attorneys to be forwarded to the company for its consent with the intent on the part of the testator that it should take effect only in case of his death was outside the issues was untenable.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 151; Dec. Dig. § 78.*]

4. **Gifts (§ 78*)—Causa Mortis—Findings.**

As under express provisions of Civ. Code, § 1149, if instrument was prepared and delivered with intent that the gift should take effect only in case of the donor's death and in contemplation of death, this makes it a gift causa mortis and legally revocable, the finding of such facts operates as a negation of the effect of the allegations of an answer alleging that it was deceased's intention that the assignment should be absolute, and that it was prepared, signed, and delivered with that intent on his part if, as contended, such allegations were designed to aver a gift inter vivos. It was not necessary to negative the facts in the same language in which they were affirmed in the answer.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 151; Dec. Dig. § 78.*]

5. **Gifts (§ 82*)—Causa Mortis—Evidence.**

Evidence *held* to show a gift causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 154, 155; Dec. Dig. § 82.*]

6. **Gifts (§ 81*)—Causa Mortis—Revocation—Evidence.**

Evidence as to conversations between deceased and his attorneys, in the absence of the son, and after the assignment had been delivered to the son and forwarded to the insurance company for its consent, in which deceased directed its recall, and declared that he had changed his mind about giving the policy to the son, and further evidence of sending telegrams to the company directing it to return the assignment, which was done without the son's knowledge or consent, was admissible to show revocation of the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 154, 155; Dec. Dig. § 81.*]

Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by George W. Stout, as executor of the estate of A. F. Redemeyer, against John L. McNab and others. From a judgment for plaintiff against defendant John A. Redemeyer, and an order denying his motion for new trial, he appeals. Affirmed.

Charles W. Slack, Weldon & Held, for appellant. Jesse W. Lilienthal, Mannon & Mannon, Robert Duncan, and Thomas, Pemberton & Thomas, for respondents.

SHAW, J. The defendant John A. Redemeyer, appeals from a judgment against him and from an order denying his motion for a new trial.

A. F. Redemeyer died on January 31, 1904, leaving surviving three sons, two daughters, and one grandchild, the daughter of a deceased daughter, as his heirs at law, John A. Redemeyer being one of the sons. In his lifetime the Union Mutual Life Insurance Company issued to him a policy of insurance on his life, which policy was in full force at his death. The plaintiff, as the executor of his estate, brings this action against the defendants to compel them to deliver up for cancellation a certain purported assignment of said insurance policy to the defendant, John A. Redemeyer, dated December 24, 1903, and assigned by the deceased, and to have a decree canceling said assignment and declaring it void. Defendants McNab and Hirsch answered disclaiming any interest in the policy and in the proceeds thereof.

The complaint alleged that the assignment was made by the deceased during his last illness, while he was extremely ill, in pursuance of a desire to divide his property among his heirs by gift to them before his death; that he signed it and delivered it to the defendants, McNab and Hirsch, with directions to forward it to the insurance company to obtain its written consent to said assignment of the policy; that it was so forwarded, but before any consent was given the deceased changed his intention and resolved to give John other property instead and had the said assignment returned to McNab and Hirsch, who were acting as his attorneys and advisers in the matter; and that it was never delivered to John A. Redemeyer, or to any person for him, but that John has asserted a claim to the policy and the proceeds thereof under said assignment; and that McNab and Hirsch, after the death of the deceased, gave notice to the company that they claimed the proceeds of the policy for John A. Redemeyer, as assignee. It is also alleged that the deceased retained possession of the policy during his life, and that he made, signed, and delivered the assignment to McNab and Hirsch with directions as aforesaid, without consideration, and with the intent to make a gift of the policy to take effect only in case of his death. The policy, which is made an exhibit to the complaint, contains a provision that any assignment thereof shall be void, unless assented to in writing by the company.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The appellant claims that the complaint does not show a gift of the policy causa mortis. This claim is based in part on the circumstance that the allegation that the deceased intended the gift to take effect only in case of his death, occurs in such grammatical connection, in the sentence containing it, that it is not a statement of the intent of the deceased Redemeyer, but a statement that McNab and Hirsch had that intent. The case was tried on the theory that a gift in view of death was alleged in the complaint. The aforesaid allegation was not inserted in the complaint until the close of the trial. The defendants' counsel during the trial repeatedly objected to evidence tending to prove a gift in view of death, on the ground that such gift was not alleged. These objections were overruled, obviously because the court believed the complaint sufficient in that respect. At the close of the trial, by leave of court, and with the avowed purpose of making the complaint conform to the proofs and to the theory on which the case was tried, the allegation aforesaid was inserted as an amendment to the complaint. The place where it was interpolated leaves it uncertain as to whose intent is alleged. But no demurrer for uncertainty was filed, or offered for filing, and no objection was then made on that ground. Under the circumstances, the defendants could not have understood otherwise than that the reference was to the intent of A. F. Redemeyer, and we hold the complaint sufficient in that respect. The only other reason advanced in support of the proposition that a gift in view of death is not averred in the complaint is that the written assignment in question, which is made a part of it, expressly declares that the assignment is "absolute and unconditional." This it is argued conclusively shows that the gift was not made in view of death, but was a gift, inter vivos, and irrevocable. This point is not sustainable. A gift in view of death must be as absolute in its terms, so far as the donor and donee are concerned, as a gift inter vivos. The difference between them is that the one is revocable by the giver and the other is not. A gift in view of death may be revoked at any time by the giver, and it is revoked by law upon his recovery from the illness, or escape from the peril, under the presence of which it was made. Civ. Code, § 1151. Gifts of any other kind cannot be revoked by the giver. Civ. Code, § 1148. But the form of a gift in view of death is as absolute and unconditional as a gift inter vivos. The title must pass to the donee at the time the gift is made and the donor must part absolutely with all control and with the title, subject only to the condition imposed by law that it may be revoked, in which case the title is regained by the giver. Daniel v. Smith, 64 Cal. 349, 30 Pac. 575. "The law requires a gift causa mortis to be absolute at the time it is given, but adds to it the condition that it may be revoked at the will of the donor, and that it is revoked by his recovery; but, if by the terms of the gift it is not to take effect until after the death of the donor, the disposal is testamentary and not a gift." Hart v. Ketchum, 121 Cal. 429, 53 Pac. 932. The insertion of the words "absolute and unconditional" in the assignment did not necessarily have the effect of depriving it of the character of a gift in view of death. It received that character from the circumstances under which it was made and the intent of the giver, and not from the terms of the gift or of the instrument by which it was effected. The above words, at most, would be merely evidence on the subject and they would not be conclusive.

The court found that the assignment in question was prepared and given to the attorneys to be forwarded to the company for its consent "with the intent on the part of the said A. F. Redemeyer that it should take effect only in case of his death." Other findings of fact to show a gift causa mortis were also made. The contention that these findings are outside of the issues is based on the aforesaid objections to the complaint, and, as they have been shown not to be well founded, it is unnecessary to say anything in regard to the findings except that they follow the allegations of the amended complaint as we understand it, and as we believe it must have been understood by the parties.

The point is made that the findings do not cover the issues tendered by the answer of the appellant, which alleged that it was the intention of the deceased that the assignment of the policy to John should be absolute, and that it was prepared, signed, and delivered with that intent on his part. These allegations are covered, in effect, by the findings last mentioned. It was not necessary to negative the facts in the same language in which they are affirmed in the answer. Under section 1149 of the Civil Code, if the instrument was prepared and delivered with the intent that the gift should take effect only in case of the donor's death and in contemplation of death, this makes it a gift in view of death and legally revocable, although absolute and unconditional in terms, and the finding of these facts operates as a negation of the effect of the allegations of the answer, if, as contended, those allegations were designed to aver a gift inter vivos.

We think the evidence was sufficient to sustain the findings as to the intention to make a gift causa mortis. The deceased at first mentioned a wish to insert in the assignment certain conditions which would have made the instrument void as an attempt to make a testamentary disposition of his property without executing a will, and he was advised that, if he desired to make a gift of the policy, it must be absolute in terms, and that there must be a delivery. This would be equally true, whether the gift was to be one in view of death or inter vivos. He then assented to the view that it must be absolute in its terms, and it was prepared accordingly. This testimony is not inconsistent with the fact that the gift was intended to be a gift in view of death. The other evidence fully sustains the findings on the subject of a gift causa mortis. Inasmuch as we hold that the assignment could have been revoked, as a gift in view of death, even if the same had been assented to in writing by the company, we do not consider it necessary to discuss or decide the point presented by the appellant that the assignment was good between the assignee and assignor as an equitable transfer, although the company never did consent thereto.

Over the objections of the appellant, evidence was admitted of conversations between the deceased and his attorneys, in the absence of John, and after the assignment had been delivered to John and forwarded to the company for its consent, in which the deceased directed its recall and declared that he had changed his mind about giving the policy to John. Evidence was also admitted of the sending of telegrams to the company directing it to return the assignment; this being done without John's knowledge or consent. There was no error in this ruling. If, as was claimed and found, the gift was a gift in view of death, it was revocable, and evidence of the steps taken by the donor towards such revocation was necessary to establish the plaintiff's contention that there had been a revocation. The evidence was not admissible to affect the validity of the instrument, but to prove a revocation of the gift made, or intended to be made, thereby.

It is proper to say that the case really shown by the complaint is that of an intended gift in view of death, which was not completely executed because, according to the allegations, there was no delivery of the assignment, and a revocation of the intended gift while the attempt to make it was in progress and before it was completed by delivery. The finding that there was a delivery shows that the gift was complete, in point of fact, assuming that the company's consent was not necessary, but this does not deprive it of the character of a gift causa mortis, nor render the evidence of a revocation inadmissible or prejudicial. We find no ground upon which the judgment or order denying a new trial can be held erroneous.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

12 Cal. App. 543

SAUNDERS v. YOAKUM. (Civ. 707.)

(Court of Appeal, Second District, California. Feb. 3, 1910.)

1. BROKERS (§ 66*)—COMMISSIONS—AGREEMENT BETWEEN BROKERS TO DIVIDE COMMISSIONS—NECESSITY FOR WRITING.

While Civ. Code, § 1624, requiring agreements employing brokers to buy or sell real estate for a commission to be in writing, does not extend to agreements between brokers to cooperate in making sales for a share of the commission, and recovery may be had in such cases on proof of an oral agreement. This presupposes that a valid contract for commissions is existent, a division of which could be subject of subsequent oral agreement.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 66.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding of the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

3. BROKERS (§ 66*)—COMMISSIONS—AGREEMENT TO DIVIDE COMMISSIONS.

Where a broker agreed to divide commissions on the sale of land with defendant if the latter effected a sale, and defendant thereafter agreed to pay plaintiff a commission for finding a purchaser, that the broker subsequently voluntarily gave plaintiff money on account of his influence in connection with the deal did not impair plaintiff's right to recover reasonable compensation for his services from defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. § 66.*]

Appeal from Superior Court, Los Angeles County; W. H. Jamison, Judge.

Action by J. T. Saunders against John E. Yoakum. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Jones & Weller, for appellant. John W. Shenk and E. R. Young, for respondent.

ALLEN, P. J. This is an appeal from a judgment and an order denying a new trial. The action was one brought by a broker to recover from another broker commissions earned in a sale of real estate. The court finds that one Edwards, under written authority, was constituted the agent of the owner for the sale of a certain tract of land, and in such authorization it was agreed that he was to receive the sum of $2,400 as commission in the event of a sale; that thereafter Edwards verbally agreed with defendant that, if he would effect a sale of the property, he would divide the commissions with him; that thereafter defendant agreed with plaintiff that, if he would procure a purchaser for any or all of the property, he would pay to the plaintiff a commission in the event of a sale; that thereupon plaintiff procured parties to purchase a two-thirds interest in the premises, and defendant himself purchased a one-third interest therein and the property was conveyed to the purchasers by the owner; that the defendant in such purchase received the benefit of $1,200, one-half of the commission so agreed to be paid to him by Edwards; that defendant refused to pay to plaintiff any portion of the commission so earned. The court finds that the value of the services rendered by plaintiff to defendant in and about the sale was the sum of $400, for which amount judgment was rendered.

It is appellant's contention that under these facts no recovery could be had, for the reason that no memorandum in writing was entered into between the plaintiff and defendant with relation to the commission which he was to receive. It is determined in Gorham v. Heiman, 90 Cal. 358, 27 Pac. 289, that section 1624 of the Civil Code does not extend to agreements between brokers to co-operate in making sales for a share of the commission, and that recovery can be had in such cases where only an oral agreement is established. This, however, presupposes that a valid contract for commissions is existent, a division of which could be subject of subsequent oral agreement. Aldis v. Schleicher, 9 Cal. App. 374, 99 Pac. 526.

Appellant further contends that there is no evidence to sustain the finding of the trial court that defendant requested plaintiff to procure purchasers and agreed to pay a commission therefor. There is testimony in the record that defendant stated to a witness that he had agreed to pay plaintiff a commission for his influence in helping to get parties to buy this property. It is true there is some conflict upon this point, but under the well-established rule the finding will not be disturbed. The fact that Edwards subsequently voluntarily gave Saunders $400 on account of his influence in connection with the deal would not have the effect to impair the agreement between plaintiff and defendant, nor to relieve defendant from his obligation to pay to plaintiff a reasonable compensation for his services in assisting defendant to earn the commission.

We find no error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

12 Cal. App. 449

SOUTH END WAREHOUSE CO. v. LAVERY et al. (Civ. 575.)

(Court of Appeal, First District, California. Jan. 21, 1910. Rehearing Denied by Supreme Court March 21, 1910.)

1. JUDGMENT (§ 650*)—RES JUDICATA—DISTRIBUTION OF ESTATE.

Where the trust provisions of a will have been carried into a decree of distribution, and the same has become final, no question as to the validity of the trust can be raised.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 650.*]

2. TRUSTS (§ 205*)—POWER OF TRUSTEES—LEASES.

Under Civ. Code, § 870, providing that, where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely void, in the absence of express power given by the trust instrument, a trustee may not make a lease that will have force after the termination of the trust, and hence where trustees under a will were to stand seised of the real property in trust to apply the income to the support of testator's daughter during her life, and on her death to transfer the property to others, they could not lease the estate for a period extending beyond the life of the daughter.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 280; Dec. Dig. § 205.*]

Appeal from Superior Court, City and County of San Francisco; Jno. A. Hosmer, Judge.

Action by the South End Warehouse Company (a corporation) against James V. Lavery and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lent & Humphrey, for appellant. John F. Davis, Charles S. Wheeler, Campbell, Metson & Campbell, and Smith & Pringle, for respondents.

HALL, J. This is an appeal upon the judgment roll from a judgment entered upon an order sustaining the demurrers of the various defendants to the complaint.

The action was brought against James V. Lavery, Milos Mitrov Gopcevic, Charles B. Russell, Henry E. Mathews and Petar M. Gopcevic, as executors of the last will of Harry A. L. Floyd Gopcevic, deceased, and James T. Boyd, Adolphus D. Grimwood, and Cora M. Keeler, as the trustees under the trust created by the last will and testament of Cora Lyons Floyd, deceased, and James T. Boyd, Adolphus D. Grimwood, and Cora M. Keeler, individually. The action concerns a piece of real estate in the city and county of San Francisco, and the claim of plaintiff is predicated upon a lease executed by the defendants Boyd, Grimwood, and Keeler, as trustees under the will of Cora Lyons Floyd, deceased, to plaintiff, of the said premises. Plaintiff in its complaint prayed for judgment against the defendants that said lease is valid, and that it be specifically enforced, that the plaintiff may have such other, further, or different relief in the premises as to the court might seem meet and proper. The various defendants appeared in the groups as they were sued, and in such groups filed demurrers, raising the point only that the complaint failed to state facts sufficient to constitute a cause of action, which were sustained. Leave to amend was not given, and the record before us does not disclose that such leave was asked. Respondents, in support of the order of the court sustaining the demurrers, urge various objections to the complaint, which might readily have been remedied by proper amendments.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Another, and the principal objection to the complaint, goes to the validity of the lease under which plaintiff claims, and is vital to the existence of any cause of action upon such lease, whether the action be considered as one for specific performance, an action in ejectment, or an action to determine adverse claims under section 738, Code Civ. Proc. As before stated, plaintiff claims under a lease executed by defendants Boyd, Grimwood, and Keeler, as trustees under the will of Cora Lyons Floyd, deceased.

It is alleged that the residue of her estate, including the real property involved in this action, was by decree of the court, having jurisdiction of the settlement of her estate, distributed to James T. Boyd, William T. Welcker, and Adolphus D. Grimwood, and their successors (Keeler is the successor to Welcker) "upon the trusts and to the intents and purposes following, that is to say: Upon trust to stand seised of the real property, and to stand possessed of the personal property of every name and description to the residue of said estate belonging. To sell any of the personal estate; * * * and with power also to improve any real estate of which said testatrix died seised, using for such purposes, however, only the property included in the trust thereby created, or the proceeds thereof. To apply as much of the prinicipal and interest of such property as may be necessary or proper to the support, maintenance, and education of the daughter of said testatrix in a manner suitable to her condition in life, until she shall have attained the age of twenty-one years, and thereafter to pay to her two-thirds of the net income of said trust estate, quarter-yearly, so long as she shall live. * * * And upon the death of said Harry Augustus Lyons Floyd to pay over and deliver the whole of the property of said trust estate to her descendants, if any, in accordance with the provisions of the statute of descents and distributions of the state of California. In case she shall leave no descendants, to pay over, convey and deliver the same property to such person or persons, and in such manner, as the said daughter shall or may by her last will and testament designate and appoint, and failing such testamentary disposition, that the estate be divided equally between Mrs. I. L. Mathews, sister of the testatrix, and Mrs. Hume and Mrs. McAdoo, sisters of the testatrix's husband, Richard S. Floyd, and if either of them shall not then be living, her share to go to her right heirs, and if there be no such heirs, to the survivors or survivor of them and her heirs."

The lease in question was executed by the trustees, and plaintiff on the 2d day of February, 1904, and in terms let to plaintiff the premises in suit from the 1st day of June, 1904, for the period of five years from said date, with the privilege to the lessee of an extension for three years at the same rental, and with the privilege of a further extension for two years at a rent to be agreed upon. Before the commencement of the term under the lease, to wit, on February 11, 1904, the said daughter of testatrix, said Harry A. L. Floyd, died leaving a will, which was subsequently admitted to probate, and in which she appointed and devised the premises in suit to Milos Mitrov Gopcevic. Though not expressly alleged it seems to be assumed that she died without issue. It is properly conceded by all parties that as the trust provisions of the will of Cora Lyons Floyd have been carried into the decree of distribution, which has become final, all question as to the validity of the trust is eliminated. Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; Matter of Trust of Trescony, 119 Cal. 568, 51 Pac. 951.

It will be observed that under the terms of the trust no express power is given to the trustees to lease the real estate, as might have been done under subdivision 2, § 857, Civ. Code, but it is not questioned by respondents that, as incident to the power to receive and apply the rents and profits to the support of the life beneficiary, the trustees had the power to make leases that would endure to the death of such life beneficiary.

Appellant contends that the trustees took an estate in fee in trust, and that notwithstanding that upon the death of Harry A. L. Floyd it became their duty under the trust to convey and deliver the trust property to her appointee, the lease theretofore executed by them was valid and binding upon such appointee. Respondents contend that whether the trustees took an estate in fee, or an estate for the life of Harry A. L. Floyd only, upon her death it was their duty under the trust to convey and deliver the trust property to her appointee free of any incumbrance made by them; that a lease that should endure beyond the life of Harry A. L. Floyd would be in contravention of the trust upon which the trustees held the property, and to that extent would be void. Section 870, Civ. Code. The argument of the appellant is in the main based upon the proposition that the trustees were seised in fee, and though such fee was held in trust, as it comprised the whole estate, they might grant a lesser estate, such as a leasehold, binding upon the ultimate beneficiary. In support of this doctrine we are cited to Greason v. Keteltas, 17 N. Y. 491, Ahern v. State, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778, and Hubbell v. Hubbell, 135 Iowa, 637, 113 N. W. 512, 13 L. R. A. (N. S.) 496.

The New York cases above cited, as well as Newcomb v. Keteltas, 19 Barb. 608, sometimes cited in support of the same doctrine, all arose under a trust contained in the will of one John Gardner, dated July 2, 1817. In neither Greason v. Keteltas nor Newcomb v. Keteltas did it appear that either of the life beneficiaries were dead. No question was involved in either of said cases as to the validity or force of a lease after the termination of the term of the trust. What was said in either case as to the validity of a lease for a term extending beyond the termination of the trust, and executed by a trustee holding an estate in fee, is obiter, and not involved in the case, as clearly appears from a careful examination of the cases, as well as subsequent New York cases referring to them. Indeed, in Newcomb v. Keteltas, supra, it was only held that the trustees during the term of the trust might make a lease for a fixed term which would not be ab initio void, and it was intimated that such lease might become void upon the termination of the trust. Ahern v. State, supra, incidentally involved the validity of a lease under the same John Gardner trust, after the termination of the trust, but no point was made by the litigants as to its validity. Both parties conceded it to be valid, and the court was not called upon to determine the question, though it used language following and citing Greason v. Keteltas, supra. Hubbell v. Hubbell, supra, reviews the cases upon the general subject, but decides nothing pertinent to the case at bar. It reversed the judgment of the trial court authorizing a lease for 99 years, and intimated that the trustees ought not to make a lease that would extend beyond the probable duration of the term of the trust. Besides the fact that the early New York cases, relied on by appellant, did not involve the validity of the lease after the expiration of the trust, they did not arise under a law such as we have in this state in section 870, Civ. Code. This section provides that "Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void."

Subsequently to the creation of the trust involved in the New York cases above referred to a statute of uses and trusts was adopted in New York (1 Rev. St. [1st Ed.] pt. 2, c. 1, tit. 2), section 65 of which is in substance identical with section 870, Civ. Code. It is: "Where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void." This section was subsequently amended in 1897 so as to authorize trustees to make leases not exceeding a term fixed in the statute that should be valid though the trust should terminate in the meantime. Prior to this later amendment and under section 65 (identical with our section 870, Civ. Code), it was settled law in New York that a lease extending beyond the life of the trust estate would be to that extent invalid, unless such lease were in terms authorized by the trust. Matter of McCaffrey, 50 Hun, 371, 3 N. Y. Supp. 96; Gomez v. Gomez, 81 Hun, 566, 31 N. Y. Supp. 206; Id., 147 N. Y. 195, 41 N. E. 420; Matter of the City of New York, 81 App. Div. 27, 81 N. Y. Supp. 32, affirmed in 179 N. Y. 572, 73 N. E. 1127.

In the Matter of McCaffrey, supra, it was held that a lease ceased to be valid upon the termination of the trust as to the property leased. In this case the property passed to the remainderman without the necessity of a conveyance. It was not a trust to convey. In this case, however, it is pointed out that Newcomb v. Keteltas, supra, and Greason v. Keteltas, supra, arose before the enactment of the statute of uses and trusts, which it is said established a new system. It is pointed out that the doctrine announced in the two early New York cases above cited, that a trustee holding the fee may make leases that will endure beyond the term of the trust, is based on the doctrine that a trustee in fee can alienate the estate to a purchaser for a valuable consideration, but that "under the present statute (section 65 above quoted) he cannot." In Gomez v. Gomez, supra, it was held that a trustee could not of his own motion make a lease with a covenant for a renewal to be enforced after the termination of the trust. The Keteltas Cases are again referred to, and it is said: "These cases arose under a trust created prior to the enactment of the Revised Statutes, which effected a radical change in the law of trusts. In Matter of McCaffrey, 50 Hun, 371 [3 N. Y. Supp. 96], in which it was held that unless expressly authorized by the trust deed a trustee is without power to make leases extending beyond the trust term, and if he attempted it the lease is invalidated by the death of the beneficiary, the Keteltas Cases are considered, and the reasons given why they should not be held to be in conflict with the doctrine of that case. The consideration which they receive meets with our approval, and therefore justifies the omission of their further discussion." It was, however, held that the tenant was entitled to a renewal because the lease providing for such renewal had been authorized by a decree of the court of chancery in a proceeding to which all persons in interest were parties. This case was affirmed by the Court of Appeals (147 N. Y. 195, 41 N. E. 420), and Matter of McCaffrey cited as to power of trustees. The court said: "The trust created by the deed being for the life of Mrs. Gomez terminated with her death, and with her death the powers of the trustees were, as we have seen, at an end, except to turn over and convey the trust property as directed by the deed." The case of City of New York, 81 App. Div. 27, 81 N. Y. Supp. 32, affirmed by the Court of Appeals in 179 N. Y. 572, 73 N. E. 1127, is particularly in point.

The trust was to apply the income of the trust estate for the use of the wife of the testator during her life, and upon her death to divide the estate into five equal parts, and to invest one share for each of testator's five children, and collect and apply the rents from the share set apart for each child, and upon the death of any child to convey, pay, and assign his share to his issue. By the ninth clause of the will power was given the trustees to rent from year to year or for any term of years. The court held that there were two trusts—one terminating with the life of testator's wife and another as to each fifth of the trust estate, terminating at the death of his several children. It was further held that, notwithstanding the power to lease given in the ninth clause of the will, any lease executed during the lifetime of testator's surviving wife would terminate at her death. The court said: "The trust estate, therefore, which the trustees held at the time when the surviving trustee executed the lease in question, continued only during the life of the widow, and, unless express power to lease for a period longer than the duration of this life estate is expressed in terms in the will, the authority to lease would be limited upon the duration of such trust estate." This language is especially significant in view of the fact that the trustees continued to hold the estate after the death of the widow in trust for the children. All the preceding cases are reviewed in this case, and the change wrought in the law of New York by the statute of uses and trusts, providing that "every sale, conveyance or other act of the trustees in contravention of the trust is rendered absolutely void" is clearly pointed out. While the court in its conclusion placed stress upon a codicil to the will, this only had reference to the court's interpretation of the express power to lease given to the trustees by the ninth clause of the will.

The case clearly holds that the cases of Ahern v. State, supra, and Greason v. Keteltas, supra, relied on by appellant, have no application to trusts created under a statute with such a provision as is contained in section 870, Civ. Code, of this state, and that under such a statute the lease, unless expressly authorized in the trust, terminated with the trust. The dissent by certain of the judges was as to the effect of the express power to lease contained in the ninth clause of the will, and does not affect the general doctrine that, in the absence of such express power given by the trust instrument, a trustee may not make a lease that will have force after the termination of the trust. To the same effect is Weir v. Barker, 104 App. Div. 112, 93 N. Y. Supp. 732, where all the cases are again referred to, and it is said to be settled law that, prior to some recent amendments made to the statute of uses and trusts, leases made by trustees were valid only for a period ending with the trust term.

And this we think must be held to be the law of this state. The argument so earnestly urged that such a rule will greatly hamper trustees, holding property for a term of uncertain duration in making advantageous leases of the trust property, is more properly addressed to the wisdom of creating such trusts, without expressly authorizing leases for such terms as may be deemed prudent, by the creator of the trust. That such power may be expressly given is not doubted.

No such authority is contained in the instrument creating this trust. While the trustees are to stand seised of the real property in trust, to apply the income to the support of the daughter of the testator during her life, upon the death of such daughter their trust requires them to transfer and convey the property to other persons or person. A lease that would be an incumbrance upon the estate conveyed to the person or persons entitled thereto upon the death of the life beneficiary would be in contravention of such trust, and is therefore void.

The conclusion we have arrived at concerning the lease makes it unnecessary to discuss the other objections urged by respondents as to the sufficiency of the complaint, but for the reasons above set forth the court did not err in sustaining the demurrers, and the judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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12 Cal. App. 542

PEOPLE v. WHALEY. (Cr. 153.)

(Court of Appeal, Second District, California. Feb. 1, 1910.)

CRIMINAL LAW (§ 1182*)—APPEAL—FAILURE OF APPELLANT TO APPEAR—REVIEW.

Under Pen. Code, § 1253, providing that the judgment may be affirmed if the appellant fail to appear, where the transcript has been filed, and the cause called for hearing, and appellant fails to appear, and the time for filing the points and authorities has expired without any being filed, the judgment will be affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3207; Dec. Dig. § 1182.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

L. C. Whaley was convicted of crime, and appeals. Affirmed.

Palmer & Mahan and William M. Tisdale, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

PER CURIAM. The transcript herein having been filed November 26, 1909, and it appearing that the cause was regularly placed upon the January calendar, and on January 24, 1910, duly called for hearing, and appellant not appearing, and the time for filing points and authorities having expired and no points and authorities having been filed in support of the appeal, it is therefore ordered that the judgment and orders appealed from be and the same are affirmed, as provided in section 1253 of the Penal Code.

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12 Cal. App. 549

TAYLOR v. MARSHALL et al. (Civ. 696.)

(Court of Appeal, Second District, California. Feb. 4, 1910.)

1. Appeal and Error (§ 113*)—Appealable Orders—Order Denying Motion to Vacate Judgment.

An order denying a motion to vacate a judgment is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 758; Dec. Dig. § 113.*]

2. Mandamus (§ 79*)—Subject of Relief—Reinstatement of Teacher—"Dismissal."

The word "dismissal," as used in Pol. Code, § 1698, providing that a teacher in case of his dismissal before the expiration of his contract may appeal to the school superintendent, etc., does not imply a hearing or trial, the word meaning the summary disposal of a case as distinguished from a trial of it, and the action of the county superintendent in approving after a hearing, the dismissal of a teacher by the board of trustees was binding on the trustees, and they could not be compelled by mandamus to reinstate the teacher (citing 3 Words and Phrases, p. 2105).

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 175; Dec. Dig. § 79.*

For other definitions, see Words and Phrases, vol. 3, pp. 2105, 2106; vol. 8, p. 7639.]

3. Schools and School Districts (§ 138*)—Teachers — Contract of Employment — Remedy for Breach.

An action will lie against a board of trustees by a principal of schools for unlawful breach of his contract of employment.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 138.*]

4. Schools and School Districts (§ 138*)—Employment of Teacher—Breach of Contract—Damages.

Where a schoolmaster was ready to perform his duties, and could not obtain other employment, the damages for breach of contract by the board of trustees is the amount he would have received under the contract.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 138.*]

5. Mandamus (§ 3*)—Subject of Relief—Reinstatement of Teacher.

Under Code Civ. Proc. § 1086, requiring the writ of mandate to be issued in all cases where there is no plain, speedy, and adequate remedy at law, the writ will not lie to compel the reinstatement of a principal of schools unlawfully discharged by the board of trustees, plaintiff having an adequate remedy at law by action for breach of his contract of employment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 24; Dec. Dig. § 3.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Petition by Edward E. Taylor for writ of mandate against Mrs. F. W. Marshall and others, trustees of the Monrovia City School District, etc. From a judgment for defendants, and from an order denying plaintiff's motion to vacate the judgment, he appeals. Affirmed.

Edward E. Taylor, in pro. per., and McNutt & Hannon, for appellant. Woodruff & McClure, for respondents.

TAGGART, J. This is a petition for a writ of mandate to compel defendants to reinstate in the positions of principal of the high school and supervising principal of the grammar and primary schools of the city of Monrovia, from which he was dismissed by them, as trustees of that school district, without a regular hearing. The superior court gave judgment for defendants and denied the writ, and plaintiff appeals from the judgment and from an order denying his motion to vacate the judgment. The order mentioned not being appealable, the case is before us on the appeal from the judgment.

The trial court finds that plaintiff was employed by defendants on July 7, 1906, to fill the positions mentioned, for the ensuing year ending June 30, 1907, that he entered upon the discharge of the duties of these positions, and continued to perform them until March 2, 1907, on which date he was discharged by defendants for alleged incompetence, unfitness, and misconduct. No charges were ever preferred against him in writing, and no formal or any other hearing was given him by defendants on the said charges of delinquency. On February 2, 1907, however, said trustees in meeting assembled advised the plaintiff and discussed with him the unsatisfactory and demoralized condition of the schools under his supervision. He admitted that such condition existed, and requested time in which to correct the disorder and rectify the matters wherein the performance of his duties was unsatisfactory, and was given until February 28, 1907, to do so. He failed to make the corrections before that time, and on that date the defendants demanded that he resign on or before March 2, 1907. This he refused to do, and on the last-mentioned day defendants, sitting as a board of trustees, declared the positions occupied by plaintiff vacant. On March 5, 1907, plaintiff appealed to the county superintendent of Los Angeles county for reinstatement, under section 1698, Pol. Code, and after a trial regularly had, at which plaintiff was represented by counsel and presented evidence upon his own behalf, the county superintendent sustained the action of defendants in dismissing the plaintiff.

Plaintiff's application for the writ is based upon the contention that neither of the positions occupied by him in the Monrovia schools was that of a mere employé, but that such positions conferred upon him a right or office which he was entitled to use or enjoy, and that he had been unlawfully precluded from such enjoyment by the defendants. Code Civ. Proc. § 1085. He has exhaustively presented the matter upon the authority of a number of English cases which sustain his view that a school teacher discharged without a hearing will be restored by the courts, and that the proper method of securing this result is by mandamus. It is not necessary to distinguish those cases. The peculiar property rights in place and office recognized in England, which are entirely inconsistent with the general rule in force in most of the states of this country, render the English decisions of little aid here. We think, however, the solution of the question before us lies in the construction of our own statutes. Monrovia, in respect to the employment and dicharge of its school teachers, is governed by the general school law affecting cities "not having a city board of education." Subdivision 7, § 1617, Pol. Code. Because of this distinction in the statute, the case of Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042, and other cases decided by our Supreme Court, involving the construction of the provisions of the Political Code conferring a fixed tenure of office upon city teachers, have no application. This appears to be conceded in effect.

As above stated, plaintiff had a hearing before the county superintendent of schools, which appears to be the only one provided by the Code. We see no injustice in assuming that no other trial was intended to be given in the case of a dismissal of a teacher by the board of school trustees. The trustees are seldom men who would feel themselves qualified to act in a judicial capacity, and, as one or more of them would probably be or become the real contestant of the teacher's fitness, the atmosphere surrounding a tribunal so constituted would be so surcharged with the preconceived opinions of its members that a formal hearing would generally be useless. The course pursued by the defendants here in discussing the alleged delinquencies of the teacher with him and allowing him an opportunity to correct them, after an admission of their truth, is certainly all that the law contemplates shall be done on behalf of the plaintiff by the trustees. The word "dismissal," used in section 1698, does not imply a hearing or trial. This word imports summary action. Its use generally implies that the one dismissed is sent away by authority. In a legal sense, it is used to denote the sending of a case out of court without a trial. It is the summary disposal of a case as distinguished from a trial of it. Words and Phrases, vol. 3, p. 2105.

There is nothing in the language of the section conferring the power, or elsewhere in the statute, to our knowledge, restricting the authority of the county superintendent to act to such cases as have been formally heard by the board of trustees. Thus there was an order of a competent tribunal, regularly made, declaring that plaintiff was unfit to be restored to his former position and sustaining the action of the defendants in dismissing him. This finding and order were as binding upon the defendants as would have been an order directing his restoration. It is apparent that there was no legal duty resting upon them to restore the plaintiff to his position which can be enforced by a writ of mandate.

The remedy of plaintiff, if any he has, is by action on his contract for his salary. This form of action has been recognized by the courts of this state as a proper remedy in such cases. An action will lie against a board of trustees by the principal of schools, whom they have unlawfully deprived of his employment, in breach of his contract, and where it appears that he was ready and willing to perform the duties required and could not and did not obtain other employment, his damages will be measured by the sum he would have received under the contract. Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44. This would have afforded plaintiff a plain, speedy, and adequate remedy at law (section 1086, Code Civ. Proc.), and the writ was properly denied. In the absence of any suggestion that the question here involved has become moot from lapse of time, we have decided the case.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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12 Cal. App. 536

STIMPSON COMPUTING SCALE CO. v. SUPERIOR COURT OF YUBA COUNTY. (Civ. 689.)

(Court of Appeal, Third District, California. Jan. 29, 1910.)

1. CERTIORARI (§ 5*)—EXISTENCE OF REMEDY BY APPEAL OR WRIT OF ERROR.

The writ of review cannot be made to serve as a writ of error for the correction of errors

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of law or of fact, as it only involves the question of jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. § 5.*]

2. Justices of the Peace (§ 159*)—Municipal Corporations—Police Court—Appeal—Undertaking—Necessity.

Under Code Civ. Proc. § 978, providing that an appeal from a justice's or police court is not effectual for any purpose unless an undertaking be filed for the payment of the costs on the appeal, the superior court has no jurisdiction of an appeal from a justice unless such an undertaking has been given.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 550; Dec. Dig. § 159.*]

3. Justices of the Peace (§ 159*)—Appeal—Failure to Furnish Undertaking—Failure to Give Notice—Jurisdiction.

Under Code Civ. Proc. § 978a, providing that the undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent, the circuit court is without jurisdiction of an appeal from a justice's court, where no undertaking on appeal was furnished and no notice of the filing of any purported undertaking was given to respondent.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 550; Dec. Dig. § 159.*]

4. Justices of the Peace (§ 141*)—Appeal—Jurisdiction—Waiver.

Where, on appeal to the superior court from a justice's court, the respondent filed his answer, he did not thereby waive the question of jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 475; Dec. Dig. § 141.*]

5. Courts (§ 24*)—Jurisdiction—Waiver.

Parties cannot waive jurisdiction of the subject-matter nor confer it by consent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76–78; Dec. Dig. § 24.*]

6. Justices of the Peace (§ 159*)—Appeal—Failure to File Undertaking—Effect on Jurisdiction.

Where, upon appeal from a justice's court to the superior court, the court's attention was called to the fact that no undertaking for costs had been filed or served, as required, the appeal should be dismissed, since the court had no legal power to proceed with the trial.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

7. Justices of the Peace (§ 159*)—Municipal Corporations—Police Court—Appeal—Undertaking—Cash Deposit—Jurisdiction.

Under Code Civ. Proc. § 978, providing that an appeal from a justice's or police court is not effectual for any purpose, unless an undertaking in the sum of $100 be filed for the payment of the costs of the appeal, where the superior court was without jurisdiction of an appeal from a justice because of a failure to file an undertaking, an offer by appellant to deposit $100 in the superior court in lieu of the bond would not confer jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550–578; Dec. Dig. § 159.*]

8. Certiorari (§ 67*)—Scope of Writ—Discretion of Court.

The writ of review does not extend to review matters entirely within the discretion of the superior court.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 179; Dec. Dig. § 67.*]

9. Justices of the Peace (§ 159*)—Appeal—Undertaking—Cash Deposit—Discretion.

The discretion of the superior court to accept a cash deposit in lieu of an undertaking for the payment of costs of appeal can only be exercised when some undertaking, though defective, has been given, and it does not exist when no security whatever on appeal has been furnished.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

10. Justices of the Peace (§ 159*)—Appeal—Undertaking—Jurisdiction.

Where no undertaking is filed after the notice of appeal from the justice court is given, and no opportunity afforded for an exception to be taken to the sufficiency of the pretended security, the superior court has no jurisdiction of the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550–578; Dec. Dig. § 159.*]

Application for certiorari by the Stimpson Computing Scale Company, a corporation, against the Superior Court of Yuba County. Order to show cause discharged.

J. C. Thomas, for petitioner. Brittan & Raish, for respondent.

BURNETT, J. On the 9th day of February, 1909, the petitioner, a foreign corporation, filed a complaint in the justice court of Marysville township against one J. Blue. At the same time the plaintiff therein filed with said court an undertaking executed on January 30, 1909, by the United States Fidelity & Guarantee Company through H. B. P. Carder, its attorney in fact. Said undertaking provided that: "Whereas an attachment against the said defendant, as security for the satisfaction of any judgment that may be recovered thereon, has been demanded by plaintiff; and whereas the plaintiff is a nonresident of the state of California, and under and by virtue of the Code of Civil Procedure of said state, section 1036, relative to foreign corporations, security for costs and charges, which may be awarded against such plaintiff, as may be required by the defendant, or bond for costs that may be required of the plaintiff on appeal, under and by virtue of section 974 of the Code of Civil Procedure of the state of California, should the plaintiff desire to take an appeal to a superior court, or other court from any judgment that may be rendered by the said justice's court or required to pay any costs in said justice's or superior court of California in and for the county of Yuba: Now, therefore, in consideration of the premises, and of such appeal, and attachment and costs which may be required, the United States Fidelity & Guarantee Company * * * does hereby undertake in the sum of two hundred and fifty dollars, and promises on the part of the plaintiff, that said plaintiff will pay all costs which may be awarded against the plaintiff, if the said defendant recover judgment in said action, plaintiff will pay all costs that may be awarded to said defendant, and all damages that he may sustain by reason of said attachment; and all costs that may be awarded to the said defendant on appeal to the superior court of the state of California, in and for the county of Yuba, and costs that may be awarded by any appellate court against the said plaintiff in favor of the defendant on certiorari or other appellate proceedings in the courts of the state of California, not exceeding the aforesaid sum of two hundred and fifty dollars, to which it acknowledges itself bound."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

On the trial of the action on July 21st the justice of the peace granted a motion for a nonsuit on the ground that plaintiff had failed to prove that it had filed its articles of incorporation with the Secretary of State, as required by statute. On the same day plaintiff gave notice of an appeal to the superior court, and on the 16th day of August the papers were filed in the superior court. On the 3d day of September an amended complaint was filed in said superior court, and an answer thereto by said defendant Blue was filed on the 11th day of September. On September 27th a notice of motion was given to dismiss the appeal on the ground that "the said appeal was not taken in conformity with requirements of sections 975, 977, 978, and 978a of the Code of Civil Procedure." This motion was granted on October 4th following. On application of petitioner an alternative writ of certiorari was issued out of this court on November 3d to review the action of the said court in dismissing the said appeal.

The writ of review, it is clearly established, cannot be made to perform the office of a writ of error for the correction of errors of law or of fact. It only involves the question of jurisdiction. Thomas v. Hawkins, 107 Pac. 578. It is equally well settled that the superior court has no jurisdiction to entertain an appeal unless an undertaking to pay the costs on appeal has been given. It is clearly so provided in the statute and reaffirmed in numerous decisions of the courts. Section 978, Code Civ. Proc., provides that: "An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal." This is, as said by the court through Justice Hart in Thomas v. Hawkins, supra, an "essential and indispensable prerequisite to the conferring of jurisdiction of appeals from justices' or police courts on the superior court." Another condition for the perfecting of the appeal is provided in section 978a, Code Civ. Proc., as follows: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent."

In the case before us no such undertaking on appeal was furnished as provided by the statute, and no notice of the filing of any purported undertaking was given to respondent as required by said section 978a. The only undertaking given, as we have seen, was executed and filed months before the trial, while the statute requires that it shall be filed within five days after the notice of appeal is given. The consideration for the undertaking is that notice of appeal has been given, while here the obligation contemplates an uncertain event in the future. By one bond in the sum of $250 it is sought to comply with the requirement of section 867 of the Code of Civil Procedure, requiring an undertaking on attachment in a sum of not less than $50 nor more than $300, as fixed by the justice, also section 1036, providing for security for costs where the plaintiff is a foreign corporation, in a sum not exceeding $300, and the provisions of said section 978 in reference to the costs on appeal. Even if such an undertaking could be considered as a part of the proceeding to perfect the appeal, we would have no right to assume, in view of the record, that $100 thereof could be applied to the payment of said costs. For aught that appears to the contrary, the justice may have required a bond of $250 to indemnify the defendant against loss on the attachment, or the whole amount may have been required under the provisions of said section 1036. At any rate, this is not the bond required by the statute for costs on appeal, it was not filed at the time exacted, and it was not served on respondent. If these provisions of the law are to be disregarded, it would be easy to justify most any departure from the legislative will.

Neither is there any merit in the contention that the question of jurisdiction was waived by the respondent when he filed his answer in the superior court. Parties cannot waive jurisdiction of the subject-matter nor confer it by consent. Whenever the court's attention was called to the fact that no undertaking for costs had been filed or served, it was the court's duty to dismiss the appeal, as it had no legal power to proceed with the trial. Likewise, it may be said that the question before us is not affected by the fact that appellant offered to deposit $100 in the superior court in lieu of the bond.

In the first place, assuming that the court could have authorized such a deposit, it was a matter entirely within its discretion, and to such considerations the writ of review does not extend. Again, it is clear that this discretion may be exercised, if at all, only when some undertaking, though defective, has been given. It does not exist when no security whatever on appeal has been furnished.

For further assurance of the soundness of the foregoing views, we make the following quotations from the decisions:

In Coker v. Superior Court, 58 Cal. 178, it is said: "To effectuate an appeal from the judgment of a justice of the peace, three things are necessary, viz.: The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking. And all these things must be done within 30 days after the rendition of the judgment. Sections 974, 978, Code Civ. Proc. All of these are jurisdictional prerequisites. None of them can be dispensed with; nor can any one of them, if not done, be supplied, or, if fatally defective, be remedied after the time limited by the statute, for, until all the prerequisites are completed, the appeal is not effectual for any purpose." It may be remarked that the Legislature of 1909 (St. 1909, c. 695) added section 978a, providing the further prerequisite that the undertaking "must be filed within five days after the filing of the notice of appeal and notice of the filing must be given to the respondent."

In McCracken v. Superior Court, 86 Cal. 76, 24 Pac. 845, in reference to the failure of the sureties to justify within five days after an exception to their sufficiency, it is said: "The superior court had no jurisdiction to extend time within which to do an act in the justice's court while the action remained in that court, and, as we have seen, until the sureties justified, the cause remained in the justice's court. The appeal was not effectual for any purpose, and the superior court had no jurisdiction whatever in the case. It may be otherwise where a defective or informal undertaking has been given. In such cases it has been held that the superior court may allow a new undertaking to be filed. Coulter v. Stark, 7 Cal. 244; Cunningham v. Hopkins, 8 Cal. 33; Rabe v. Hamilton, 15 Cal. 31; Coker v. Superior Court, 58 Cal. 177. But to allow the superior court to assume jurisdiction and make the order complained of in this case, as against the plain provision of the Code that, 'if the sureties fail to justify within the term fixed,' it must be regarded 'as if no such undertaking had been given,' would be to override the express and unequivocal language of the statute." It is further stated that: "Authority is given the Supreme Court to accept a new undertaking in lieu of an insufficient one in certain cases and on certain terms, but we know of no such statutory authority on the part of the superior court."

In Lane v. Superior Court, 5 Cal. App. 762, 91 Pac. 405, it is held, as stated in the syllabus: "Upon an attempted appeal from the justice's court, where the sureties fail to justify when required to do so, the appeal must be regarded as if no undertaking had been given, and the cause remains in the justice court until a new undertaking is filed or until the sureties justify. In such case, when the justification of the sureties was abandoned and an undertaking was filed more than 30 days after the rendition of the judgment, the appeal is ineffectual, and the superior court has no jurisdiction thereof."

With greater reason even must it be held that where no undertaking is filed after the notice of appeal is given, and no opportunity afforded for an exception to be taken to the sufficiency of the pretended security, the superior court has no jurisdiction of the appeal.

The cases all emphasize the necessity for a substantial compliance with the requirement of the statute in order to clothe the appellate tribunal with authority to review the action of the trial court.

As here the requirement of the law was disregarded by the appellant, the court certainly had jurisdiction to dismiss the appeal, and the order to show cause is therefore discharged.

We concur: CHIPMAN, P. J.; HART, J.

12 Cal. App. 545

HANSON v. UNDERHILL, County Auditor.
(Civ. 731.)

(Court of Appeal, First District, California. Feb. 4, 1910.)

1. OFFICERS (§ 100*) — COMPENSATION — INCREASE — CONSTITUTIONAL LAW—"INCREASE IN COMPENSATION."

County Government Act (St. 1905, c. 431), § 215; Pol. Code, § 4290—provided that the salary paid to a county recorder should be in full compensation for all services, and that all deputies should be paid by him out of his salary; and Pol. Code, § 4261, as amended by St. 1909, c. 422, provided that in certain counties the recorder should receive a fixed salary and be allowed two deputies at a certain salary to be paid from a certain fund. *Held*, that where a recorder's term of office began January 1, 1907, the amendment allowing him to appoint two deputies to be paid by the county was an "increase in compensation," within the meaning of the constitutional provision that the compensation of county officers shall not be increased after their election or during their term of office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 153; Dec. Dig. § 100.*

For other definitions, see Words and Phrases, vol. 4, pp. 3516, 3517.]

2. OFFICERS (§ 100*) — COMPENSATION — INCREASE—CONSTITUTIONAL LAW.

Where the statute provides a fixed salary for the officer and for a certain number of deputies, all payable out of the county treasury, an increase in the salary of such deputies, or a provision for extra deputies, is not within the constitutional prohibition against increasing the salary of county officers after their election or during their term of office, since in such case the state has undertaken to pay the officer, and in addition to pay the expenses of running the office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 153; Dec. Dig. § 100.*]

3. OFFICERS (§ 100*) — COMPENSATION — INCREASE—CONSTITUTIONAL LAW.

Under the constitutional prohibition against increasing the salary of county officers after election or during their term of office, where the statute allows a lump sum to cover their compensation and expenses, such sum cannot be increased during their term.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 153; Dec. Dig. § 100.*]

Application for a writ of mandate by Pauline E. Hanson against W. H. Underhill, as Auditor of San Mateo County. Writ discharged.

A. Kincaid, for petitioner. J. J. Bullock, for respondent.

COOPER, P. J. This is an application for a writ of mandate to compel the defendant, as auditor of San Mateo county, to draw a warrant upon the county treasurer for the payment of $66.66, claimed to be due petitioner as salary as deputy recorder of said county for the month of September, 1909. A demurrer has been interposed to the petition; and at the argument it was conceded that the facts stated in the petition are true, and that the question for determination is a question of law as to whether or not the petition states facts sufficient to entitle petitioner to any relief.

It appears that, at the November election in 1906, one J. F. Johnston was elected recorder of the county of San Mateo, and duly qualified as such. His term of office commenced on the first Monday after the 1st day of January, 1907. At the time he was elected, and when his term began, the law fixed his salary at $3,500 per annum, and in effect provided that such salary should be in full compensation for all services of every kind and description rendered by him, and that all deputies employed should be paid by him out of his salary. County Government Act 1905 (St. 1905, c. 431) § 215; Pol. Code, § 4290. At the session of the Legislature held in 1909, section 4261 of the Political Code was amended as to counties of the thirty-second class (San Mateo), by which it was provided as follows: "In counties of the thirty-second class the county officers shall receive as compensation for the services required of them by law or by virtue of their office the following salaries, to wit: * * * (3) The recorder, $3,500 per annum, and said recorder may appoint two deputy recorders, which offices are hereby created, who shall receive a salary of $800 per annum. The deputies herein provided for shall be paid at the same time and in the same manner and out of the same fund as the recorder is paid." St. 1909, c. 422. After the said section was so amended, and after it had gone into effect in May, 1909, the petitioner was duly appointed by Johnston deputy recorder of said county of San Mateo, and took the proper oath and qualified as such deputy recorder.

The Constitution of the state, at the time the said Johnston was so elected recorder, provided, and ever since has provided, as follows: "The compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office." The question then arises as to whether or not the amendment of 1909 to section 4261 of the Political Code increased the compensation of the county recorder of San Mateo county. When he was elected his compensation was $3,500, out of which he was required to pay all his deputies and assistants, as we have before stated, and of course the net sum he received as compensation was the remainder of the $3,500 after so paying his deputies or other assistants. The law then made no provision for paying any deputy or assistant; and hence, if the said recorder had been compelled to employ two deputies at a salary of $800 per year each, his net compensation would have been $1,900. Now if the Legislature had added $1,600 to the $3,500, thus making his salary $5,100, after his election and during his term of office, there would be no question but that such additional compensation would be within the plain prohibition of the Constitution. The Legislature could not, by a plain direct act, in terms increase his salary, and this is so evident that even a layman would so declare. If such salary could not be increased directly, it could not be increased indirectly; and, no matter what it is called, it is in effect an increase in compensation. It is as much an increase of compensation to allow to the recorder $1,600 with which to pay his deputies as it would be if he had been allowed $1,600 with which to pay his house rent or with which to purchase groceries. The case is the same in principle as Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, where it was held that an order of the board of supervisors of Marin county, allowing the county clerk a deputy at a salary of $50 a month, where no deputy had been allowed before, was in effect an increase in compensation and void. It was there said by the Chief Justice: "The sum allowed to any given officer being a lump sum, out of which he must pay for the services of all deputies and assistants necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after the payment of such deputies and assistants; and it is equally evident that, just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased."

The above case has not been overruled, but, on the contrary, has been followed in all subsequent decisions to which our attention has been called. Agard v. Shaffer, 141 Cal. 725, 75 Pac. 343; Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651. There are cases holding that where the statute provides a fixed salary for the officer, and a fixed salary for a certain number of deputies, all payable out of the county treasury, an increase in the salary of such deputies, or a provision for extra deputies, is not within the prohibition of the Constitution for the reason that in such case the state has undertaken to pay the salary of the officer, and in addition to pay the expenses of running the office, such as clerk hire, deputies, and so forth. Newman v. Lester, 105 Pac. 785 (Oct. 25, 1909); Tulare County v. May, 118 Cal. 303, 50 Pac. 427; Harrold v. Barnum, 8 Cal. App. 21, 96 Pac. 104. In the latter case the rule laid down in Daggett v. Ford County, 99 Ill. 334, is adopted, where it was held that if the statute allowed a fixed compensation as salary to the officer, and a further sum to cover the clerk hire and expenses of the office, if it was found that the sum so allowed was insufficient, such allowance might be increased; or, in other words, that the allowance for expense of clerk hire or deputies might be increased. But we have not been referred to any case that holds that, where a lump sum is allowed to cover compensation and expenses, such sum can be increased.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It follows that the demurrer must be sustained, and the writ discharged.

We concur: KERRIGAN, J.; HALL, J.

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12 Cal. App. 553

EARLE v. BRYANT et al. (Civ. 735.)

(Court of Appeal, Second District, California. Feb. 4, 1910.)

1. TRUSTS (§ 105*)—CONVEYANCE BY TRUSTEE—EFFECT—CONSTRUCTIVE TRUST.

Under Rev. St. U. S. § 2269, providing that where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, his executor or administrator, or one of the heirs, may file the necessary papers to complete the same, the entry to be in favor of the heirs, and that a patent issued thereon, will inure to the benefit of such heirs, where the wife of a deceased person holding land in trust under the statute conveyed it, the deed vested the legal title to the wife's share in the grantee subject to a constructive trust in favor of the other heirs.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 105.*]

2. LIMITATION OF ACTIONS (§ 102*)—TRUSTEE—CONSTRUCTIVE TRUST—WHEN STATUTE COMMENCES TO RUN.

The statute of limitations commences to run in favor of the trustee of an involuntary or constructive trust as soon as the trust relation is created.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500–502; Dec. Dig. § 102.*]

3. LIMITATION OF ACTIONS (§ 103*)—CONSTRUCTIVE TRUST—DISAFFIRMANCE.

No disaffirmance of an involuntary or constructive trust is necessary to set the statute of limitations in motion.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 506–510; Dec. Dig. § 103.*]

4. LIMITATION OF ACTIONS (§ 105*)—PENDENCY OF ADMINISTRATION—TOLLING OF STATUTE.

Under Code Civ. Proc. § 1453, providing that unless it appears to the court that the rents, issues, and profits of real estate for a longer period are necessary to be received by the executor or administrator, in order to pay debts, or that it will probably be necessary to sell the real estate, the court, at the end of the time limited for the presentation of claims against the estate, must direct the administrator to turn over the real estate to the heirs, the pendency of the administration for more than 20 years could not toll the statute of limitations, since the heirs were entitled to the possession after the time for presentation of claims had passed, unless a sale of the property to pay debts or expenses of administration was necessary.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 105;* Executors and Administrators, Cent. Dig. § 1762.]

5. LIMITATION OF ACTIONS (§ 105*)—PENDENCY OF ADMINISTRATION—TOLLING OF STATUTE.

Under Code Civ. Proc. § 1452, providing that heirs may sue to quiet their title to real estate against any one except the executor or administrator, etc., and section 1581 providing that the possession of the executor or administrator is the possession of the heirs for the purpose of bringing suits to quiet title, etc., the pendency of the administration for more than 20 years could not toll the statute of limitations, since the heirs could at any time have brought an action to quiet title.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 105;* Executors and Administrators, Cent. Dig. § 1762.]

6. QUIETING TITLE (§ 10*)—TITLE TO SUPPORT ACTION—ADVERSE POSSESSION.

In an action to quiet title, title by adverse possession is sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 38; Dec. Dig. § 10.*]

7. TRIAL (§ 388*)—AGREED STATEMENT—FINDINGS OF FACT—NECESSITY.

Where a case is submitted on an agreed statement covering all the facts of the case, no findings of fact are necessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 911; Dec. Dig. § 388.*]

8. APPEAL AND ERROR (§ 1177*)—REVERSAL—NECESSITY OF NEW TRIAL.

Where the questions of law presented by appellant's brief were conclusions drawn from an agreed statement of facts, the error could not be corrected by a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1177.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Charles F. Earle, as executor of William Y. Earle, deceased, against John S. Bryant, individually and as administrator of William Bryant and Elizabeth Bryant, deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Nathan P. Bundy and Chas. W. Hatton, for appellants. Chas. S. McKelvey, for respondent.

TAGGART, J. This is an action to quiet title. The case was submitted to the trial court upon an agreed statement of facts. Judgment was rendered in favor of plaintiff based upon full and complete findings made by the court. Appellants moved for a new trial upon a bill of exceptions, in which the only exceptions, or alleged errors, presented consist of some 10 specifications of the insufficiency of the evidence to justify or sustain the findings. The appeal is from an order denying that motion.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff claims title to the real estate in dispute as executor of William Y. Earle, deceased, to whom it was conveyed for a valuable consideration by Elizabeth E. Bryant, by deed dated November 24, 1886. He entered immediately into possession thereof, improved the property by building a house and making other improvements, paid all taxes levied and assessed against the property, and his occupation and possession thereof were open, continuous, and exclusive, until he died on October 22, 1905. Since that time possession has been held and all taxes thereon paid by plaintiff in the same manner. Defendants' predecessor in title was William Bryant, who, in his lifetime, was the husband of said Elizabeth E. Bryant. Bryant settled upon said premises with his family in the year 1875, and continued to reside thereon until his death on December 22, 1882. In 1877 he made application to the United States Land Office to enter a pre-emption claim upon a government fraction which included the land in controversy. His application was rejected, but after successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior, his application was directed to be received by an order dated on February 27, 1885. Elizabeth E. Bryant, who had been appointed administratrix of the estate of William Bryant, deceased, in January, 1884, thereafter, on the 23d day of March, 1885, entered the property as a pre-emption claim, and on January 12, 1889, the patent thereto issued in her name. The land was returned by said Elizabeth E. Bryant as a part of the estate of William Bryant in the inventory and appraisement of said estate filed by her as administratrix; the said property being declared to be community in character. On October 11, 1884, a final account and petition for distribution was filed in said estate, wherein distribution of said property to the heirs at law of William Bryant was prayed for. No decree of distribution was made, and nothing further done in said administration. The petition signed in the name of Elizabeth E. Bryant, by her attorney, enumerates all the defendants, except Timothy Judson and J. E. Hartell, as heirs at law of William Bryant, deceased, and declares them all to be adults, except Amanda M. Bryant, whose age is given at 16 years. Knowledge on the part of William Y. Earle of the interest of the estate in the property mentioned, at the time he purchased, is admitted; and it is also stipulated that all of the defendants have lived in the county of Los Angeles near where said property is situated with knowledge of said conveyance, since it was made, and have never made any claim to the premises until this action was commenced, May 13, 1907.

Accepting the view that the title to the land which Elizabeth E. Bryant obtained from the government created a trust for the benefit of the estate of William Bryant, deceased, under the provisions of section 2269 of the Revised Statutes of the United States as that section then stood, she did not hold the title as administratrix, but under a trust created by the statute. This being the case, the effect of her deed to William Y. Earle was to vest the legal title to the property in him. Her interest therein passed by the deed, and the trust which arose in favor of the other heirs of William Bryant was one created by operation of law and therefore a constructive one. The cases cited by appellants to support their contention that the statute of limitation will not begin to run in favor of a trustee against parties claiming to be the beneficiaries of a trust, until there is a repudiation of the trust, relate to voluntary, continuing, or express trusts, and not to those which are involuntary or constructive.

In the case of the trustee of an involuntary or constructive trust, the statute of limitations commences to run as soon as that trust relation is created by devolution of the title of the trust property on him. No disaffirmance of the trust on his part is necessary to set the statute in motion. Norton v. Bassett, 154 Cal. 411, 418, 97 Pac. 894. The pendency of the administration for more than 20 years could not be said to toll the statute, as defendants were entitled to the possession of the real estate after the time for presentation of claims had passed, unless a sale of the property to pay debts or expenses of administration was necessary (Code Civ. Proc. § 1453); and appellants might have brought an action to quiet title at any time had they desired to do so. Code Civ. Proc. §§ 1452, 1581. Title by adverse possession under color of title was clearly established by plaintiff. That is sufficient title to sustain the judgment of the court in plaintiff's favor.

Where a case is submitted upon an agreed statement covering all the facts of the case, no findings of fact are necessary. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364. The questions of law presented by appellants' brief relate to the conclusions of law of the court drawn from the statement of facts, rather than to any inferences of fact contained in the findings. A new trial could not effectively correct the errors complained of. See Swift v. Occidental Mining Co., 141 Cal. 166, 74 Pac. 700. The questions, however, have been considered upon their merits, independent of the method of presenting them.

Order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

12 Cal. App. 530

WINSLOW v. GLENDALE LIGHT & POWER CO. (Civ. 743.)

(Court of Appeal, Second District, California. Jan. 28, 1910.)

1. Municipal Corporations (§ 823*)—Special Interrogatories—Request.

Code Civ. Proc. § 625, as amended in 1905 (St. 1905, c. 62), requires the court, upon written request to direct a special verdict upon any issue or findings upon particular questions of fact, and provides that a special finding will control if inconsistent with the general verdict. In an action against a contractor for injuries by tripping over a wire stretched across the sidewalk, defendant requested a special interrogatory whether the wire was in such a position that plaintiff could have observed it by ordinary care, which the court modified by adding, "had she been looking for the wire," and gave. The evidence was conflicting as to whether it was negligence for plaintiff not to look for the wire across the street. *Held*, that the court was bound to submit special questions requested if the answers were relevant to some material issue, and, if favorable to the requesting party, would be inconsistent with a general verdict for the other party, and an affirmative answer to the question requested by defendant would have been inconsistent with a general verdict for the plaintiff, while such an answer given to the modified question was not, so that it was error not to submit the question as requested.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 823.*]

2. Municipal Corporations (§ 821*)—Obstructions in Streets—Care Required of Pedestrian—Contributory Negligence.

It could not be said as a matter of law that ordinary care in passing along a street required a pedestrian to look for a wire stretched across it so as to make her guilty of contributory negligence in failing to do so.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1756; Dec. Dig. § 821.*]

3. Municipal Corporations (§ 821*)—Injury to Pedestrian—Street Obstruction—Jury Question—Contributory Negligence.

Where, in an action against a contractor for injuries by tripping over a wire stretched across a sidewalk, the evidence was conflicting on the question of contributory negligence, it was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1754–1756; Dec. Dig. § 821.*]

4. Evidence (§ 591*)—Conclusiveness on Party Introducing it.

Plaintiff was not bound by the testimony of one of her witnesses which favored defendant's theory and conflicted with the testimony of plaintiff and her other witnesses; her other testimony not being introduced to impeach the witness whose testimony conflicted with her other testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440–2443; Dec. Dig. § 591.*]

5. Evidence (§ 471*)—Opinion Evidence—Conclusions.

A question as to whom witness was working for on a certain day was not objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

6. Trial (§ 29*)—Misconduct of Judge.

In an action for injuries received by tripping over a wire across a sidewalk, in which defendant attempted to show that the wire was placed across the walk by an independent contractor employed by it, remarks of the trial court upon overruling an objection to a question as to whom witness was working for on a certain date, that "if a man does not know whom he is working for he ought to go off to the woods; it is a very simple question," were not improper so as to prejudice defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80–84; Dec. Dig. § 29.*]

7. Witnesses (§ 240*)—Examination—Leading Questions.

The asking of leading and suggestive questions is largely within the trial court's discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 795; Dec. Dig. § 240.*]

8. Appeal and Error (§ 1002*)—Findings—Conclusiveness—Conflicting Evidence.

The jury's findings under proper instructions upon conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

9. Appeal and Error (§ 1001*)—Verdict—Conclusiveness.

A verdict will not be disturbed on appeal where there is some evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

10. Trial (§ 296*)—Instructions—Construction as a Whole.

An instruction which does not direct a verdict is not objectionable for omitting the law relative to some essential element in the case, if such omission is supplied by other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 706; Dec. Dig. § 296.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Mary M. Winslow against the Glendale Light & Power Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Tanner, Taft & Odell, for appellant. Morton, Pruitt & Goodrich and O. E. Smith, for respondent.

TAGGART, J. Action for damages for personal injury. Plaintiff, who was 76 years of age at the time of the injury complained of, was walking along the sidewalk of a street in the city of Glendale, and her feet becoming entangled with a wire stretched across the sidewalk, she tripped and fell upon the pavement, dislocating her knee, spraining her wrist, and bruising her face, shoulder, leg, and ankle, rendering her generally lame and crippled. The jury rendered a verdict in her favor against the defendant for the sum of $2,000, upon which verdict judgment was entered.

Defendant appeals from the judgment and from an order denying its motion for a new trial; and as reasons for a reversal of the judgment contends: (1) That the evidence shows that the wire which threw the plaintiff to the ground was placed across the sidewalk by the employés of one John C. Seaman, who was engaged in construction work for defendant as an independent contractor, and not as an employé of the defendant corporation; (2) that plaintiff was guilty of contributory negligence; (3) that the amount of damages awarded by the verdict is excessive; (4) that the court erred in its rulings upon some 72 objections made by defendant to the admission of testimony on behalf of plaintiff; (5) that the court erred in giving certain instructions requested by plaintiff and in denying some and modifying other instructions requested by defendant; and (6) that the court erred in refusing to give a special interrogatory relating to the issue of contributory negligence requested by defendant, and in giving it in a modified form.

The interrogatory requested by defendant was as follows: "Was the wire, over which it is alleged the plaintiff tripped and fell, in such position that plaintiff could have observed it had she been exercising ordinary care?" This, it is said, the court modified by adding, "Had she been looking for said wire?" The answer given by the jury was, "Yes." If the question had been asked as presented by defendant and this answer returned, it would have been inconsistent with the general verdict, and would have controlled the latter upon the issue to which it related—that is, the contributory negligence of the plaintiff. Section 625, Code Civ. Proc. At the time of the trial of the cause, section 625 of the Code of Civil Procedure was in force as amended in 1905 (St. 1905, c. 62), and under the law as then construed it was the duty of the court to submit to the jury particular questions of fact requested by the parties, and to direct written findings thereon. Plyler v. Pac. Cem. Co., 152 Cal. 125, p. 131, 92 Pac. 56. The Plyler Case sustained a party's right to have such questions submitted to the jury, even where they did not call for a finding upon a material issue, provided the answers to the questions were relevant to some material issue, and, if favorable to the party preferring the request, would be inconsistent with a general verdict for his adversary. Measured by this rule, a finding in defendant's favor in answer to the special question requested by it upon the issue of contributory negligence as above stated would have been inconsistent with the general verdict rendered, while, on the other hand, the finding actually made by the jury, in answer to the modified interrogatory of the court, did not in any way affect the general verdict and is not inconsistent with it. The jury merely finds that if the plaintiff had been looking for a wire at the place of the injury she might have seen it. There is nothing in the record that enables us to say as a matter of law that in the exercise of ordinary care in passing along the public street it was necessary that she should be looking for a wire. Indeed, the court very properly, at her own request, instructed the jury that such was not the law.

The evidence was contradictory upon this subject, and the defendant was entitled to a determination of the question to whose testimony the jury gave credence and consideration. The position of appellant, that because one of the witnesses put upon the stand for the plaintiff testified in support of defendant's theory, while others testified so as to sustain the opposite conclusion, the plaintiff was bound by the testimony of the unfavorable witness, is entirely untenable. The testimony of plaintiff, her daughter and the other witnesses, which was in conflict with that of the witness Harvey, and tended to establish her claim that she acted with ordinary care, was not introduced for the purpose of impeaching Harvey, but to prove a material element in her case, and could not be excluded from consideration by the jury merely because it was inconsistent with the testimony of Harvey. We know of no such application of the rule invoked by appellant.

The objections to certain questions of plaintiff, based upon the ground that the testimony sought to be elicited was but a conclusion of the witness, were properly overruled, and the motions to strike out on the same ground properly denied. The question, "For whom were you working on the 27th day of February, in 1907?" was asked, and this objection was interposed, and the trial judge remarked, in overruling the objection, "A man ought to know who he is working for." This is assigned as error. We do not so regard it. The witness Harvey was asked who employed him and he answered, "J. H. Seaman," and also gave the same answer to the question, "Whom were you working for at that time?" In each answer he attempted to modify this by some statement as to the capacity in which Seaman had acted in engaging him to work, and was interrupted and prevented by the opposing counsel from finishing his answer. Thereupon the examining attorney propounded the question: "I do not ask you who engaged you to work, but for what company or corporation or individual were you working on that day?" Counsel for the defendant prevented the witness from answering the question and demanded the right to cross-examine him as to "whether he knew or not" before permitting an answer. It is contended that it was prejudicial error for the court to say in this connection: "If a man does not know who he is working for, he ought to go off to the woods; it is a very simple question." We see nothing wrong in the assumption by the court of this view as the basis of its ruling, and find no impropriety in the language of the ruling to the prejudice of appellant. Neither was it wrong for the court to ask the question, "Whom were you working for?" This question the witness answered, "I should say the Glendale Light & Power Company." Later, in response to the inquiry, "Were you employed by the defendant here, the Glendale Light & Power Company?" asked first by counsel and then by the court, the same witness replied, "Well, yes, sir" (the answer being given after an admonitory "if you know" by defendant's counsel). Objections subsequently made to questions on the ground that they were improper because assuming that the witness was in the employ of defendant were properly overruled. Some of the questions objected to as leading and suggestive were perhaps open to some criticism on that ground, but the asking of questions in this form rests largely in the discretion of the trial court, and we find no prejudicial abuse of that discretion in any of the rulings complained of.

There was conflict in the evidence as to whether or not the witness Seaman was an independent contractor, and, as above stated, there was at least some evidence to show that the men who were moving the wire were working for defendant. The jury, under proper instructions, found that Seaman was not an independent contractor in doing this job, and we cannot disturb that conclusion. The other contentions based upon the insufficiency of the evidence may be met in the same way—that is, there was some evidence to sustain the verdict. That this is true of the issue of contributory negligence appears from the evidence above referred to in connection with the refusal of the court to submit the special question requested by defendant.

The instructions given at the request of plaintiff, taken together, correctly declare the law applicable to the facts of the case. It is no objection to a single instruction—which does not direct a verdict—that it omits the law relative to some essential element in the case, provided the law be supplied elsewhere in another instruction given to the jury. The instructions requested by defendant, and either denied or modified by the court, wherein the jury were instructed in effect that the evidence showed that the witness Seaman was an independent contractor, or in which it was assumed that the facts as to Seaman's employment enumerated by defendant, established, as a matter of law, that he was an independent contractor, were properly refused and modified, respectively.

The other alleged errors assigned will probably not arise upon a new trial, and it is not necessary to pass upon them. For the failure to submit the special question requested, the motion for a new trial should have been granted.

The judgment and order reversed.

We concur: ALLEN, P. J.; SHAW, J.

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12 Cal. App. 604

SHIELS v. NATHAN. (Civ. 640.)

(Court of Appeal, Third District, California. Feb. 9, 1910. Rehearing Denied March 8, 1910; Denied by Supreme Court April 7, 1910.)

1. APPEAL AND ERROR (§ 1078*)—REVIEW—MATTERS NOT URGED IN BRIEF.

A defense that plaintiff, in an action to recover real estate conveyed by an insolvent debtor prior to the commencement of the action, conveyed an interest in the property to her attorneys, who are not made parties to the action, which defense is not urged in defendant's brief, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. § 1078.*]

2. EXECUTORS AND ADMINISTRATORS (§ 37*)—DISCHARGE OF EXECUTOR — RIGHT TO APPOINT SUCCESSOR.

Code Civ. Proc. § 1698, provides that the final settlement of an estate shall not prevent a subsequent issue of letters "if other property be discovered, or if it become necessary or proper, for any cause, that letters should be again issued." An executor reported that he was unable to discover any property belonging to the estate, and was discharged. *Held*, that after his death the court could appoint an administratrix c. t. a. to take charge of subsequently discovered property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 37.*]

3. EXECUTORS AND ADMINISTRATORS (§ 449*)—ACTION AGAINST EXECUTOR—PLEADING.

In an action by an administratrix c. t. a. against the administrator of another estate to recover property in the hands of defendant belonging to the estate of plaintiff's decedent, where the due appointment of plaintiff is alleged in the complaint and is not denied in the answer, the jurisdiction of the court to appoint plaintiff cannot be raised.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 449.*]

4. EXECUTORS AND ADMINISTRATORS (§§ 221, 236, 244*)—CLAIM OF EXECUTOR—ALLOWANCE BY JUDGE.

Code Civ. Proc. § 1510, provides that, if an administrator is a creditor of the decedent, his claim must be presented for allowance or rejection to a judge of the superior court, and its allowance is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. Section 1504 provides that a judgment against an administrator upon any claim for money against the estate of decedent only establishes the claim the same as if allowed by the administrator and the judge. *Held*, that the allowance of a claim of an administratrix by the judge is of equal force with a judgment against the administratrix and may be contested by any person interested in the estate the same as other allowed claims might be contested; but, in case of a contest, the burden is on the party contestant to show that the claim was not properly allowed; and the same rule holds good in an action brought by an administratrix to enforce an approved claim belonging to her.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 841, 866, 901; Dec. Dig. §§ 221, 236, 244.*]

5. EXECUTORS AND ADMINISTRATORS (§ 57*)—PROPERTY FRAUDULENTLY CONVEYED BY TESTATOR—RECOVERY BY ADMINISTRATOR.

Under Code Civ. Proc. § 1589, making it the duty of an administrator to prosecute an action to recover for the benefit of the creditors of the estate all real estate fraudulently conveyed by the decedent, the action may be prosecuted by an administratrix who is the sole creditor of the estate.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 57.*]

6. Executors and Administrators (§ 241*)—Right to Contest Allowed Claim.

Where probate proceedings have been regularly conducted and the claim of an administratrix has been allowed, all the world are parties to such proceedings and are bound thereby, subject to the right of an interested party to have the claim set aside for cause, although a judgment is an estoppel only as to parties and privies.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 241.*]

7. Appeal and Error (§ 931*) — Review — Presumptions.

It will be presumed on appeal, in an action by an administratrix to recover property fraudulently transferred by decedent, in order to pay her claim against the estate, that the judge, in approving her claim, heard evidence in support of the facts averred in the claim and found them to be true.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.*]

8. Limitation of Actions (§ 100*)—Accrual of Right of Action—Discovery of Fraud.

Code Civ. Proc. § 338, subd. 4, provides that a cause of action for relief on the ground of fraud does not accrue until the discovery by the aggrieved party of the facts constituting fraud. Plaintiff and her husband agreed to a separation and to fully account for all community property to two men selected to divide it. Plaintiff's husband did not return a sum of money on deposit which was community property, and plaintiff knew nothing of its existence. After the separation and division of all the property returned, the husband transferred all his property to defendant's intestate, and after the death of the husband, defendant's intestate was made his executor and was subsequently discharged. After the death of defendant's intestate, plaintiff was made administratrix of her husband's estate, and then discovered the fraud as to the bank deposit, and brought an action against defendant to set aside the transfer of real estate of her husband to defendant's intestate within three years after discovery of the fraud. It did not appear that defendant's intestate, while executor, filed any affidavit showing that he published notice to creditors in the matter of the husband's estate, nor that plaintiff had any knowledge that notice to creditors was published. *Held*, that the action was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. § 100.*]

9. Executors and Administrators (§ 437*)—Action—Laches.

Plaintiff and her husband agreed to separate and to return all community property held by them to two men appointed to divide the same between them. The husband did not return a sum of money belonging to the community deposited in a bank, and subsequently transferred all his property to defendant's intestate, who was appointed the husband's executor and was subsequently discharged because he found no property belonging to the estate. Plaintiff did not discover the fraud of her husband in concealing the bank deposit for 13 years after the settlement, and made no effort during that time to ascertain the facts. She discovered the fraud shortly before the death of defendant's intestate, but delayed the presentation of her claim against the estate of her husband until after the death of defendant's intestate. The deed by which her husband conveyed the property to defendant's intestate was in consideration of love and affection only. It was not shown that defendant's intestate knew anything about the facts existing at the time of the separation. Plaintiff, after defendant's intestate had been discharged as executor, was appointed administratrix c. t. a., and had her claim for a portion of the bank deposit allowed, and within three years after discovering the fraud of her husband in concealing the bank deposit sued to set aside the conveyance by her husband of real estate to defendant's intestate. *Held*, that her action was not barred by laches; there being nothing tending to show that the heirs of defendant's intestate, nor any creditors interested in the estate, had suffered prejudice by delay in presenting the claim.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 437.*]

10. Equity (§ 72*)—Laches—Prejudice.

Mere lapse of time less than the statutory period of limitation will not bar an action for equitable relief, unless the delay under the circumstances has been such as to justify the presumption that defendant may have been prejudiced thereby.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207–220, 225, 226; Dec. Dig. § 72*.]

11. Executors and Administrators (§ 431*) —Fraudulent Conveyance by Decedent — Avoidance — Action — Necessity for Judgment.

Under Code Civ. Proc. § 1589, providing for the recovery by the personal representative of property fraudulently disposed of by a testator, the requirement that claims of creditors must be evidenced by a judgment, or they must have been allowed by the administrator or executor, the approval by the judge of the claim takes the place of the allowance by the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 431.*]

12. Executors and Administrators (§ 450*) —Fraudulent Conveyance by Decedent — Avoidance — Action — Evidence of Fraudulent Intent.

In an action by an administratrix who held an unsatisfied claim against the estate, to set aside a transfer by testator of his real estate as fraudulent, evidence *held* to show the fraudulent intent of the testator in transferring his property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.*]

13. Executors and Administrators (§ 450*) —Fraudulent Conveyance by Decedent —Avoidance — Action—Insolvency—Sufficiency of Evidence.

In an action by an administratrix to set aside a transfer of property by decedent as being in fraud of creditors, evidence that decedent transferred all of his property shortly before his death *held* to sustain a finding of insolvency.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.*]

14. Executors and Administrators (§ 453*) —Fraudulent Conveyance by Decedent —Action to Set Aside—Judgment.

Under Code Civ. Proc. § 1589, authorizing an administratrix to recover for the benefit of creditors all real estate fraudulently conveyed by decedent, and section 1591, providing that all real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seized thereof, and the proceeds appropriated in payment of the debts in the same manner as other property in the hands of the administratrix, and the remainder paid to the person from whom such property was recovered, a judgment in an action by an administratrix to recover property fraudulently conveyed by decedent vested the title in her for the benefit of creditors, and also declared it to be free and clear of all claims of the defendant as administrator of the estate of the grantee, or any other person claiming through or under said estate, the latter provision should be stricken out.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 453.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mary Shiels, as administratrix of the estate of Bernard Shiels, against I. C. Nathan, as administrator of the estate of Michael Shiels. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

W. A. Gett, for appellant. M. S. Wahrhoftig and Hinkson & Elliott, for respondent.

CHIPMAN, P. J. This is an action, brought under section 1589, Code Civ. Proc., to recover from the estate of Michael Shiels, deceased, certain real estate for the benefit of the creditors of the estate of Bernard Shiels, deceased.

It appears from the complaint that Bernard Shiels died December 31, 1902, leaving a will by which he devised all his property to Michael Shiels, naming him as executor; that Michael was duly appointed as executor, and was thereafter, to wit, November 6, 1903, discharged from his said trust; that plaintiff was duly appointed administratrix with the will annexed shortly thereafter, and ever since has been and now is such administratrix; that Michael died intestate, in the state of Nevada, on December 12, 1905, leaving estate in the county of Sacramento, this state; that defendant was duly appointed administrator of his estate, April 5, 1906, by the superior court of said county, and now is such administrator; that before and at his death Bernard was indebted to Mary Shiels in the sum of $1,691, with lawful interest from November 14, 1890, upon a claim arising out of an agreement of separation (the said Bernard and Mary being husband and wife) and a division of their community property theretofore had between them, "all of which will more fully appear from a copy of the claim of said Mary Shiels, which is hereto annexed (i. e., to the complaint) marked 'Exhibit A,' and is hereby referred to and made part of this complaint"; that on March 7, 1906, said Mary presented to Hon. Peter J. Shields, judge of the superior court of said county, for his approval and allowance, her said claim against the estate of said Bernard Shiels, deceased (amounting then to $3,505, principal and interest) "accompanied with a statement of the facts out of which said claim arose," which said claim was, on said March 7, 1906, allowed and approved by said judge and duly filed in the office of the county clerk. It is then alleged that on December 26, 1902, said Bernard was the owner of certain described real estate referred to in the complaint, situated in said county, and also had on deposit in the Sacramento bank the sum of $1,800; that he then owned no other property, real or personal; that on said last-named day Mary was a creditor of said Bernard, who, "without any valuable or adequate consideration therefor, transferred and conveyed to the said Michael Shiels all of the above-described real estate and said sum of money so on deposit as aforesaid, and from the time of said conveyance and transfer until his death he had no other property out of which said debt could be paid, and he thereby rendered himself insolvent, and he continued to be insolvent up to the time of his death." It is further alleged that said transfer was "with fraudulent intent and purpose to hinder and defraud the said Mary Shiels, and to prevent her from resorting to said real estate and money whereby to collect and satisfy her said debt, and to avoid the payment of the same"; that said Michael immediately thereafter removed said money without the jurisdiction of this court; that there are no assets in the hands of plaintiff nor in the estate of said Bernard Shiels, deceased, with which to pay said claim of said Mary Shiels, or to pay the costs and expenses of administering said estate, and it is necessary to recover the whole of said real estate for such purposes."

The claim referred to in the complaint and as presented and allowed reads as follows: "In the Matter of the Estate of Bernard Shiels, deceased. The undersigned, a creditor of Bernard Shiels, deceased, presents her claim against the estate of said deceased, with the necessary voucher for approval, as follows, to wit: "Estate of Bernard Shiels, deceased, to Mary Shiels, Dr. March 7, 1906, To money owing, due and unpaid from said Bernard Shiels at the time of his death, to claimant founded upon the facts set forth in the statement hereto annexed, and which is made part hereof, and is explanatory of this claim, $1,691.00. Interest owing, due and unpaid on said sum of $1,691.00, from the 14th day of November, 1890, to date, at the rate of 7 per cent. per annum, $1,814.00. Total, $3,505.00."

It is set forth in the claim that Bernard and Mary married on November 28, 1872, and were husband and wife until the death of Bernard, December 31, 1902; that during their marriage and up to November 14, 1890, they had, by their joint labor, accumulated "a large amount of money and other property which was then their community property"; that, owing to differences then existing between them, they mutually agreed to make an equal division between them of all their said community money and other community property, and to live separate and apart from each other, and that they would select two men to make a true and correct inventory and appraisement of all their said community property, who should divide the same equally between them, and that each of them should furnish to said two men "a full, true, and correct statement and memorandum of all of said community money and other property that each of them had in his or her possession and under his or her control"; that pursuant thereto claimant did on November 14, 1890, furnish to the said Bernard and the said two men a full statement of all said property in her possession or control, and the said Bernard "furnished to claimant and said two men what he represented and stated to be, and what claimant then believed to be, a full, true, and correct statement and memorandum of all said community money and other property that was then in his possession and under his control, and claimant believed, and had full confidence in said Bernard Shiels, and in his said statement and memorandum, and his assurance, that he had made to her, that said statement and memorandum contained a full, true, and correct statement of all of said community money and other community property that was then in his possession and under his control, and in making a division of said community, claimant believed, and acted solely upon said representations, statement, and memorandum of the said Bernard Shiels"; that said two men acted upon said statement and divided the property accordingly, and, believing said statement to be true, claimant accepted the share set apart to her and consented to the division so made, and thereupon she and said Bernard entered into an agreement in writing to live separate and apart from each other; that from said 14th day of November, 1890, to the day of the death of said Bernard, she remained separate and apart from her said husband, supported herself, and in all respects complied with said agreement of separation; that during all said time she knew nothing of Bernard's business affairs and had no means of knowing or ascertaining anything about his business matters, or of the amount of said community property in his control, and did not know or discover until after his death and until letters of administration were issued to her, on November 25, 1903, that he had money which he had concealed from her and said two men at the time of said division; but that after said letters were issued to her, to wit, on November 28, 1903, she ascertained from the Sacramento Bank, in the city of Sacramento, on presenting to it her authority to act as administratrix of Bernard's estate, that on November 14, 1890, said Bernard had on deposit in said bank the sum of $3,382, which was community property, and which he had concealed from claimant and said two men and was not taken into account in said division and no part thereof was ever paid to her; that one-half thereof belonged to her by virtue of said agreement of separation, and she was entitled thereto on said November 14, 1890, and it was due to her at the date of his death. The claim was duly verified and bore the following indorsement: "Allowed and approved for $3,505.00 this 7th day of March, 1906. Peter J. Shields, Judge. Filed Mar. 7, 1906. Wm. B. Hamilton, Clerk, by S. B. Keller, Deputy."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Defendant demurred to the complaint on several grounds: (1) That the court was without jurisdiction because it does not appear that defendant, as a trustee, has possession of the property; (2) that there is a defect of parties defendant, in this, that Michael Shiels died testate, and his heirs are not made parties defendant; (3) that sufficient facts are not alleged to constitute a cause of action; (4) that the complaint is uncertain, unintelligible, and ambiguous, in this, that no copy of the claim, in form or substance, as required by section 1494, Code Civ. Proc., is attached to the complaint; (5) that no facts are set forth in support of the averment that certain real estate was transferred "with the fraudulent purpose to hinder and defraud," etc. The complaint is demurred to also as barred by certain sections of the Code of Civil Procedure. The demurrer was overruled, properly we think, and defendant answered, pleading the statute of limitations in bar of the action. Denials were made to the material averments of the complaint, except the averments in the first and second paragraphs thereof, in the language of the complaint. For example, the averment of the complaint that at his death Bernard was indebted to Mary in the sum of $1,691, and averments in that connection are simply denied in the language of the complaint. So of the averments as to the presentation and allowance of her claim by Judge Shields. So also of the averments that there are no assets in the hands of plaintiff as administratrix of the estate of Bernard with which to pay said claim or costs and expenses of administration, "and it is necessary to recover the whole of said real estate for such purpose."

A defense is pleaded on the ground that plaintiff, prior to the commencement of the action, conveyed an interest in the property described in the complaint to Messrs. Hinkson & Elliott (who are her attorneys), and that they are necessary parties to the action. This is not urged in appellant's brief and may be dismissed from consideration.

A defense is also pleaded that plaintiff knew, about the time of its execution, of the execution of the deed from Bernard to Michael, mentioned in the complaint, and is guilty of laches, and should therefore not be permitted to maintain the action and is estopped thereby. The answer also pleads laches, in that the complaint fails to show that plaintiff made any effort to recover said money, or property until October 13, 1906, when the complaint was filed, being more than five years after Bernard bought the land in question. But the statute of limitations began to run from the date of the discovery of the fraud, which was in 1903.

The court found the averments of the complaint to be true, except that the amount of money on deposit in the Sacramento Bank was $1,727.78 at the time claimed, to wit, December 26, 1902, and except, also, that the evidence did not show that Michael removed the money from this jurisdiction, but that Bernard did, on December 26, 1902, transfer said money to Michael, and he caused the same to be transferred to his credit and on January 3, 1903, he removed the same from said bank and closed his account; that the conveyance to Michael by Bernard was voluntary and without any valuable consideration and was made while he was in debt to Mary "with intent on his part to hinder, delay, and defraud the said Mary Shiels in the collection of her said claim and to defeat the same and deprive her of her rights." The court finds against defendant as to the material averments of his answer. The judgment was that plaintiff recover "for the benefit of the creditors of Bernard Shiels, deceased, and of his estate," and that the title to the lots in question be henceforth, "without further act or proceeding, vested in the plaintiff for the purposes hereinbefore set forth, free and clear of all claims of said defendant as administrator of the estate of Michael Shiels, or any other person, or persons, claiming by, through, or under said estate of Michael Shiels, deceased, or the defendant as administrator."

Defendant gave notice that he would, on April 17, 1908, move to vacate the judgment on the ground that it was rendered through mistake, inadvertence, surprise, and excusable neglect. The motion was denied, and, as the appeal from that order is not now pressed, it will not be considered.

Defendant also moved for a new trial on most of the statutory grounds, which motion was denied. He appeals from the judgment, from the order refusing to vacate the judgment, and from the order denying his motion for a new trial.

When the cause was called for trial, the court asked counsel for plaintiff, after he had read the complaint, whether the allegations of plaintiff were denied by defendant. He replied: "We admit that defendant has attempted to deny all the allegations of our complaint, except paragraphs 1 and 2 thereof, which are admitted; but we do not concede that the denials of defendant are sufficient."

Over defendant's objection, plaintiff submitted evidence showing: That the court had approved and allowed the claim as set forth in the complaint; the will of Bernard by which he devised all his property to his brother Michael, to show an intention, at the time he made the deed, to exclude plaintiff from sharing in his estate; petition of Michael, as executor of Bernard's estate, asking his discharge, and to show that he therein reported to the court that he was unable to discover any property belonging to Bernard, and for that reason asked his discharge; the order of discharge showing that it was made on the ground stated in the petition; inventory in the matter of the estate of Michael showing that it returned the lots in question as part of Michael's estate, of the inventory value of $5,050. It was shown by witnesses that Bernard, when making his deed to Michael, expressed the intention that his wife should have none of his property, as he had made ample provision for her, and she had property of her own, and that he desired that Michael should have all the property he possessed. It was also proven that on December 26, 1902, Bernard had on deposit in the Sacramento Bank $1,728.78, and that he transferred the account to Michael on that day, who drew the money out January 3, 1903, and closed his account.

Defendant offered no evidence. He pleaded the deed from Bernard to Michael and the settlement contract between Bernard and his wife, which, not being denied, are deemed admitted.

Appellant urges many points in support of his contentions: That the demurrer should have been sustained; that his motion for nonsuit should have been granted; and that the evidence does not support the findings. The questions in controversy are more or less involved in all these contentions and may be considered without special reference to either one in particular.

1. It is claimed that the appointment of Mrs. Shiels as administratrix of Bernard's estate was without jurisdiction for the reason that the executor (Michael) of that estate was discharged and jurisdiction over the executor and over the property of the estate was terminated. The only ground for asking the discharge or for making the order, so far as appears, was the averment in the petition, found as fact in the order, that the executor was unable to discover any property belonging to the estate. The contention is that by the discharge the court lost jurisdiction which could only be regained by setting aside the order on some sufficient ground made to appear, and, as no such step was taken, the court could not appoint an administratrix with the will annexed. Section 1698, Code Civ. Proc., provides that the final settlement of an estate shall not prevent a subsequent issue of letters, "if other property be discovered, or if it become necessary or proper for any cause

that letters should be again issued." The point is without merit. To have vacated the order discharging Michael as executor would have had the effect to restore him to his office; but he was then dead, and the order would have been futile. The jurisdiction of the court over the estate continued as to subsequently discovered property of deceased. The statute gives the court jurisdiction, even "after the final settlement of an estate," to subject newly discovered property to administration and this without disturbing the settlement. Furthermore, the due appointment of Mrs. Shiels was alleged in the first paragraph of the complaint, and this paragraph is not denied.

2. The other questions are directly or remotely connected with the approved claim of Mrs. Shiels. It therefore becomes of the first importance to determine its status and the extent to which its approval and allowance figure in the case, since it is conceded that it was necessary for plaintiff to show that she was a creditor of the estate of Bernard, which appeared only through her approved claim.

Section 1497, Code Civ. Proc., reads: "Every claim allowed by the executor or administrator, and approved by a judge of the superior court, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration."

Section 1510, Code Civ. Proc., provides: "If the executor or administrator is a creditor of the decedent (the case here), his claim, duly authenticated by affidavit, must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration."

It was held in Estate of More, 121 Cal. 635, 54 Pac. 148, that the judgment of a court and the approval of a claim by the judge are of equal force. See, also, Hall v. Cayot, 141 Cal. 13, 74 Pac. 299. Section 1504, Code Civ. Proc., practically so declares. Speaking of the judgment of the court, the court, in Estate of More, supra, said: "It did, however, establish the claim in the same manner as if it had been allowed by the judge, and was prima facie evidence of its correctness. The judgment was, however, subject to be afterward contested by any person interested in the estate, in the same manner and to the same extent as other allowed claims might be contested. But in all such cases the burden is upon the party contesting to show that the claim was not properly allowed"—citing Estate of Loshe, 62 Cal. 413; Estate of Swain, 67 Cal. 637, 8 Pac. 497. In Estate of Loshe, the court said: "It is not necessary to consider how far the allowance and approval of a claim resemble or give the effect of a judgment; it is sufficient to say that such a claim is to 'rank among the acknowledged debts of the estate, to be paid in due course. If it be an acknowledged debt, it is good until cause be shown.'" In these cases the question arose at some stage of the administration; but we see no reason why the same rule should not apply where, as here, the plaintiff, as a creditor, pleads her approved claim in support of her action. To the extent of showing that she is a creditor, the approved claim should be treated "as an acknowledged debt of the estate," and the burden to show otherwise should be, and we think is, upon the party assailing it. Section 1589, Code Civ. Proc., makes it the duty of the executor or administrator to prosecute the action to recover for the benefit of the creditors of the estate all real estate fraudulently conveyed by the decedent, in his lifetime, and the action may be prosecuted by an administrator who is a creditor, even if a sole creditor.

Appellant contends that the allowance of Mrs. Shiels' claim cannot affect him, as he was a stranger to the estate and was not a party or privy thereto, citing Shay v. McNamara, 54 Cal. 169. It is true that a judgment is an estoppel only as to parties and privies. But subject, however, to the right of an interested party to have the allowance of a claim set aside for cause, all the world are parties to the probate proceedings relating thereto and are bound thereby, where the probate proceedings have been regularly pursued. Let us, then, consider the attack made upon the claim of Mrs. Shiels.

3. It is claimed that the action is barred in three years by subdivision 4, § 338, Code Civ. Proc., if it is for relief from fraud or mistake; that it is barred in two years by subdivision 1, § 339, Code Civ. Proc., if the claim is upon contract not founded upon an instrument in writing; and is barred in four years by section 343, Code Civ. Proc., if the action is for relief not otherwise provided for.

It seems to us that the claim is based upon the contract entered into between Bernard Shiels and his wife as set forth in the statement of facts therewith made. We must presume that before or at the time the judge approved the claim, he heard evidence in support of the facts averred in the claim and found them to be true. Briefly, that Bernard, at the time the agreement of separation was entered into had a deposit in the Sacramento Bank of $3,382, belonging to the community, which he purposely and fraudulently concealed from his wife and of which he made no account in returning to her, and to the two men chosen to divide the property, a memorandum of the community property in his possession, to one-half of which, $1,691.00, she was entitled by the agreement, with interest to March 7, 1906, the date of filing the claim, amounting to $1,814.00; that by the agreement each was to make a full, true, and correct statement and memorandum of all the community property in possession or control of each; that claimant had full confidence in her husband and in his statement and his assurance then made to her that it contained a true and correct return of all his said property; that in making said settlement she "believed and acted solely upon said representations and memorandum of the said Bernard Shiels," as also did the said two men chosen to make said division of the property; that she had no means of ascertaining the facts, and did not discover said money so deposited until shortly after letters were issued to her, to wit, November 28, 1903, and then for the first time was informed by the officers of said bank that Bernard had money on deposit (the amount set out in the claim) at the date of the separation. The claim was admitted in evidence as presented to and allowed by the judge. Defendant offered no evidence tending to dispute any of the facts presumably determined by its approval, and the only defense now made to it is the statute of limitation and laches in failing to make due injury. The discovery of the fraud was made November 28, 1903, and the action was brought within three years thereafter, to wit, October 13, 1906. While the action is upon the agreement of separation, the relief sought is for fraud—"The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Subdivision 4, § 338, Code Civ. Proc. The action was not barred by any statute of limitation. It does not appear from the transcript that Michael, while acting as executor, or at all, filed any affidavit showing that he published notice to creditors, in the matter of the estate of Bernard, nor did it appear that Mrs. Shiels had any knowledge that notice to creditors had been published.

4. It is true that many years passed before the discovery was made by Mrs. Shiels, and it is urged that she ought to have shown that she made some effort to ascertain the facts, that available means of knowledge amount to knowledge, and that there is an utter failure to show any sort of diligence in making the discovery from 1890 until 1903. The answer is that the relation of husband and wife is one of the highest degree of confidence and trust, and although in this case they had "differences," not explained, which led to their separation, the claim stated, and the judge presumably found as fact, that the wife had confidence in her husband and trusted him in making return of his property. Differences might have existed without destroying confidence in each other's honesty and integrity. The husband is entitled to the exclusive possession and control of the community property and presumably knows all about it, while no such presumption attaches to the wife. Accepting the settlement upon the belief that her husband had returned all the community property, she had a right to rest in that belief and was not called upon to pursue an independent search for other property; to have done so would have implied want of confidence in her husband's honesty in making return of the property, whereas her belief in and reliance upon his honesty was the ground on which she accepted the settlement. We do not know, except from the facts stated in the claim, when or how her suspicions were aroused, or when or how she came to make inquiry as to the facts; they were inquired into by the judge who allowed the claim. There is no evidence of any facts or circumstances from which it might be inferred that she knew or had any reason to believe that her husband had deceived her at the settlement, prior to the actual discovery.

5. It is argued, as evidence of her unfairness and laches, that although she learned of the fraud in November, 1903, she delayed the presentation of her claim until after the death of her husband's brother, Michael, to whom the property in question had been conveyed by Bernard; that by his death she could not be confronted with his testimony in explanation of the conveyance. The deed shows that it was without consideration other than love and affection. Besides, it cannot be assumed, and it did not appear, that Michael knew anything about the facts existing at the time of the separation. The defense of laches is sometimes sustained, although the period of delay is less than that provided by the statute of limitation. Mere lapse of time less than the statutory period of limitation will not bar action for equitable relief, unless the delay, under the circumstances, has been such as to justify the presumption that the defendant may have been prejudiced thereby. Ex-Mission Land Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Cahill v. Superior Court, 145 Cal. 47, 78 Pac. 467; Cook v. Ceas, 147 Cal. 614, 82 Pac. 370. There is nothing in the record tending in the slightest degree to show that the heirs of Michael or any creditors interested in his estate have suffered or will suffer prejudice by the delay in presenting the claim.

6. It is urged that there was no evidence of actual fraudulent intent in conveying the property to Michael. The claim presented to and allowed by the judge raised no issue as to the land in question or its transfer to Michael. Only such facts or issues as were then raised are to be deemed adjudged by the allowance. The complaint avers that Mary Shiels was a creditor of Bernard at and before the date of the transfer; that "he, without any valuable or adequate consideration therefor," conveyed to Michael the land and the money on deposit, and thenceforward to the date of his death "he had no other property out of which said debt could be paid, and he thereby rendered himself insolvent," and so continued until he died. It has been

held that under section 1589, Code Civ. Proc., it must appear: "(1) That there are creditors to be paid; (2) that there is an insufficiency of assets in the hands of the administrator to meet their demands; and (3) the claims of creditors must be evidenced by a judgment obtained in this state, or they must have been allowed by the administrator or executor, which is the equivalent of a judgment. Aigeltinger v. Einstein, 143 Cal. 609, 615, 77 Pac. 669, 101 Am. St. Rep. 131. (Of course, the approval by the judge takes the place of the allowance by the administrator when the latter is the claimant.) Section 1589 authorizes the action "when the decedent, in his lifetime, has conveyed any real estate, * * * with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by the law the deeds or conveyances are void as against creditors."

There was evidence tending to establish the requirements mentioned in the case cited. It was, however, necessary to show further that the conveyance was with fraudulent intent. It was held, in Emmons v. Barton, 109 Cal. 662, 42 Pac. 302, that, where the consideration was love and affection alone, it was not insufficient unless made with intent to defraud the creditors; that the intent is a question of fact; and that a voluntary conveyance is not prima facie fraudulent, and fraudulent intent is not to be arrived at as a presumption of law. It was further held in that case: "Pronounced insolvency at the time of the grant would, no doubt, be a strong circumstance tending to show fraudulent intent, and, in the absence of other controlling facts, it would be sufficient to justify a finding of such intent."

It appeared from the evidence that Bernard was mortally ill and in the hospital when he made the conveyance, and died five days thereafter; that he declared that it was his intention to convey all the property he possessed, and, so far as known, he did so; that his brother Michael served for a time as executor of Bernard's estate and could find no property belonging to him and for that reason asked to be and was discharged. We think the evidence was sufficient to justify the finding that by the conveyance he rendered himself insolvent. Strictly, he was not insolvent when he made the conveyance, but, coincidently with and by that act, he became insolvent, and this, we think, brings the case within the rule in Emmons v. Barton, supra, and justifies the finding that the conveyance was with fraudulent intent to defraud his creditors.

Whether section 1589, Code Civ. Proc., is to be given the same effect as section 3442, Civ. Code, need not be decided, for, if so, by the terms of the latter section any transfer made "voluntarily, or without valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." In Gray v. Brunold, 140 Cal. 615, 74 Pac. 303, it was said that an allegation of intent to defraud is no longer required, under section 3442, where insolvency is alleged: but in Estate of Vance, 141 Cal. 624, 75 Pac. 323, the court said that intent to defraud must be alleged, and that the proviso in the section is a rule of evidence and not of pleading. Nevertheless, proof of insolvency establishes the intent. Here there were sufficient allegations and proof. Conceding the rule, appellant says the section does not apply here because there is "but one creditor, and that creditor created by the fraud itself." This rather singular contention is based on the fact that "it was necessary to prove the fraud in the first place, before any advantage can be taken of any special presumption of fraud, in order to establish the status of the plaintiff as a creditor, so that it could be claimed that the transfer was made by an insolvent." We fail to see any force in this point. If she was a creditor, it is immaterial how she became such creditor.

7. It is urged that the judgment is erroneous because it does not conform to the provisions of the Code authorizing it.

Section 1589, Code Civ. Proc., provides that the administrator "may recover for the benefit of the creditors all such real estate so fraudulently conveyed," etc. Section 1591 provides: "All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court; and the proceeds * * * must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. The remainder of the proceeds, after all the debts of the decedent have been paid, must be paid to the person from whom such property was recovered."

In Emmons v. Barton, 109 Cal. 662, 668, 42 Pac. 302, 304, it was held that, in a case like this, "the judgment should be that the property fraudulently conveyed, or so much thereof as is necessary, be applied to the satisfaction of the debts, and that the residue, if any, go to the grantee. It is not to go into the assets of the estate for any purpose other than the payment of the debts. The residue does not go to the heir; for he stands in the shoes of the fraudulent grantor." See Tully v. Tully, 137 Cal. 60, 66, 69 Pac. 700. In Estate of Page, 57 Cal. 238, 241, it is said: "But the property, when recovered, must be inventoried as assets of the estate, and sold for the payment of debts, in the same manner as if the decedent had died seised thereof"—citing sections 1589, 1591, Code Civ. Proc.

As the conveyance by Bernard Shiels was void, the statute authorized the recovery of the property and its sale for the benefit of the creditors of Bernard, and to make a sale the title would have to be vested in the administratrix. The judgment vested the title in the administratrix for the benefit of creditors, which was proper; but it also declared it to be "free and clear of all claims of the said defendant as administrator of the estate of Michael Shiels, deceased, or any other person, or persons, claiming by, through, or under said estate of Michael, deceased, or of the defendant as such administrator." This was unauthorized. The heirs of Michael are entitled to the surplus, if any, after the property is sold, and the decree should so provide.

The order denying defendant's motion to vacate the judgment and the order denying his motion for a new trial are affirmed. The judgment is modified by striking out the portion last above quoted and in lieu thereof inserting the following: "And upon the sale of said premises the proceeds thereof shall be applied to the payment of the claims of the creditors of the said Bernard Shiels, which have been or shall be duly allowed, and the residue of such proceeds shall be paid to the administrator of the estate of Michael Shiels, deceased."

And as thus modified, the judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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12 Cal. App. 572

VAN VALKENBURGH v. OLDHAM et al.

(Civ. 681.)

(Court of Appeal, Third District, California. Feb. 8, 1910. Rehearing Denied March 9, 1910; Denied by Supreme Court April 7, 1910.)

1. MORTGAGES (§ 76*) — VALIDITY — CONSENT OF PARTIES.

Under Civ. Code, § 1565, providing that the consent of the parties to a contract must be free, mutual, and communicated by each to the other, if the consent of a party to a note and mortgage was not freely or voluntarily given, they were void even though signed by the party.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 174, 175; Dec. Dig. § 76.*]

2. MORTGAGES (§ 86*)—VALIDITY—MISREPRESENTATION — FRAUD — UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

In proceedings to foreclose a mortgage, evidence *held* to show that no misrepresentation was made, no undue influence exerted, nor fraud practiced in procuring the mortgage, and that the execution of the note and mortgage was the voluntary act of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1364; Dec. Dig. § 86.*]

3. WORDS AND PHRASES — "PERSUASION" — "COERCION."

Persuasion is not coercion.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5367; vol. 2, pp. 1241–1242.]

4. WORDS AND PHRASES — "UNDUE INFLUENCE."

Insistence upon one's legal rights is not undue influence.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7166–7172; vol. 8, pp. 7823–7824.]

5. WORDS AND PHRASES—"FRAUD."

Pertinacious zeal to secure the payment of a just debt is not fraudulent.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2943–2954; vol. 8, p. 7666.]

6. MORTGAGES (§ 25*)—VALIDITY—CONSIDERATION—EVIDENCE—SUFFICIENCY.

In proceedings to foreclose a mortgage, evidence *held* to show a consideration for the note and mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 42, 1364; Dec. Dig. § 25.*]

7. EVIDENCE (§ 320*)—HEARSAY.

Evidence of a witness that he had heard an instrument spoken of and it was dated anywhere from the 9th or 10th up to the 15th of the month was properly stricken out as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.*]

8. GUARANTY (§ 36*)—LIABILITY OF GUARANTOR.

A guarantor's liability is limited to the terms of the agreement.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 38; Dec. Dig. § 36.*]

9. PRINCIPAL AND SURETY (§ 59*)—LIABILITY OF SURETIES.

Sureties are entitled to stand on the precise terms of the bond and are not bound beyond its strict letter.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. § 59.*]

10. MORTGAGES (§ 66*) — VALIDITY—"EXECUTION"—DELIVERY.

Under Code Civ. Proc. § 1933, defining the execution of an instrument, the term "execution," as applied to a mortgage, includes delivery.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 161; Dec. Dig. § 66.*

For other definitions, see Words and Phrases, vol. 3, pp. 2558–2561.]

11. MORTGAGES (§ 74*)—VALIDITY—DELIVERY — POSSESSION OF INSTRUMENT — PRESUMPTION.

In proceedings to foreclose a mortgage, where it was actually in possession of the mortgagee at the time of trial and was not introduced in evidence by him, the presumption that they came into his possession lawfully is sufficient to support a finding of delivery.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 172; Dec. Dig. § 74.*]

12. JURY (§ 14*)—RIGHT TO TRIAL BY JURY—MORTGAGE FORECLOSURE.

Defendant in proceedings to foreclose a mortgage is not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 46; Dec. Dig. § 14.*]

13. EVIDENCE (§ 186*)—SECONDARY EVIDENCE —LOSS OF PRIMARY EVIDENCE—ADMISSIBILITY OF COPY.

Under Code Civ. Proc. § 1855, providing in what cases the contents of a writing may be proved, where the showing was sufficient to justify the conclusion that the original was either lost or destroyed, a copy was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 667; Dec. Dig. § 186.*]

14. WITNESSES (§ 372*)—INTEREST—MOTIVE—CROSS-EXAMINATION TO SHOW.

Under Code Civ. Proc. § 1847, providing how the presumption that a witness speaks the truth may be repelled, it is proper to show motive and interest on cross-examination.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1192; Dec. Dig. § 372.*]

15. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The refusal to allow a witness to answer a question as to whether he expected to make a pretty good fee if he made the collection was without prejudice where he had already testified that the matter had been put in the hands of his father and himself for collection, since the court could assume that they were to be compensated for their services.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4201; Dec. Dig. § 1058.*]

16. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR — EXCLUSION OF EVIDENCE.

The rejection of evidence subsequently admitted is harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

17. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR — EXCLUSION OF EVIDENCE.

The rejection of evidence previously admitted is harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

18. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is substantially conflicting upon all material points, it will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by R. W. Van Valkenburgh against D. A. Oldham and Cynthia A. Blackburn. From a judgment foreclosing a mortgage upon certain real estate belonging to Cynthia A. Blackburn, she appeals. Affirmed.

A. H. Carpenter, for appellant. Webster & Webster, for respondent.

BURNETT, J. The appeal is from a judgment foreclosing a mortgage upon certain real estate belonging to appellant. The nature of the defense is shown by the following averment of the answer: "That neither the note nor the mortgage set forth and described in the plaintiff's said complaint herein were executed by her willingly, freely, or voluntarily, and the same are not and never were her obligations; and her signature to each of said documents, if either or both were signed by her, was obtained by fraud, menace, and undue influence in the following manner and way." Then follows a description in detail of the transaction relating to the execution of said note and mortgage in which are set forth sufficient facts, if established by the evidence, to defeat the action. Indeed, appellant's story, as told upon the witness stand, is a pathetic recital of the subjugation of her will and the coercion of her understanding by the importunity, pertinacity, and misstatements of the stronger personalities interested in obtaining the security, but the case presents a very different aspect when viewed in the light of the testimony of other witnesses. It is true that extreme anxiety was manifested by plaintiff and considerable explanation and persuasion were necessary to induce appellant to execute said note and mortgage, but in contemplation of the rule as to conflicting testimony and of the discretion as to the weight of evidence granted by the law to the trial court, it cannot be said that there was anything in the conduct of plaintiff which is opposed to good morals, legitimate business methods, or any mandate of the statute. This, we think, will appear as we proceed to notice specifically the various contentions of appellant.

1. There can be no controversy as to the principles of law announced by appellant that if the consent of Mrs. Blackburn was not freely or voluntarily given, the note and mortgage were void, even though signed by her. Civ. Code, § 1565; Loaiza v. Superior Court, 85 Cal. 30, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197. And, if executed, fraud, menace, duress, or undue influence would render them void. Civ. Code, § 1567; Morrill v. Nightingale, 93 Cal. 455, 28 Pac. 1068, 27 Am. St. Rep. 207. And consent is deemed to have been obtained through one of these causes when it would not have been given had such cause not existed. Civ. Code, § 1568; Stockton, etc., Works v. Insurance Co., 98 Cal. 558, 33 Pac. 633.

But the history of the transaction, as gathered from the testimony of plaintiff's witnesses, shows these facts: On May 29, 1906, appellant guaranteed any indebtedness to accrue after that date from a certain firm of Price & Oldham to the California Electrical Works, a corporation (plaintiff's assignor), to the extent of one thousand dollars. By reason of this guaranty, the said corporation furnished said firm with merchandise to the extent of $945. In settlement of this sum the defendants Oldham and Blackburn (the latter as surety) gave their promissory note secured by said mortgage of appellant's property. The one thousand dollar guaranty was then canceled and given to the defendant Blackburn.

As to the immediate circumstances attending the execution of the note and mortgage, the witness Percy Webster testified: "The plaintiff told Mrs. Blackburn that he intended to do what was right; he didn't want anything that did not belong to him, but his company could not afford to lose the money; they looked to him as the man who had let the account be carried, and he wanted to see them whole in the matter, he didn't like to make a woman pay it, particularly if she didn't have much money, but as long as the guaranty was signed by her and Price & Oldham were not good for it, he would have to look to her. As I remember it Mrs. Blackburn then

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said that she did not think she wanted to pay it; she would want to see somebody; and Mr. Van Valkenburgh said that she could see somebody if she wanted to, but he would not do anything but what was right; all he wanted was his money and no more; and she said that she didn't have any money with which to pay, but she had this property, and it was suggested to her that she could give a mortgage on her property for the payment of it. Mrs. Blackburn asked how that would be done, and then they had some lengthy conversation as I remember it about what to make the terms of the note; they talked it over with Mr. Oldham, and he was told that he really ought to pay it; he said he felt that too, he didn't want to make her pay it; he didn't have any property, but he had an interest in the Commercial Credit Company, and he would be willing to turn over the net profits of that company to the payment of this; and Mr. Van Valkenburgh I believe made the assertion that that was not very good security, but Mrs. Blackburn's property would be, and Mr. J. B. Webster suggested that Oldham give an agreement that he would make the payments, and they figured it out, and he figured that the net proceeds as he made it would be about $25 a month; he would be willing to apply those in payment of the note, and then tney had some talk about what interest was to be paid, and Mr. Van Valkenburgh said he would not make that heavy, make it as light as possible, and called it 5 per cent., and that was agreed upon, and Mrs. Blackburn was asked if that would be satisfactory to her, and she said, 'Yes.'" The mortgage was then prepared, but a mistake was made in the description. The mistake was corrected, after the mortgage had been read to Mrs. Blackburn and signed by her. After the correction the instrument was again read to her, and "I asked her if that was her signature to it; she said, 'Yes'; I said, 'You then acknowledge this mortgage with the change?' She said she did; then I made the acknowledgment; I initialed the change on the mortgage; the note and mortgage were signed at that time by Mrs. Blackburn, and then this agreement—there was an agreement made between Mr. Oldham and Mrs. Blackburn; I wrote it myself;—that he would hold her harmless from the payment of this account; the agreement also assigned to her the net proceeds of the Commercial Credit Company. After this note and mortgage was signed and executed, Mrs. Blackburn made the remark to Mr. Oldham, 'Now, you don't want to let me pay this, you want to see you keep up the payments.' Oldham said he certainly would, he would apply the $25 and maybe more, if the business was good, so as to wipe it out as quickly as possible. Mrs. Blackburn said, 'I hope so, because I hate to have the neighbors know I have a plaster on my house.' Before the execution of the three papers by Mrs. Blackburn, the paper (the guaranty) was explained to her, its contents were explained to her, and after the execution of the three papers, and just before she was leaving, she said she ought to have it, and Mr. Van Valkenburgh said he ought to have it to show his position in the matter. why he was taking the note and mortgage; you said to him she was entitled to it on giving the note and mortgage and she was given the original." It is true the witness stated that appellant was agitated and in tears a part of the time, but it seemed due to her conviction that she had been robbed by one Price who was formerly a member of the firm of Price & Oldham. The only conclusion to be drawn from the testimony of this witness, as we are required to regard it, is that no misrepresentation was made, no undue influence exerted nor fraud practiced in the transaction, but that the execution of said note and mortgage was the voluntary act of said appellant. The same may be asserted of the testimony of plaintiff, although some isolated sentences give color to appellant's contention that advantage was taken of her necessities. Persuasion is not coercion; insistence upon one's legal rights is not undue influence; and pertinacious zeal to secure the payment of a just debt is not fraudulent.

2. It is claimed that another fraud was perpetrated by the insertion in the note and mortgage of $124.99, an indebtedness of Price & Perkins, which, it is asserted, was not included in the guaranty. Reliance is had upon the testimony of plaintiff that everything that was billed prior to June 9th was shipped to Price & Perkins, which amounted to $124.99, and the amount shipped to Price & Oldham was $834.03. Appellant's obligation was expressed as follows: "In consideration of one dollar paid to me by the California Electrical Works and the extension by such company of credit on account from time to time to Price & Oldham which I hereby request, I guarantee the payment of all balances on account and all notes given by them for or on account of such balances up to the sum of one thousand dollars as the same shall become due and payable by them to such company. * * * All bills shall become due the 15th of the month following their dates." The effect of appellant's contention would be to reduce the amount of the principal of the note and mortgage to the extent of said $124.99, but we are required to reject this view since plaintiff testified that, "During the latter part of May, Price came to my office and asked to open an account with them, which I told him we could not do unless he could give us a guaranty. He asked me to open the account in the name of Price & Perkins, and sent a guaranty some few days later in the name of Price & Oldham. In the meantime before he had sent us a guaranty he had sent us a number of orders covering material which he asked us to ship, and these orders were headed Price & Perkins. He asked us to ship them, but we held them

awaiting this guaranty. When the guaranty came we shipped a certain part of those orders, and our billing department and shipping department headed our shipping tags 'Price & Perkins.' The shipments were made to Price & Perkins and were taken out by Price & Oldham, Price & Perkins having gone out of business in the meantime, and Price & Oldham succeeding them. All of the material, however, that is charged in either one of those accounts was received by Price & Oldham, and none of the material by Price & Perkins, because we have never made a shipment upon open account to Price & Perkins." Turning to the Price & Perkins account, we find that every item on the debit side, which was charged against appellant, became due after May 29th, the date of the execution of said guaranty. There is evidence, also, that the whole matter was explained to appellant before she executed said note and mortgage. There seems, therefore, no question as to the consideration for the said note and mortgage.

3. There is apparently no merit in the contention that the guaranty was fraudulently dated. It is based upon the testimony of one R. B. Green who declared that he was in Stockton when the guaranty was executed and was in Ashland or Grant's Pass, Oregon, on May 29th, the date the instrument bears, and did not return till June 4th, but he further testified: "I didn't witness the document, but I heard it spoken of, and it was anywhere from the 9th or 10th up to the 15th of June, 1906." His testimony in reference to the date of the execution of said instrument was very properly stricken out as hearsay. It is undoubtedly true that the guarantor's liability is limited to the terms of the agreement (Glassell v. Coleman, 94 Cal. 260, 29 Pac. 508), and sureties are entitled to stand on the precise terms of the bond and are not bound beyond its strict letter (Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. 765); but these requirements are met by the testimony of the witnesses for the plaintiff and the said amount of $945 is thereby brought within the operation of said guaranty.

4. Another point made is that the mortgage is void for want of delivery. Appellant asserts that "Mrs. Blackburn testified that she had no recollection of signing the note and mortgage on her home, and she asserted positively under oath that she never delivered either of those two alleged documents to the plaintiff or to any other person for him, and her evidence is undisputed." As to this it may be said that the court was entirely justified in concluding from all the testimony of appellant that she was mistaken in the foregoing declaration. Besides, while no witness stated that the note and mortgage were "delivered," it is impossible to give full credit to the testimony of plaintiff's witnesses without reaching the conclusion that everything was done which is necessary to make said instruments effective. There is, moreover, the positive assertion of the said witness Webster that "this note and mortgage was signed and executed." The term "executed," as applied to such instruments, has a well-defined meaning, and includes delivery. Code Civ. Proc. § 1933; Clark v. Child, 66 Cal. 87, 4 Pac. 1058; Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229. Again, the same witness testified that he told appellant of having had the mortgage recorded, and the instruments were actually in possession of plaintiff at the time of the trial, and were introduced in evidence by him. The presumption that they came into his possession lawfully would be sufficient to support a finding of delivery.

5. Appellant complains because the court denied her request for a jury trial. A sufficient answer is found in the decision of the Supreme Court in Downing v. Le Du, 82 Cal. 473, 23 Pac. 202, wherein is quoted with approval the following from Carroll v. Deimel, 95 N. Y. 254: "This is an action for the foreclosure of two mortgages on real estate, and was triable by the court. The defendant was not entitled as matter of right to a trial by jury. Although a sale of the mortgaged premises might result in a deficiency for which a money judgment could be docketed against the defendant liable for such deficiency, such a judgment was not the sole object of the action, but was an incident of the equitable relief sought. It might not even become necessary, as the mortgaged premises might bring a sufficient sum to pay the mortgaged debt and the circumstance, that in the contingency of the premises proving insufficient, a judgment for the deficiency might result, did not entitle the defendant to a jury trial."

6. Certain rulings of the court during the trial of the action are assailed as prejudicially erroneous. Some of them are so manifestly correct that we deem it unnecessary to notice them specifically.

A copy of the said guaranty was received in evidence. Assuming that the circumstance is important, there was a sufficient foundation laid for its introduction, as appears from the testimony of the said Webster and of appellant. The former said that Mrs. Blackburn declared she ought to have the paper, and the plaintiff desired to retain it to show his position in the matter, and "so a copy was made and he indorsed on the original—made a certain indorsement on the original and a copy of it was also made, and she was then given the original; I have an exact copy of it." Mrs. Blackburn testified: "If it was ever given to me, I lost it." She added that she never had it. Be that as it may, the showing was sufficient to justify the conclusion that the original was either lost or destroyed and therefore the copy was admissible. Section 1855, Code Civ. Proc.

The court sustained an objection to the following question asked of the witness Webster: "And you expected to get a pretty good fee, did you not, if you could make this collection against Price & Oldham?" The objection probably should have been overruled, as it is proper to show motive and interest on cross-examination. Section 1847, Code Civ. Proc.; People v. Thomson, 92 Cal. 506, 28 Pac. 589. But the ruling was entirely without prejudice, as the witness had already testified that the matter had been placed in the hands of himself and father for collection, and the court had the right to assume that they were to be compensated for their services. Besides, they were attorneys of record for the plaintiff, and they had asked in the complaint for an attorney's fee of $100. Appellant had the benefit, therefore, of whatever unfavorable inference might be drawn from the fact that the witness was interested in the result of the trial. The plaintiff, in giving his account of the transaction with appellant, was proceeding to state that he said to her, "and that it was not the practice of my company." It was objected to on the ground that it was "incompetent, irrelevant, immaterial, hearsay, and self-serving." The objection was overruled, but whether correctly or not is immaterial, as the witness proceeded no further with the "practice."

The ruling of the court was harmless on the question asked of plaintiff: "Do you remember when you first shipped electrical goods here to Stockton to Price or to any firm of which he was a member?" as it was subsequently answered. The same may be said of some other assignments of error.

As to certain questions asked of appellant after she was recalled and to which an objection was sustained, it may be said that, as far as material, they had all been previously answered by her.

In conclusion, the observation may be indulged that appellant makes the very common mistake of emphasizing the testimony favorable to her theory and assuming that this court will hold that it must be believed in opposition to the testimony sustaining the contention of respondent. It is needless to say that however much we may deplore the misfortunes of appellant, as the evidence is substantially conflicting upon all material points, we cannot enter upon an inquiry as to the relative weight of the evidence and the credibility of the witnesses.

The judgment is affirmed.

We concur: CHIPMAN, P. J., HART, J.

12 Cal. App. 637

SAUL v. SAUL. (Civ. 746.)

(Court of Appeal, Second District, California. Feb. 10, 1910.)

DIVORCE (§ 287*)—FRIVOLOUS APPEAL—AFFIRMANCE.

In an action for divorce, which was denied, the court found, as was admitted, that certain land was community property; but in the judgment no order was made with reference thereto, and an order was made under Civ. Code, § 136, for the support of defendant and minor children awarded to her. *Held*, that her appeal from the judgment, which was criticised only as purporting to declare the status of the property rights of the parties, was frivolous, and the judgment would be affirmed, as there was nothing in it fixing such status, as to which there was no issue.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 287.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John E. Saul against Emma Saul. There was a judgment in favor of defendant, and she appeals. Affirmed.

Charles Lantz, for appellant. Walter J. Horgan, Frank W. Allender, E. G. Kuster, for respondent.

ALLEN, P. J. This was an action for divorce, which was denied. Plaintiff in his complaint and defendant in her answer admit that a certain tract of land was property of the community and was all the property owned by them or either of them. The court in its findings of fact found that which was admitted, namely, that the property was community property, but in the judgment no order is made with reference thereto. The custody of some of the children was given to plaintiff and others to defendant, and under section 136 of the Civil Code an order was made requiring plaintiff to pay to defendant for the support of herself and the minor children awarded to her the sum of $12 per week, lawful money of the United States, each and every week until the further order of the court, and that plaintiff pay the costs of the action.

This appeal is from the judgment; the only criticism thereof being that such judgment purports to declare or establish the status of the property rights of the parties. The appeal seems to us to be frivolous. There is nothing in the judgment appealed from fixing the status of property rights, nor was there an issue in relation thereto. The only thing the court did was to exercise the power conferred by section 136 of the Civil Code, of which no complaint is made.

The judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12 Cal. App. 567

COFFIN v. KINGSBURY, Surveyor General. (Civ. 665.)

(Court of Appeal, Third District, California. Feb. 8, 1910. Rehearing Denied by Supreme Court April 7, 1910.)

Taxation (§ 679*)—Sale to State—Delinquent Taxes—Payment of Taxes—Subsequent Purchaser.

Under Pol. Code, § 3788, providing that the Surveyor General shall not permit an entry or sale of state lands deeded to the state for nonpayment of taxes except upon payment of the delinquent taxes and costs by the person proposing to make the entry or purchase, where property has been sold to the state and the taxes are paid by an applicant whose application is subsequently canceled, no further payment is required of future applicants, since the law contemplates only one payment of the taxes and penalties as a condition precedent to the filing of an application for the purchase of the land and the payment of the purchase price.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Proceedings for a writ of mandate by Franky R. Coffin against W. S. Kingsbury, Surveyor General. Judgment for defendant, and plaintiff appeals. Affirmed.

Pardee & Pardee and Wahrhaftig & Shinn, for appellant. U. S. Webb, Atty. Gen., and M. C. Glenn, Asst. Atty. Gen., for respondent.

BURNETT, J. A proceeding was brought in the superior court for a writ of mandate to compel the respondent to file an application presented by appellant for the purchase of certain school lands. It appears, as stated by respondent, that in the year 1889 a similar application was made by one Billington, who paid 20 per cent. of the purchase price and received a certificate of purchase. He assigned his certificate to George R. Fletcher. The latter permitted the taxes to become delinquent, and his interest was sold through a tax sale. Thereafter a deed was made to the state, and, pursuant to the provisions of section 3785 of the Political Code, the deed was forwarded to the Surveyor General. According to said section, the lands thereupon again became subject to entry and sale, subject to the provisions of section 3788 of said Political Code. On June 8, 1908, William R. Mawer applied for the same lands, and, under the provisions of said section 3788, he paid into the treasury a sum equal to the delinquent taxes, etc., which existed at the time of the sale to the state. The application of Mawer was subsequently canceled by the Surveyor General for the reason that Mawer failed to furnish the necessary proof as to the character of the land. Afterward, one M. P. Barnes presented his application for the said lands, and the Surveyor General required him to pay only the purchase price, for the reason that in the opinion of the Surveyor General the taxes and penalties had been fully satisfied and paid on the application of said Mawer and nothing remained due for the same at the time the said Barnes made his application. Acting upon this theory, respondent declined to file the subsequent application of appellant of the date of April 2, 1909.

It is the contention of appellant that the Legislature, in said section 3788, "prescribes the manner in which and the terms upon which state lands of a certain class, to wit, lands which have been entered, but upon which the full purchase price has not been paid, and which have been sold and deeded to the state for nonpayment of taxes, shall be sold and disposed of. And, by the terms of the section, we find that 'the Surveyor General shall not permit an entry, or make a sale of any lands thus deeded to the state, except upon the previous payment into the state treasury, as other moneys are required to be paid therein, in addition to the price of said lands as compared with the prices fixed for other lands of like character, by the person or persons proposing to make the entry or purchase, of a sum equal to the delinquent taxes, penalties, costs, and accruing costs, by virtue whereof the state became a purchaser of the lands thus sought to be entered or purchased, and also all delinquent taxes, penalties and costs which may have accrued upon such lands from and subsequent to the date of the sale to the state, in pursuance whereof the state received a deed therefor.' It appears clearly from these provisions that the Legislature intended to fix, and did fix, a different price on this class of lands, as compared with the price fixed for other lands of like character. The price thus fixed is the price fixed for other lands of like character, plus a sum equal to the taxes, penalties, costs, and accruing costs by virtue whereof the state became a purchaser of the lands, etc. And this sum equal to the said taxes, penalties, and costs is in terms required to be paid 'by the person or persons proposing to make the entry or purchase.' "

On the other hand, to state respondent's position, we quote quite fully from his brief, as follows: "The state school lands are offered for sale at the rate of $1.25 per acre. Section 3494, Pol. Code. Title 8, within which the last-named section is found, deals with property of the state, and also within this title are contained the provisions as to the sale of school lands. Section 3788 is primarily a section concerning revenue and the collection thereof, and is not in any sense, except in a secondary way, a statute granting any right to purchasers of state land: and, in this light, the section should be considered. The last-mentioned section is found in title 9 of the Political Code, covering the subject of 'revenue,' and the chapter within which section 3788 falls is one dealing with the 'collection of property taxes.' There can be no doubt, therefore, that the main object and purpose of the latter section is to enable the state to collect delinquent taxes, and not for the purpose of fixing the price of school lands. If this be the purpose of the section, it follows that, when the object contemplated thereby has been accomplished, the provisions of the section referring to the delinquent taxes have no further application. * * * We submit that the section, considered in this entirety, is free from ambiguity or doubt. It cannot be given the construction contended for by appellant, when so considered. It provides that, after the deed referred to in section 3785 shall be filed with the Surveyor General, the lands shall again become subject to entry and sale, in the same manner and subject to the same conditions, as apply to other state lands of like character, but that the Surveyor General shall not permit an entry or make a sale of such lands, except upon the previous payment into the state treasury * * * of a sum equal to the delinquent taxes, penalties, and costs which may have accrued upon such lands prior and subsequent to the date of the sale to the state. The section proceeds: 'The money thus paid into the treasury shall be distributed in the manner prescribed in section three thousand eight hundred and sixteen; provided that the moneys received for twenty per cent. of the purchase money, and accruing interest together with the principal in case of full payment on the lands, shall be distributed by the Surveyor General, in the manner now provided by law for such distribution.' Turning to section 3816, it will be found that that section provides for the apportionment of taxes, penalties, etc., on redemption; the county, of course, receiving its proper proportion of such amount. With the latter section incorporated within section 3788, the argument that appellant advances must necessarily fall."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In other words, a different disposition is made of the redemption money and the purchase price of the land, and they are thus clearly treated as separate and distinct.

We are entirely satisfied that when the property has been sold to the state, as in the case at bar, the law contemplates only one payment of the taxes and penalties, etc., as a condition precedent to the filing of an application for the purchase of said land and the payment of the purchase price. When Mawer paid into the treasury the sum prescribed, the state was entirely reimbursed, and the land was in exactly the same condition as though no application had ever been made for its purchase. It was, in other words, subject to application as provided in said section 3494 of the Political Code. It is not contended that Mawer could recover the money thus paid, and it is equally untenable that the status of the land is not entirely restored by the said payment of the "back taxes."

It is true that said section 3788 provides that the Surveyor General shall not permit an entry or make a sale of any lands thus deeded to the state except upon the said payment of the delinquent taxes, etc., "by the person or persons proposing to make the entry or purchase"; but it is clear that the statute has in view the situation after a sale of the land to the state. Thus, before the purchase price can be accepted, the payment of the penalties must be made by the person or persons proposing to make the entry or purchase. There is nothing in the context requiring that this payment of the penalties shall be repeated.

We may add that a perusal of the various sections of the Political Code in reference to the collection of the revenue furnishes additional confirmation of the legislative intent that only one payment of the taxes assessed and accruing penalties is contemplated.

We see no reason to disturb the conclusion of the trial court, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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12 Cal. App. 560

WATSON v. ALTA INV. CO. et al. (WESTERN FUEL CO., Intervener).

(Civ. 701.)

(Court of Appeal, First District, California. Feb. 8, 1910. Rehearing Denied by Supreme Court April 7, 1910.)

1. CONTRACTS (§ 295*)—BUILDING CONTRACTS—SUBSTANTIAL PERFORMANCE — DESTRUCTION OF BUILDING — RECOVERY BY CONTRACTOR.

Where a building contract provided that, if before completion the work should be wholly destroyed by fire or earthquake, the owner should sustain the loss to the extent of the installments paid or due, and the contractor should lose the installments not then due, the contractor, on destruction of the building before completion, could not recover on the theory of substantial performance, though the value of the work remaining to be done was only $48 and the contract price was $13,000; the owner not having received the benefit of the work and not being able to recoup damages for imperfections or omissions therein.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353, 1362; Dec. Dig. § 295.*]

2. MECHANICS' LIENS (§ 231*)—EXTINGUISHMENT—DESTRUCTION OF BUILDING.

There can be no mechanic's lien on vacant land, where the uncompleted building, without fault of the owner, has ceased to exist.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 413; Dec. Dig. § 231.*]

3. CONTRACTS (§ 303*)—BUILDING CONTRACTS—DESTRUCTION OF BUILDING BEFORE COMPLETION.

Where a building contract expressly provides how the loss shall be borne in case the building is destroyed by fire or earthquake, a covenant that the building must continue in existence, and that a destruction thereof before completion shall excuse further performance by the contractor and entitle him to recover for the value of the work done, will not be implied.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1435; Dec. Dig. § 303.*]

Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Action by Sage Watson against the Alta Investment Company and others, wherein the Western Fuel Company intervened. From the judgment, plaintiff and intervener appeal. Affirmed.

See, also, 108 Pac. 50.

Olney, Pringle & Mannon, Jas. Alva Watt, and Max Thelen, for appellants. A. G. & H. K. Eells and W. F. Williamson, for respondents.

KERRIGAN, J. This is an action by plaintiff, as assignee of Watson Bros., for the foreclosure of a mechanic's lien as against the Alta Investment Company, and for the recovery of money due on an express contract as against James Crichton.

The Alta Investment Company entered into a contract with James Crichton, by the terms of which Crichton was to do all the granite and brick work on a building being erected by said company. Shortly thereafter Crichton entered into a contract with Watson Bros., a copartnership, according to the terms of which they were to carry out and be bound by the agreement between the Alta Investment Company and Crichton, except that they were to receive a bonus of $100 from Crichton. Under these contracts the work was to be paid for as it progressed in four equal installments. After the first two payments had been made, the building, through no fault of any of the parties hereto, was entirely destroyed by the calamity of April 18, 1906, which visited San Francisco and vicinity. The third payment was to be made on the completion of the building, and the fourth was to be made 36 days thereafter. If the building was completed prior to its destruction, these two payments became obligatory, and judgment should have gone against the defendants.

The contract between the Alta Investment Company and Crichton contained the following provisions:

"Fifth. The owner agrees to pay $13,000 at times and in the manner following, to wit: * * * Third payment three thousand two hundred and fifty ($3,250) dollars when all work is completed and accepted."

"Fourth. Payment, $3.250 thirty-six days after all work is completed and accepted and notice of completion is filed in the office of the county recorder."

"Provided that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from said architect stating that the payment or installment is due or work completed, as the case may be. * * *"

"Twelfth. In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake or other act of God which the contractor could not have reasonably have foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of this contract; and the loss occasioned thereby and to be sustained by the contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract. * * *"

The court found: "That said work was not completed, nor was the same accepted. * * * That said architect refused to give said certificate for the reason that said work was not done nor completed to his satisfaction nor at all." Also that before completion of either the building or of plaintiff's work, the building was, without fault of defendant or of any of the parties to the action, "wholly and entirely destroyed by fire" in the calamity of April, 1906, and that at no time thereafter "was there said or any building or structure upon said land."

The finding of the court that the contract was uncompleted is based on evidence which shows that the value of the work remaining to be done was $48. Plaintiff contends that when this amount is compared with the contract price of the granite and brick work, i. e., $13,000, the conclusion is irresistible that the work left undone is of a trivial nature, and therefore that the finding that the contract was not completed is unsupported by the evidence. To sustain this position he cites us to a number of mechanic's lien cases which hold that when the work has been substantially performed the contractor may recover against the owner, notwithstanding that there may be some trivial imperfection in the work. The theory of those cases seems to be that the owner receives the benefit of the work of the contractor, and can be protected by an allowance of damages for trivial omissions or imperfections. But in this case the owner has not received or accepted the benefit of the work, and he cannot recoup damages for the imperfections in it, for which reasons the doctrine of those cases is inapplicable. Moreover, the parties to the contract, in paragraph fifth thereof, stated what they meant by the word "completion," and in the twelfth paragraph they expressly stipulated precisely as to where the loss should fall in the event of the destruction of the building by fire or earthquake.

Recently, in passing upon this exact question, in the case of Seebach v. Kuhn, 9 Cal. App. 485, 99 Pac. 723, this court said: "Undoubtedly the rule is well established that in ordinary cases the contractor in a building contract may recover against the owner, notwithstanding that he has not strictly complied with his contract because of minor defects and imperfections, and even omissions, not willful or fraudulent. This rule is sometimes spoken of as the modern equitable doctrine of substantial performance. It rests for its justification upon the proposition that in such cases the owner has either accepted the benefit of the work of the contractor, or because of the nature of the transaction he perforce receives such benefit to his property, and may be protected from actual pecuniary loss by a recoupment in damages for deficiencies and imperfections. Oftentimes minor defects and imperfections occur in the construction or repair of buildings without intentional fault of the contractor. For such defects the owner may be readily made whole by an allowance of damages. So, too, under the mechanic's lien law it is provided that for the purpose of filing liens a building shall not be held uncompleted because of trivial imperfections. (Citing cases.) But we do not think that the doctrine of substantial performance has any application to this case. The defendant did not accept the work or enter into the use and possession of the building. He did not and cannot receive any benefit from the work done, and he cannot be made whole by any allowance for damages for incomplete performance. Each and all of the just and equitable principles upon which the doctrine of substantial performance rests are absent from this case. It manifestly is not a case where both parties may be protected from loss. On the contrary, when the parties to the contract framed the fire and earthquake clause, they had in mind a contingency under which one or both parties must suffer a loss. They deliberately undertook to provide how that loss should be borne. The contract that they made is perfectly lawful, and we know of no reason why courts should not give it effect according to its terms."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A further reason why the plaintiff cannot recover against the Alta Investment Company is that there can be no mechanic's lien on vacant land when the uncompleted building, without fault of the owner, has ceased to exist. Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75.

Plaintiff contends that the law reads into contracts of this character an implied covenant that the building on which the work shall be done must continue in existence, and that a destruction thereof before the completion of the contract excuses further performance by the contractor, and entitles him to recover for the value of the work done up to the time of the destruction. But inasmuch as the contracts in this case expressly provided how the loss should be borne in case the building should be destroyed by fire or earthquake, there is no room for the application of that principle.

Plaintiff suggests that the Alta Investment Company—Crichton contract was only referred to and attached to the contract between Crichton and Watson Bros. for the purpose of showing what work was to be done, and that the latter contract does not include the fifth and twelfth paragraphs hereinabove quoted, but that, the work having been substantially completed, he is entitled to recover as against defendant Crichton. The contract between Watson Bros. and Crichton stipulated that the work to be done on the building in question by Crichton should be done by Watson Bros. according to the "terms" of the agreement and "specifications," etc., of the contract between the Alta Investment Company and Crichton, and a copy of that contract was attached to and made a part of the subcontract. Plaintiff's position in this regard is without merit. One of the terms of the original contract was that, if the building should be destroyed before completion, the contractor should stand the loss for all payments not due, and this provision by reference became one of the terms of the contract between Watson Bros. and Crichton. The payments under the second contract were to be made at the same time as those under the first contract, and the amounts of the payments were the same, except that the third payment from Crichton to Watson Bros. was to contain the $100 bonus. The reference clearly imports the incorporation of all the terms of the original contract into the contract between Watson Bros. and Crichton, including those now in question.

Thus it appears that the plaintiff should not recover on the contract as against defendant Crichton, nor has he any right of lien as against the property of the Alta Investment Company.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 566

WATSON v. ALTA INV. CO. et al. (WESTERN FUEL CO., Intervener).

(Civ. 773.)

(Court of Appeal, First District, California. Feb. 8, 1910. Rehearing Denied by Supreme Court April 7, 1910.)

Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Action by Sage Watson against the Alta Investment Company and others, wherein the Western Fuel Company intervened. From a judgment for defendants and from an order denying a motion for new trial, intervener appeals. Affirmed.

Olney, Pringle & Mannon, James Alva Watt, and Max Thelen, for appellant. A. G. & H. K. Eells and W. F. Williamson, for respondents.

KERRIGAN, J. This is an appeal by the intervener, Western Fuel Company, from the judgment in favor of the defendants, and from an order denying its motion for a new trial, and is taken on the same transcript as case No. 701 (108 Pac. 48), bearing the same title, which we have this day decided. It grows out of the same transaction, and is argued in and submitted upon the same briefs. The intervener furnished materials to Watson Bros., the plaintiff's assignors, to be used in the construction of the building giving rise to the controversy in said case No. 701; and long after the destruction of the building it served notice on the owner, the Alta Investment Company, to withhold any moneys that might be due by it to defendant Crichton. But we have this day affirmed the judgment of the lower court in favor of defendants Alta Investment Company and Crichton, by which it was adjudged that there was nothing due from said company.

For the reasons stated in the opinion in said case No. 701 for affirming the judgment and order in that case, the judgment and order in this case should be affirmed, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 595

SCHWARTZ et al. v. ROYAL NEIGHBORS OF AMERICA. (Civ. 597.)

(Court of Appeal, Third District, California. Feb. 9, 1910.)

1. Insurance (§ 819*)—Action on Benefit Certificate—Sufficiency of Evidence.

In an action on a benefit certificate, evidence *held* to support a finding that insured was not pregnant when she made application, and did not become so before the certificate was delivered to her.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

2. Insurance (§ 819*)—Action on Benefit Certificate—Sufficiency of Evidence.

In an action on a benefit certificate, evidence *held* to support a finding that insured, to questions as to whether she had consulted any physician as to personal ailment, whether she had undergone a surgical operation, and as to how many miscarriages she had had, with dates, made correct answers to the insurer's officer who examined her, and was told by such officer that a miscarriage suffered by her was not such as contemplated by the question in the application, and that her answer should be, "None," and that acting on such advice she answered it in the negative.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

3. Insurance (§ 818*)—Action on Benefit Certificate—Admissibility of Evidence.

In an action on a benefit certificate, where defendant alleged false answers in the application as to insured's having had a miscarriage, a document signed by persons as Supreme Physicians of the insurer, setting forth certain rules to be observed in passing upon the application of a person "who has had a miscarriage," was inadmissible in evidence, it not appearing to be a by-law of the order, nor that the physician making insured's examination, or insured, knew of its existence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.*]

4. Insurance (§ 724*)—Application—Untrue Answers by Agent of Insurer.

Where insured orally gave insurer's agent literally true answers, and the agent wrote down answers not literally true, if insured accepted such answers, she will be deemed to have done so in acceptance of the construction put upon the matter by the agent, and a by-law providing that no officer of the beneficial society is authorized or permitted to waive any of the laws of the society relating to the contract for payment of benefits between any member and the society does not apply.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1866-1868; Dec. Dig. § 724.*]

5. Appeal and Error (§ 1058*)—Harmless Error—Exclusion of Testimony.

The excluding of a question asked a witness was harmless where the witness had previously testified to the fact sought to be elicited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

6. Insurance (§ 818*)—Action on Benefit Certificate—Admissibility of Evidence.

In an action on a benefit certificate, where the insurer claimed untrue answers to a question as to whether insured had had a miscarriage, testimony of a witness as to whether a miscarriage insured had had, in fact had anything to do with one she suffered after the application, was improperly admitted as immaterial, the warranties running to the answers given in the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.*]

7. Appeal and Error (§ 1050*) — Harmless Error—Admission of Evidence.

The admission of immaterial testimony was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.*]

8. Depositions (§ 110*)—Objections—Sufficiency.

In objecting to depositions, error must be made to appear, and an objection that they were irregularly taken is insufficient.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 323-328½; Dec. Dig. § 110.*]

9. Insurance (§ 818*)—Action on Benefit Certificate—Admissibility of Evidence.

In an action on a benefit certificate, where the insurer claimed untrue answers in the application, evidence was admissible to show what took place when the application was made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Otto Schwartz and others, minors, by Otto Schwartz, their guardian, against the Royal Neighbors of America. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Benjamin D. Smith and F. E. Cook, for appellant. J. R. Webb and S. L. Strother, for respondents.

CHIPMAN, P. J. This is an action to recover upon a benefit certificate issued by defendant on the life of Cecilia Schwartz. Plaintiff had judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

The benefit certificate was admitted in evidence, is dated Peoria, Ill., May 9, 1906, and was delivered to Mrs. Schwartz, May 21, 1906; also copy of her application dated February 15, 1906, and proof of death which occurred

August 15, 1906. It was admitted that the signatures to the several documents are true and correct, and that all assessments and dues required to be paid under the policy have been paid. The court found all the allegations of the complaint to be true, and all of the defendant's first affirmative defense to be true "except as hereinafter found." This defense is based upon the provisions set forth in the benefit certificate and the conditions thereto affixed, and particularly averring that the insured warranted the answers made by her in her application to be "full, complete, and literally true." Certain specified questions and answers are then set forth as to which it is averred that the answers were false and untrue, "by reason whereof the said benefit certificate herein sued on became, was, and is null and void," to wit: "(18) Have you, within the last seven years, consulted any person, physician or physicians in regard to personal ailment? No. If so, give dates, ailment, length of illness, and person, physician, or physician's name and address. Only confinement." The court found this defense to be untrue. "(19) Have you ever undergone a surgical operation?" To which she answered, "No." This averment is found untrue. "(331) Are you pregnant? * * * If applicant is pregnant, application will not be accepted by Supreme Physician. Examination should be postponed until at least two months after confinement." She answered, "No;" and the answer alleges that at that time, to wit, February 23, 1906, she was pregnant. This averment is found untrue. "(33n) How many miscarriages, and give dates of each?" To which she answered, "None;" it is claimed that prior thereto she had had a miscarriage. As to this the court found that Mrs. Schwartz "made true and correct answer to said question to Mrs. Lulu Case, Deputy Supreme Oracle of defendant, and one of the officers of defendant, and was by said Deputy Supreme Oracle informed that the miscarriage suffered by said applicant was not such a miscarriage as was contemplated by said question by defendant, and that her answer should be, 'None;' that, acting on said advice and information, and believing therefrom that her said answer was literally true as meant by the question asked, said Cecilia Schwartz answered the same in the negative."

A second affirmative defense is based upon the answer given to question 331, and it is particularly averred that if Mrs. Schwartz was not pregnant on February 23, 1906, as warranted by her, the "said condition of nonpregnancy, so certified to and warranted by her said answer, did not continue as so warranted to the completion of the contract applied for in said application; but alleges that on and prior to the 23d day of May, 1906, the said Cecilia Schwartz became and was pregnant and that she failed and neglected to notify the defendant with relation thereto," whereby the said certificate became void. As to this the court found "that said applicant was not pregnant at the time of the delivery to and acceptance by her of defendant's benefit certificate." The findings are challenged as unsupported by the evidence.

It appears that Mrs. Schwartz was born in Germany and did not understand the English language very well, and, when being questioned by Mrs. Case, on several occasions required the questions to be repeated, and seemed "not to understand very well." Her application was solicited at her own home by Mrs. Lulu Case who recommended the application and witnessed it as "D. S. O., Camp Recorder, Deputy Supreme Oracle or Camp Physician." The form of application required the camp physician "to fill in" the answers to questions made part of the application. The answers now claimed to be false were made to and written in the application by Mrs. Case, acting in her official capacity. This examination was had on February 15, 1906, and the applicant was required to verify the answers before a physician. In the record is a verification, dated February 23, 1906, signed by Mrs. Schwartz and by Charles H. Ingrim, M. D. In this verification she affirms the truth of her statements made in her answers; agrees that they shall form the basis of her contract with the company and makes them part of her benefit certificate; agrees that if they are "not literally true" the "benefit certificate shall be void"; agrees that any certificate issued to her "while in sound health, shall be in pursuance of the by-laws of the society"; also, that the benefit certificate and the application "shall be construed as one entire contract." Dr. Ingrim, who signed this verification with Mrs. Schwartz, did not testify, and it does not appear that he asked her any questions.

There was but little testimony, and, as it bears more or less upon all the answers to questions claimed to be untrue, it may here be given. Dr. McMurtry was called by defendant and testified that he was the attending family physician of deceased; that he was called to attend her in November, 1905, and treated her then for a miscarriage and that "she was up in three or four days." He was again called to treat her about August 10, 1906, and she died August 15. He testified that "the direct cause of her death was her kidney condition." She was then pregnant. "The fetus was about half born. I did not measure the fetus, and it is impossible to say how long she was pregnant. I stated once it was about three months, but I think it was in the neighborhood of four months. I did not measure the fetus and could not say positively." On cross-examination he testified: "If it should appear in evidence that Mrs. Schwartz was sick in her monthly period the latter part of April, I should then say that the fetus was about three months old. * * * If it should be a fact that in the latter part of April she was sick, it would be impossible for her to know, definitely, her true condition by the 21st of May." (This was the date she received her benefit certificate.) He testified that she died of convulsions, and "the miscarriage was caused by that also." It appeared from the testimony of Mrs. Schwartz' husband that she "had her last monthly sickness at the end of April the same year she died."

The depositions of Mary Teichman and Rosa Teichman were received in evidence. These witnesses were next-door neighbors of Mrs. Schwartz and were present when the Deputy Supreme Oracle and Camp Physician of the society examined Mrs. Schwartz and took her application. Mary Teichman testified: "At that time I and Rosa Teichman were there, and Rosa's mother, who could not talk English, and also Mrs. Case and Miss Bond, representing the company. Mrs. Case wrote the answers to the questions in the application, and I heard everything she asked and the answers given. I heard Mrs. Case ask Mrs. Schwartz whether she had ever been sick or not, and what kind of sickness she had; how many times she was sick, and she said only once and she said she miscarried and got an operation. Mrs. Case says she don't have to tell doctor about it." On cross-examination she testified: "I do not speak English very well. When the people are talking I do not understand everything they say when they speak in English. You know, Mrs. Schwartz she (Mrs. Case) asked her lots of times questions and she could not understand them very well. She asked her lots of times what mean that. Mrs. Schwartz was German and I am German. Mrs. Case spoke to Mrs. Schwartz in English. Sometimes Mrs. Schwartz did not understand what she said. Then Mrs. Case would speak over. Mrs. Case asked Mrs. Schwartz if she was in a family way or not. She never was in family way at that time when Mrs. Case was there. All I know about it was what Mrs. Schwartz said. Mrs. Case told her she had to go to see doctor for it before she could get her final papers. I was in the room all the time Mrs. Case was there. Mrs. Case had a paper and wrote these things down. When she asked Mrs. Schwartz a question and Mrs. Schwartz answered it, Mrs. Case would write it down." Rosa Teichman testified substantially as did Mary Teichman. She testified: "Mrs. Schwartz at that time was not pregnant. She said, 'I ain't in a family way,' and that was all she said about it. She said she was not so very sick on this former occasion when she had the miscarriage, but that she had a doctor and an operation at that time. I asked Mrs. Case if she should tell Dr. Ingrim about the miscarriage, and she said, 'No, you don't have to tell him.' Mrs. Case was there; she had a fountain pen and asked the questions and wrote down the answers. Mrs. Schwartz did not always understand the question when it was first asked her. * * * Mrs. Schwartz did not know how old her grandpa and grandmamma was, and she asked my mamma about it in German and then told Mrs. Case in English. I spoke to Mrs. Schwartz in English. My people came from the same part of Germany that Mrs. Schwartz's people did." This closed the testimony.

1. As to the answer given by Mrs. Schwartz to question 331, that she was not then pregnant and as to the point that she became pregnant before the benefit certificate was delivered to her, the evidence fully warranted the findings of the court. The first symptom of probable pregnancy occurred the last of April, 1906, and Dr. McMurtry testified that "it would be impossible for her to know definitely, her true condition by the 21st of May," when she received the certificate.

2. Questions 18, 19, and 33n all relate to a single instance of previous sickness, pregnancy, and operation. The evidence is that Mrs. Schwartz made no concealment of the fact that in 1905 she had a miscarriage and an operation, which seems not to have been of any seriousness, for Dr. McMurtry testified that he treated her and "she was up and about in three or four days." She did not make any concealment of the fact from Mrs. Case, but told her the truth, and, after explanations, Mrs. Case, not Mrs. Schwartz, wrote down the answers. There is no evidence that Mrs. Schwartz knew what answers were being recorded against her, except the presumption that might follow from having signed the paper. We cannot, from anything disclosed, impute to her any intention to deceive or that she was knowingly a party to any guilty deception. She was asked no questions, so far as appears, by Dr. Ingrim, the society's medical officer. Mrs. Case was the authorized agent of the society, and appears to have enjoyed the rather high-sounding title of "Deputy Supreme Oracle and Camp Physician," and with her was Miss Bond, an officer of the society. Neither of these persons was called by defendant to explain their conduct or part in the taking of the application. Nor was Dr. Ingrim called to show what occurred when Mrs. Schwartz came to him. We cannot presume that either one of these officers was purposely committing a fraud upon the society which they represented, or was intentionally seeking to mislead it or Mrs. Schwartz. The reasonable, as well as the more charitable view of the transaction, is, that both Mrs. Case and Miss Bond, after hearing the facts about the single previous sickness of any kind which is in

question, concluded that it was of little consequence and on their own initiative and through no wish of the applicant, made out the application. Mrs. Schwartz took this application to Dr. Ingrim bearing the recommendation of Lulu Case, who had conducted the examination, and we may well assume that he accepted it without further inquiry, believing that "the Deputy Supreme Oracle and Camp Physician" had sufficiently examined Mrs. Schwartz. Mrs. Schwartz was told that she need not speak of the miscarriage to Dr. Ingrim, but whether she did or not we do not know. Presumably she made no verbal misrepresentations to him or defendant would have shown it by Dr. Ingrim. The burden was on defendant to establish its defense which we think it failed to do. The findings of the court are supported by the evidence.

3. There was admitted in evidence a document signed by Susan McG. Snyder and three others, "Supreme Physicians, Royal Neighbors of America," setting forth certain rules to be observed by themselves in passing upon the application of a person "who has had a miscarriage." It does not appear to be a bylaw of the society, nor does it appear that "Camp Physician" Case or Mrs. Schwartz knew of its existence. It is addressed "To whom it may concern," but we cannot see that it concerns any one of the plaintiffs or has any relevancy to the case.

4. There was also admitted in evidence a section of the by-laws of the society which provides that no officer of the society or local camp officer "is authorized or permitted to waive any of the provisions of the laws of this society which relate to the contract for the payment of benefits between any member and the society." It is contended that the insured warranted her answers to be literally true, and neither Mrs. Case nor any other officer had the authority to waive truthful answers to the questions in her application. The question here seems to us not one of waiver so much as it is the acceptance of the answers as satisfactory by the society's agent. The answer as orally given was literally true, for Mrs. Schwartz said she had had a miscarriage, and, after explanation it was the agent and not Mrs. Schwartz who gave a meaning to the sickness and wrote down what was not strictly true. It was the society's agent and not the insured who did this and if the insured accepted it as her answer we may safely assume that she did so in acceptance of the construction put upon the matter by the agent. In North American Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638, 646, Mr. Justice Cooley said: "If the insurer himself, or his agent, drafts an answer to such interrogatory, in which he treats it as immaterial and does not observe strict accuracy in his statement of facts, the assured might well suppose he could be thought captious and hypercritical if he should insist upon answers exactly correct, when the party seeking the information, and who, alone, was interested in it, was satisfied with statements less accurate, and which, with full knowledge of the facts, he had written out to suit himself."

The assured here was a German woman with an imperfect understanding of the English language. Approached by an officer whose title implies one second in authority to the "Supreme Oracle," accompanied by Miss Bond, also an officer of the society, it was natural for her to be guided by these representatives of the society and place confidence in them. If there was a violation of the society's rules or failure of duty it was not on the part of the assured, and her beneficiaries should not suffer through the zeal or shortcomings of the society's agents. It may be observed that the representation related to a matter which in no wise affected the then present physical condition of the applicant.

5. Error is claimed in sustaining plaintiffs' objection to a question put to Dr. McMurtry by defendant: "Doctor, you have said that when Mrs. Schwartz consulted you some several weeks prior to her death, you knew she was pregnant; state whether she had told you before?" The witness had testified that Mrs. Schwartz went to see him "about two weeks before she was taken sick; that about a week before she had spoken to him about being pregnant." The witness had already testified to the fact sought to be elicited. Conceding that the question was proper the ruling was harmless.

6. The witness was permitted, over defendant's objection, to answer the question: "Did you think the first miscarriage had anything to do with the last one?" and answered, "I do not." We think the question was immaterial, inasmuch as the warranties ran to the answers given in the application. But we do not think the ruling prejudicial.

7. When the depositions of Mary and Rosa Teichman were offered, defendant objected. The record states: "It was admitted that the depositions were irregularly taken, and counsel for defendant objected to same * * * on the ground that same and such evidence is incompetent, irrelevant, and immaterial; that under the by-laws of defendant no agent has any right to waive the rules of defendant, and that defendant is not bound by the acts of any agent in attempting to waive the rules." If there was such irregularity in the taking of the depositions as to have made them inadmissible, defendant should have so shown. They may have been "irregular" and still admissible. Error must be made to appear. We think it was admissible to show what took place at the time the application was made.

The case is not entirely free from difficulty, but regarding the acts of the parties as free from intentional wrong, though not strictly in conformity with the rules of the society, we feel constrained to uphold the view taken by the learned trial judge.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

12 Cal. App. 558

PECK v. BERNARD et al. (Civ. 745.)

(Court of Appeal, Second District, California. Feb. 5, 1910. On Petition for Rehearing, March 7, 1910.)

1. MUNICIPAL CORPORATIONS (§ 651½,* New, vol. 9, Key No. Series)—NAME OF STREETS—CHANGE OF NAME.

Where the name of a street became the official name by resolution of the city council, the subsequent recording of a map of a subdivision giving the street a different name was inoperative to change the official name, without reference to the owners of the property on the street.

2. MUNICIPAL CORPORATIONS (§ 651½,* New, vol. 9, Key No. Series)—NAME OF STREETS—CHANGE OF NAME.

Where a street was officially designated as O. street by resolution of the city council, and some persons called it D. street, an attempt of the city council to change D. street to S. street did not affect the official name.

3. MUNICIPAL CORPORATIONS (§ 294*)—STREET IMPROVEMENTS—NOTICE TO PROPERTY OWNERS.

Where the attempt of the city council to change the official name of a street did not affect the name, a street improvement proceeding taken under the changed name was not notice to the abutting property owners, and, where they had no actual knowledge of the improvement until after the commencement of a suit to foreclose an assessment lien, a judgment of foreclosure was erroneous.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776–788; Dec. Dig. § 294.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by E. C. Peck against Pierre Bernard and others. From a judgment for plaintiff, defendant Jeannette Apion appeals. Reversed.

Charles Lantz, for appellant. A. J. Sherer and Edward Winterer, for respondent.

PER CURIAM. This appeal involves the validity of the same street assessment considered by the Supreme Court in the two cases Nos. 2,300 and 2,301 (103 Pac. 918, 919), and therein held to be void.

For the reasons given in the opinion of department 2 of that court, filed August 24, 1909, in appeal No. 2,300 (103 Pac. 918), the judgment of the trial court directing a foreclosure of the lien based upon that assessment and directing a sale of the premises described is reversed.

On Petition for Rehearing.

Respondent petitions for a rehearing of this appeal on the ground that the decisions of the Supreme Court in Peck v. Stassforth (Nos. 2,300 and 2,301) 103 Pac. 918, 919, are not applicable to this case because the lot of appellant was identified by being named as lot 12 of Davin & Jullien's subdivision, and the street in question is called Davin on the plat of that subdivision introduced in evidence. We read the decisions mentioned as holding, in effect, that Otto street became the official name of the street in question in 1890 by a resolution of the common council of the city of Los Angeles, and that the recording of the map of the Davin & Jullien subdivision in 1894, giving the same street the name of Davin, did not operate to change the name to Davin. In the application of this rule it was not material who owned the property. There being no such official street as Davin, but the street called by some persons by that name being officially designated Otto street, the attempt of the city council to change Davin to Savannah street did not affect the official name of Otto street at all. Therefore, the property owners on Otto street received no constructive notice that any improvements were being made on that street by any proceeding taken with reference to Savannah street. The appellant, who is not contradicted, testified that she had no actual knowledge of the improvement until after the commencement of the suit, and that no demand was ever made upon her for the payment of any assessment, and that the lot has always been vacant and unoccupied. The claim of estoppel can never be sustained where there is no notice. The further point made by the petition that appellant is bound by any act of E. R. Fox, as her predecessor in title, is repugnant to the express statement in the bill of exceptions: "No evidence was offered by the plaintiff, or by any person, that E. R. Fox ever owned lot 12 of said Davin & Jullien's subdivision, or any property fronting on said Otto street or Savannah street, in said city of Los Angeles."

Petition for rehearing is denied.

12 Cal. App. 635

JOHANSON v. JOHANSON. (Civ. 742.)

(Court of Appeal, Second District, California. Feb. 10, 1910.)

1. DIVORCE (§ 109*)—EVIDENCE OF ADULTERY—BURDEN OF PROOF.

If, in a suit for divorce on the ground of adultery, it would be inferred, from evidence that defendant visited a brothel, that he committed adultery, the presumption would only cast upon him the burden of explaining the purpose of his visit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 354–364; Dec. Dig. § 109.*]

2. DIVORCE (§ 115*)—EVIDENCE OF ADULTERY.

Evidence that defendant visited a brothel some two months after the suit for divorce was brought is inadmissible.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 371–378; Dec. Dig. § 115.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a suit for divorce for adultery, any error in the rejection of evidence that defendant visited a brothel some two months after the suit was brought is not prejudicial, where the finding that the overt acts of adultery charged were not committed is sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Bertha Johanson brought suit for divorce from Charles J. Johanson. Divorce denied, and plaintiff appeals. Affirmed.

Charles F. Carrier and W. P. Butcher, for appellant. W. C. Gammill and H. C. Booth, for respondent.

ALLEN, P. J. This is an appeal from a judgment upon a bill of exceptions to review errors of law in the exclusion of testimony.

The action was one for divorce upon the ground of adultery. The complaint averred that defendant, on the 16th day of December, 1907, in the city of Santa Barbara, at a house numbered 820 Anacapa street, committed adultery with a woman named Violet; that on January 15, 1908, at No. 822 Anacapa street, in said city, defendant committed adultery with some female whose name is unknown to plaintiff; that defendant has committed adultery at various other times with the said female named Violet, at said house No. 820 Anacapa street, and with other females in said house and elsewhere, the particular dates of said acts of adultery being unknown to plaintiff. The complaint was filed on the 16th day of January, 1908. The evidence offered in support of plaintiff's complaint is entirely circumstantial, it being shown that on January 15, 1908, and at about 11 o'clock p. m. of such date, defendant in company with another man visited a brothel in the city of Santa Barbara; that at the time of such visit there was but one female inmate and the only conduct of defendant established in connection with the visit was that he was seen sitting in the reception room, wherein the inmate was playing the piano and the male companion was dancing. Were it even to be assumed that from a visit to a place of this character adultery is to be inferred, nevertheless the presumption attaching would only cast upon defendant the burden of explaining the object and purposes of his visit. This the defendant did to the entire satisfaction of the trial court, who found that no adultery was committed by defendant as charged in the complaint. The court finds, and there is ample evidence in its support, that defendant did not commit adultery with the woman named Violet at any time or place.

Upon the trial, a witness was called who admitted that she had been an inmate of the brothel during the month of March, 1908, and she was asked by counsel for appellant whether at night after 11 o'clock, on one or more occasions during the month of March, defendant visited that house. The court sustained an objection to this question, and by reason of which error is claimed, and this upon the authority of Carpenter v. Carpenter, 56 Hun, 643, 9 N. Y. Supp. 583, wherein it is held that where adultery is charged in particular houses of ill fame evidence is admissible of visits to other houses of ill fame to show the habits and inclinations of the defendant, and as bearing upon the probability of the evidence in support of the specific charges. It will be observed that the evidence sought to be elicited by this question related to conduct long after the commencement of the action, and in no degree can the same be said to establish the commission of the offenses alleged to have been committed before the filing of the complaint. Assuming, however, such question to be admissible as tending to show the intent with which the visit to the brothel was made at the time specified in the complaint, we do not regard the error in its rejection, if conceded to be such, as sufficiently prejudicial to warrant a reversal of the judgment. The court having found that the overt act was not committed, and the record not disclosing any circumstance or fact from which the court could have found otherwise, it is of little importance as to the intent of the visit. Had there been some evidence from which it might be reasonably inferred that his relations with the female inmate on that occasion had been of an adulterous character, the effect of the exclusion of the evidence might have been different; but in the absence of any testimony or circumstance other than the bare matter of a visit, and it being clearly shown that no offense was committed upon the occasion of such visit, it can scarcely be said that the error was prejudicial.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

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12 Cal. App. 582

MODERN LOAN CO. v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 613.)

(Court of Appeal, First District, California. Feb. 9, 1910.)

1. CONSTITUTIONAL LAW (§ 309*)—PERSONAL PROPERTY — POSSESSION — DUE PROCESS OF LAW.

One in possession of personal property under claim of right cannot be deprived thereof without due process of law, to satisfy which there must be notice of the time and place of hearing and opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. Constitutional Law (§ 309*)—Due Process of Law—Ownership of Property—Determination—Searches and Seizures.

Pen. Code, § 1524, subd. 1, authorizes the seizure of stolen or embezzled property on a search warrant, and section 1536 provides that when the property is delivered to the magistrate, he must dispose of it as provided in sections 1408–1413. Sections 1408 and 1409 provide that on satisfactory proof of ownership the magistrate must order the property to be delivered to the owner. *Held*, that sections 1408 and 1409, in so far as they are applicable to search warrant proceedings, are unconstitutional for failure to provide for notice of time of hearing to the person from whose possession the property is taken under a search warrant, and an opportunity to be heard, as depriving such person of his property without due process of law, nor was it any answer to such objection that the magistrate would probably see to it that notice and an opportunity to be heard were given.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

3. Constitutional Law (§ 309*)—Due Process of Law—Notice.

The right to take jewelry, alleged to have been stolen or embezzled from the person in possession, by means of a search warrant issued out of a police court, and for such court to determine the ownership thereof in summary proceedings, without notice or opportunity to the possessor to be heard, as authorized by Pen. Code, §§ 1408, 1409, cannot be sustained by the rule authorizing the taking or destruction of property without notice when the public welfare demands summary action.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Prohibition on petition of the Modern Loan Company against the Police Court of the City and County of San Francisco and E. P. Shortall, judge thereof. From a judgment making the writ permanent, respondents appeal. Affirmed.

Charles F. Hanlon, for appellants. Robt. W. Harrison, amicus curiæ. Chas. N. Douglass, for respondent. Campbell, Metson, Drew, Oatman & Mackenzie and W. H. Orrick, amici curiæ.

KERRIGAN, J. This is an appeal from a judgment of the superior court making permanent a writ of prohibition. In August, 1908, one Bessie Seaman, presented to Hon. E. P. Shortall, judge of the police court of the city and county of San Francisco, an affidavit, properly subscribed and sworn to by her, in which she averred that in February, 1908, one E. R. Burke had willfully, unlawfully, and feloniously taken and carried away a certain diamond breastpin of the value of $250, the property of said Bessie Seaman, and that there was probable and reasonable cause to believe that said breastpin was concealed at the place of business of the Modern Loan Company, the above-named respondent, in San Francisco. Upon said affidavit the police judge issued a search warrant, pursuant to which the said breastpin was taken from the possession of the respondent. Thereafter, it appearing that said police judge was about to proceed and determine the ownership of said pin, the respondent, claiming a lien upon the same, and asserting that he was entitled as such lienholder to possession thereof, instituted these proceedings in the superior court for a writ of prohibition. That court held that the provisions of the Penal Code, which purport to authorize the police judge to hear and determine "the ownership of" and "title to" personal property, were unconstitutional, and that therefore such police judge was without jurisdiction to proceed in the matter, and a peremptory writ of prohibition issued as prayed for in the petition. From the judgment in favor of the Modern Loan Company appellants prosecute this appeal.

Respondent claims that when personal property has been stolen or embezzled, and that fact is made to appear by affidavit, nevertheless a search warrant should not issue unless a complaint is filed charging the guilty person with the larceny or embezzlement of the property in question. See contra Haworth v. Newell, 102 Iowa, 541, 546, 547, 71 N. W. 404. He also claims that under section 1527 of the Penal Code the evidentiary, and not the ultimate, facts should be stated. Here the affidavit set forth the commission of the larceny, not upon information, but in positive terms; and, in view of the decisions in Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619, and People v. Staples, 91 Cal. 23, 27 Pac. 523, this last contention would seem to have as little merit as the first one. However, the conclusion we have reached on the chief point in the case will render any discussion of these, or any other minor exceptions to the regularity of the proceedings, unnecessary.

The sections of the Penal Code which authorize the disposition and award of personal property seized under search warrants fail to provide for the giving of notice to interested parties, or to afford them an opportunity to be heard on such proceedings, and for this reason respondent contends that those sections are unconstitutional. When personal property has been stolen or embezzled, and, as the result of proceedings under a search warrant, has been seized and delivered to a magistrate, he must dispose of it as provided in sections 1408 and 1409 of the Penal Code. Subdivision 1, § 1524, of the same Code provides that a search warrant may issue "When the property was stolen or embezzled, in which case it may be taken on the warrant from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be." Section 1536 provides: "When the property is delivered to the magistrate he must, if it was stolen or embezzled, dispose of it as provided in sections 1408 and 1413 inclusive. * * *"

Sections 1408 and 1409 of the Penal Code read as follows:

"Sec. 1408. On satisfactory proof of the ownership of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

"Sec. 1409. If property stolen or embezzled comes into the custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate."

We agree with the contention of the respondent that these two sections, so far as they are applicable to search warrant proceedings, are void. One who is in possession of property under a claim of right cannot be deprived of its possession without due process of law; and, in order to constitute due process of law, there must be notice of the time and place of hearing, and an opportunity to be heard. Murray v. Hoboken Land, etc., Co., 18 How. 280, 15 L. Ed. 372; 22 Cyc., pp. 72, 73; People v. Granice, 50 Cal. 447. The statute should give the parties interested in the property an opportunity of presenting, in a deliberate, regular, and orderly method, issues of fact and of law to the court or to a court and jury unless a jury is waived. Under these two sections, irrespective of the value of the property, and without any right of appeal, and without the slightest notice—indeed immediately upon the return of the warrant—the magistrate may proceed to the "proof of the ownership or of title" to the property and make an award. A proceeding permitting this contravenes the provisions of the state and federal Constitutions that a person cannot be deprived of his property without due process of law. It is no answer to the objection urged that the magistrate quite probably will see to it in each case that notice and an opportunity to be heard are given, for the right of a person to his day in court must rest on something more substantial than favor or discretion. It is essential to the validity of a statute that it furnish the means whereby one may enforce his constitutional right.

As said by the Supreme Court of this state in Re Lambert, 134 Cal. 626, 634, 66 Pac. 851, 854 (55 L. R. A. 856, 86 Am. St. Rep. 296): "In the absence from the statute of any requirement of notice to the person, any notice that might be given would be without legal force and authority, and consequently, whether acted upon by him or disregarded, the proceeding would be equally ineffective. 'It is not enough that he may by chance have notice, or that he may as a matter of favor have a hearing. The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done.' Stuart v. Palmer, 74 N. Y. 188 [30 Am. Rep. 289]. It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The Constitution guards against the chances of infringement. Bennett v. Davis, 90 Me. 105 [37 Atl. 865]."

In the language of Mr. Justice Rich, speaking for the Supreme Court of the state of New York in Re Grout, 105 App. Div. 98, 93 N. Y. Supp. 711: "It is not enough that a person may by chance have notice, or that he may, as a matter of favor or courtesy, have a hearing. The law itself, to be constitutional, must require notice, and give a right to a hearing. It matters not, upon the question of the constitutionality of such law, that the questions involved have been fairly decided. The essential validity of the law is to be tested, not by what has been done under it, but what may by its authority be done." Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; Bennett v. Davis, 90 Me. 102, 37 Atl. 864; Dewell v. Commissioners, 232 Ill. 215, 83 N. E. 811; Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

It will be unnecessary in this case to consider whether or not the magistrate sitting in search warrant proceedings may, as the language of the statute (sections 1408, 1409, Pen. Code) imports, adjudicate the title to the property. It may be conceded that if he passes upon the title he does so only incidentally (Est. of Rathgeb, 125 Cal. 302, 57 Pac. 1010), and that the person from whom the property was taken in search warrant proceedings may maintain an action in claim and delivery against the person to whom it was delivered, and that the award or action of the magistrate would not be res adjudicata (Moore v. Ewbanks, 66 S. C. 374, 44 S. E. 971; Houghton v. Bachman, 47 Barb. [N. Y.] 388, 393). This statute, however, does at least purport to authorize the magistrate to determine the right of actual possession of the property, and actual possession is a most valued right, and is an essential part of property, and no one, consistent with constitutional safeguards, can be deprived of the possession or title to property, or of any other substantial right, without reasonable notice and an opportunity to be heard. As said by the Supreme Court in Meacham v. Bear Valley Irrigation Co., 145 Cal. 606, 79 Pac. 281, 68 L. R. A. 600: "The guaranty of the Constitution that he shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession." In the case of Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac.

121, 10 L. R. A. 627, 18 Am. St. Rep. 192, the Supreme Court expressed the same idea, saying, per Mr. Chief Justice Beatty: "A court cannot take property from his (the party in possession) possession without a hearing, and compel him to prove title in order to regain it." See, also, Boca, etc., Ry. Co. v. Superior Court, 150 Cal. 147, 88 Pac. 715; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; Hornsby v. U. S., 10 Wall. 242, 19 L. Ed. 900; Ex parte Koser, 60 Cal. 210; White v. Ward, 157 Ala. 345, 47 South. 166, 169, 18 L. R. A. (N. S.) 568; Bennett v. Davis, 90 Me. 102, 37 Atl. 864; Eustis v. City of Henrietta, 90 Tex. 468, 39 S. W. 567.

Turning from these observations to a consideration of cases which tend more directly to support respondent's position, that the sections in question are void in failing to provide for the giving of notice to the claimant and an opportunity to be heard, in the case of State v. Snow, 3 R. I. 64, liquors of specified kinds kept for sale in violation of the provisions of a certain act were liable to be seized upon search warrant and adjudged forfeited. The court held that the section providing for the mode of condemnation of the liquors was unwarranted, in that the parties interested in the subject of the adjudication were afforded under the act no opportunity to answer and defend. The court said: "In order to the validity of a judicial trial, the parties interested in the subject of the adjudication should be informed of the nature and cause of the charge upon which the adjudication is to be made—they must have an opportunity to answer and defend. Can it be said in this case that there is any such opportunity given to any person who has an interest in the things seized upon the search warrant, that he has any notice of any allegation of the facts necessary to exist in order to warrant a forfeiture, or of any proceeding against the liquors themselves? We think not. No such allegation is anywhere made or to be made. No complaint of that kind is provided for, and the property is to be divested from the owner without any charge or trial of the facts upon which alone he could be legally divested, and without any notice of any such intended trial or inquiry."

In the case of Fisher v. McGirr, supra, the court considered the constitutionality of a statute which made it unlawful for unauthorized persons to keep or to have on deposit spirituous or intoxicating liquors for sale, and directed, upon a complaint being filed showing a violation of the act, the issuance of a search warrant and the confiscation of such liquors. The act however, provided that, before the liquors should be forfeited or destroyed, if the keeper or owner thereof should be known to the officer executing the warrant, such owner or keeper should be summoned forthwith before the officer who issued the warrant to show, if he could, that the liquors were lawfully kept, and if the officer did not know the owner, keeper, or possessor of the seized liquors, notice for the same purpose was to be given by posting for two weeks. That act, it will be observed, as to notice and a hearing, better conserved the rights of parties interested in the property than does the one now under consideration; nevertheless in a very elaborate opinion the court held the act unconstitutional on the ground, among others, that it fixed no time or place at which a claimant might appear with his evidence, and have a trial and meet opposing witnesses face to face. The court said: "If the officer returns the name of some person as owner or keeper, and such person does not appear forthwith, then the liquor may be adjudged forfeited, without further notice or proof. The officer, who, of course, must act upon hearsay and the best information he can obtain, however honestly he may endeavor to obtain the truth, may be mistaken in his return of the name of a person as owner or keeper; then the property may be confiscated and destroyed without any opportunity given the true owner to appear and defend. But suppose the officer happens to be right, and the owner has notice, the notice is to appear forthwith. No day in court is given, no allowance made for the contingency of the owner's absence or sickness or engagements. No provision is made that personal notice shall be given, or that proceedings shall be postponed until personal notice be given. Probably it was not the intention of the Legislature to direct a proceeding subversive of the rights of the subject; and it is quite probable that magistrates and courts, acting in conformity with the more familiar and established maxims governing the administration of justice, have required proofs on the part of the prosecutor, and given to respondents some of the privileges of a defendant, before proceeding to a judgment. But * * * the statute itself must, on its face, be conformable to the Constitution."

In Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115, section 636 of the Penal Code as it then read, providing for the seizure, sale, and forfeiture of apparatus employed in illegal fishing without the formality of a judicial hearing, was declared void and unconstitutional. In that case it was said: "The statute under consideration contained no provisions whatever for determining whether the property was liable for condemnation for the forfeiture denounced against it for the criminal acts of those who had it in their possession. It merely authorizes a peace officer to seize the property without warrant or process, to condemn it without proof, or the observance of any judicial forms, and to destroy it without notice of any kind, or sell it upon notice posted anywhere in the county for five days. Such an enactment cannot be harmonized with those constitutional guaranties which are supposed to secure every one within the state his rights of liberty and property. * * * The law of the land in judicial proceedings requires a hearing before condemnation, and judgment before dispossession."

And in Loesch v. Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682, a statute authorized certain peace officers, or every agent of any society for the prevention of cruelty to animals, to kill any animal found neglected or abandoned, and which is injured or diseased past recovery, or from age has become useless. The court said that the act could not be maintained as an exercise of police power, as its destruction was not made to depend upon the existence of infectious or contagious disease, or other condition affecting the public health or comfort. And, after citing and quoting from a number of cases, the court held it unconstitutional because it allowed the owner to be deprived of his property without due process of law—without notice. The court said: "It is fundamental that no person can be deprived of any article which is recognized as property without a judicial hearing, after due notice. No degree of misconduct or wrong can justify the forfeiture of the property of a citizen except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have an opportunity to contest the ground upon which the forfeiture is claimed."

Hibbard v. People, 4 Mich. 125, invokes a like principle. There the part of a certain act commonly called the "search and seizures clause" was held repugnant to the Constitution and void, in that the act provides no notice to the owner of the property when, where, or before whom the search warrant is to be returned.

Donovan v. Mayor of Vicksburg, 29 Miss. 247, 64 Am. Dec. 143, was a proceeding to prohibit the sale of two hogs found running at large, contrary to the provisions of an estray ordinance. The court said: "The petition shows that the ordinance complained of was of a summary nature, itself directing the city marshal to seize and sell all hogs found running at large in the city, and to pay over the proceeds of the sales, one half to the use of the hospital, and the other half to retain for his services in executing the ordinance. No process is required to be issued for the seizure or the sale, nor notice given to the owner, either actual or constructive, nor is there any opportunity given to him to appear and show cause, under any circumstances, why the ordinance should not be enforced against his property. The entire proceeding is summary, and calculated to deprive the party of his property in all cases without notice or trial, and however clearly he might be able to show that property seized was not within the operation of the ordinance. It is manifest that it [the ordinance] falls within the condemnation of these provisions of the Constitution. It deprives the citizen of his property without notice or trial, and without the opportunity to protect his rights, and of course without 'due course of law.'" See, also, Poppen v. Holmes, 44 Ill. 362, 92 Am. Dec. 186; Jenks v. Stump, 41 Colo. 281, 93 Pac. 17, 124 Am. St. Rep. 137; Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208.

Cooley, in his work on Constitutional Limitations, speaking of search warrants, and after referring to a number of objections that would be fatal to such a warrant, says: "The warrant must also command that the goods or other articles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that, upon further examination into the facts, the goods and the party in whose custody they were may be disposed of according to law. And it is a fatal objection to such a warrant that it leaves the disposition of the goods searched for to the ministerial officer, instead of requiring them to be brought before the magistrate, that he may pass his judgment upon the truth of the complaint made; and it would also be a fatal objection to a statute authorizing such a warrant if it permitted a condemnation or other final disposition of the goods without notice to the claimant, and without an opportunity for a hearing afforded him."

Black on Intoxicating Liquors, at section 351, says: "The statute [i. e., one providing for the confiscation or forfeiture of liquors kept in violation of law] must provide for notice to the party interested in the property, and for a trial and judicial ascertainment of the facts requisite by the statute to warrant a forfeiture, and an opportunity must be given for such party to appear and defend. If the statute fails in these particulars, it is not valid."

McConnell v. McKillip, 71 Neb. 712, 99 N. W. 505, 65 L. R. A. 610, 115 Am. St. Rep. 614, was an action in replevin against a deputy game warden for the possession of three shotguns, held by him under a statute authorizing game wardens to seize and forfeit to the state all guns, ammunition, dogs, blinds, and decoys, and all fishing tackle, in actual use by persons hunting or fishing in violation of the game law. There, in passing upon the contention that the statute was a valid exercise of the police power of the state, the court said there was a wide distinction between personal property, which can only be put to an illegal use, and firearms, which may be used for many other purposes innocent and lawful in their nature, that in the former case the Legislature might declare such property to be a public nuisance, and provide for its summary abatement or destruction by a public officer, but on the other hand, if property susceptible of a beneficial use has been perverted to an unlawful use, and therefore is subject to forfeiture to the state, that such forfeiture can only be declared after the owner of the property has had his day in court. The court said: "We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture, and the transfer of the right of property in the same from one person to another as punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect." See, also, State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; Wagner v. Upshur, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; Berry v. De Maris, 76 N. J. Law, 301, 70 Atl. 337; Beavers v. Goodwin (Tex. Civ. App.) 90 S. W. 930; Darst v. People, 51 Ill. 286, 2 Am. Rep. 301; In re Gannon, 16 R. I. 537, 18 Atl. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; In re Lance, 55 Misc. Rep. 13, 106 N. Y. Supp. 211; Louisville, etc., Board v. King, 127 Ky. 824, 107 S. W. 247, 15 L. R. A. (N. S.) 379; State v. Chittenden, 127 Wis. 468, 107 N. W. 500; Craig v. Board of Improvement, 84 Ark. 390, 105 S. W. 867; Chauvin v. Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194; East Kingston v. Toule, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; Central, etc., Ry. Co. v. Wright, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134; Canon City v. Manning, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272; Clement v. Rabbach, 62 Misc. Rep. 27, 115 N. Y. Supp. 162; In re Rosser, 101 Fed. 562, 41 C. C. A. 497; Ulman v. Baltimore, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224, and note; Kuntz v. Sumption, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 655, and note.

The case of Collins v. Lean, 68 Cal. 284, 9 Pac. 173, lends no support to the position of appellants. There, from an affidavit filed with a justice of the peace, it appeared that Collins had in his possession certain lottery tickets, and that he intended to use them as a means of committing a public offense. A search warrant was issued, under the authority of which the place of business of Collins was searched, and 100 lottery tickets were found and taken by the police officer for the purpose of being used as evidence against Collins in a future prosecution. After the tickets were no longer required as evidence, their return to Collins was refused on the ground that they should be retained to prevent him from committing the public offense of selling them. The court said that, while as a general rule one could not be deprived of property without due process of law, nevertheless it was firmly settled that all property must be kept and used in consonance with the welfare of the general public; that when property is held or used so as to be injurious to the general welfare of the public, it may be seized and destroyed. It was apparent that Collins would put the lottery tickets to an unlawful use, and the refusal therefore to return them was held authorized. In that case the property was seized under subdivision 3 of section 1524, Pol. Code, as property held "with the intent to use it as a means of committing a public offense," and under section 1536, unlike the case at bar, the magistrate was under no duty of delivering the property to its owner "upon a satisfactory proof of title," but was required to retain it in his possession subject to the order of the court to which he was required to return the proceedings before him.

There is a line of cases holding that it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action. Instances of this kind are the power to destroy diseased meat or decayed fruit, to kill diseased cattle, to destroy obscene pictures and books, to pull down houses in the path of a devastating fire, to destroy property used or kept in violation of the law which is incapable of lawful use (Mullen v. Mosley, 13 Idaho, 457, 90 Pac. 986, 12 L. R. A. [N. S.] 394, 121 Am. St. Rep. 277). The property involved in this case is what is sometimes termed in the books to be "innocent property." It threatens no danger in any way to the public health or morals, and there is no reason why the claimant of the property should not be accorded by statute an ample opportunity to make his defense. It is plain that the present case does not fall within the rule of the cases just cited.

If it be conceded that in a criminal prosecution a court, judge, or magistrate would be authorized and warranted incidentally to pass upon and award the possession of personal property as provided in said sections 1408 and 1409, yet in the case at bar no one has been arrested; no one has been charged with an offense; no one has been brought to trial; nor is the article seized to be used in evidence in any case. Thus it clearly appears that the search warrant proceedings were resorted to for the sole purpose of having the magistrate pass upon the right of possession of property under a law which gives no notice to the person from whom the property is summarily taken. We think that it was never intended, under the circumstances of this case, that the right of possession of property should be adjudicated by a magistrate, especially when the law has provided the means for settling such question by the ordinary action of claim and delivery. In our opinions sections 1408 and 1409, in so far as they purport to authorize a magistrate to pass upon and adjudicate the right to the possession of personal property without notice to the person from whose possession it was taken, or who claims title to it, are null and void.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 240

PEOPLE v. DRIGGS. (Cr. 141.)

(Court of Appeal, Second District, California. Dec. 17, 1909. Rehearing denied by Supreme Court Feb. 14, 1910.)

1. INDICTMENT AND INFORMATION (§ 125*)—ALLEGATIONS—CHARGING SEVERAL OFFENSES—"FORGERY."

Pen. Code, § 470, makes any person guilty of "forgery" who, with intent to defraud, signs another's name to a lease, etc., knowing he has no authority to do so, or utters, publishes, or passes such forged instrument as true with intent to injure another, and section 115 makes every person guilty of felony who knowingly procures or offers any forged instrument to be recorded. An information alleged that accused willfully, fraudulently, etc., made and forged a lease, which was set out, and afterwards, knowing the instrument to be forged, and with intent to defraud, willfully and fraudulently uttered, published, and passed such instrument as true by offering it for record by the county recorder and having it recorded. *Held*, that the information only charged an offense under section 470, and not under section 115, the allegations as to the manner in which the lease was published being of evidential facts which may be disregarded as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.*

For other definitions, see Words and Phrases, vol. 3, pp. 2900–2910; vol. 8, p. 7665.]

2. INDICTMENT AND INFORMATION (§ 154*)—DUPLICITY—OBJECTIONS—WAIVER—FAILURE TO DEMUR.

Failure to demur to the information on the ground that it charges more than one offense, as permitted by Pen. Code, § 1004, subd. 3, waives that objection to the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 501; Dec. Dig. § 154.*]

3. CRIMINAL LAW (§ 1036*) — TRIAL — RECEPTION OF EVIDENCE—NECESSITY OF REPEATING OBJECTIONS.

While as a rule objections to testimony are waived by failing to object to its admission, where one has once objected and excepted to the admission of a certain line or character of testimony, he need not make repeated objections to the reception of such testimony in order to have the ruling admitting it reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639–2641; Dec. Dig. § 1036.*]

4. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

The information charged accused with forging a lease which recited a consideration of past kindness to the purported lessor by accused. The executor of such lessor testified that he had a conversation with the latter during his lifetime, in which he told decedent that accused was apt to have forged papers against his estate, and advised him to convey his property to those he wanted to give it to, which he (decedent) did, saying that that would balk accused in anything she did. Another witness testified to conversations with decedent relative to accused, in which the former said that accused wanted him to sign a lease, but he did not do it, and ridiculed the idea of doing so, and said that accused was an adventuress, and that he was fixing things to head off the old woman in case he died, and another witness testified that decedent told him he expected to have trouble with accused and was deeding his property away, and that he called her a reprobate, etc., and said she was working him as she worked another man. *Held*, that the evidence was hearsay and improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. §§ 419, 420.*]

5. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR — ADMISSION OF EVIDENCE — PREJUDICIAL EFFECT.

The admission of the evidence was highly prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Gertrude Driggs was convicted of forgery, and she appeals. Reversed.

For opinion of Supreme Court denying rehearing, see 108 Pac. 64.

See, also, 10 Cal. App. 445, 102 Pac. 542.

Paul W. Schenck, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Appeal from judgment of conviction and an order denying defendant's motion for a new trial.

By information filed by the district attorney the defendant was charged with the crime of forgery, it being averred that she forged the name of one John J. Charnock to an instrument, which purported, in consideration of "past kindness and tender care bestowed upon him by the said Gertrude Driggs," to lease to her for a term of years certain real estate therein described. Appellant attacks the information, claiming that it is defective in that it charges her with the commission of two offenses, namely, that of forgery as defined in section 470, Pen. Code, and also that defined in section 115, Pen. Code, which provides that: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States, is guilty of felony."

The information, in appropriate language, charges the defendant with forging the instrument; it being averred therein that: "Gertrude Driggs is accused * * * of the crime of forgery, committed as follows: That the said Gertrude Driggs * * * did willfully, unlawfully, falsely, fraudulently, and feloniously make, alter, forge, and counterfeit a certain lease, indenture, writing obligatory, conveyance, and contract, which instrument is and was in the following words and figures, to wit," which instrument is set out in hæc verba. This is followed by the averment which it is claimed states an offense under said section 115, Pen. Code, and is as follows: "That afterwards, to wit, on or about the 25th day of March, 1909, Gertrude Driggs, well knowing that the said instrument was false, altered, forged, and counterfeited as aforesaid, and with intent to defraud * * * did willfully, unlawfully, falsely, fraudulently, and feloniously, at and in the county and state aforesaid, utter, publish, and pass as true and genuine the instrument aforesaid, by offering the said instrument for record at the office of the recorder of the county of Los Angeles, state of California, and did then and there cause the same to be recorded as a record in said office."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The information in form is identical with that considered in the case of People v. Harrold, 84 Cal. 567, 24 Pac. 106, and it is upon the authority of that case that appellant bases her claim that the information states more than one offense. An examination of the opinion in the Harrold Case discloses the only point there decided was that the instrument which was the subject of forgery, even if genuine, was not one entitled to be recorded, and hence it was not a felony to offer it for record, or to cause or procure it to be recorded; and, for this reason, says the court, the instrument leaves but one offense charged—that of forgery. This was a sufficient ground for so deciding, and we cannot accept the opinion as an authority for holding the information defective upon the grounds claimed in the case at bar. Indeed, it was not so held. All that the allegation purports to aver is that defendant uttered, published, and passed as true and genuine the alleged forged instrument, and that she did this, not by assigning or transferring it, but in a certain specified manner, namely, by offering it for record, etc. The utterance, publishing, and passing of the instrument as true and genuine are acts constituting the offense under section 470. The manner of such utterance and publishing is evidentiary, and should be disregarded as mere surplusage. The averment does not purport to charge the substantive offense defined by said section 115. In the absence of such averment proof that the instrument was offered for record would constitute evidence of its utterance and publication. People v. Baker, 100 Cal. 190, 34 Pac. 649, 38 Am. St. Rep. 323. In our judgment, there is no merit in appellant's contention upon this ground. Moreover, such objection to an information is made the ground for demurrer by subdivision 3, § 1004, of the Penal Code, and when demurrer to the information upon such ground is not interposed, the defendant must be deemed to have waived such objection. Section 1012, Pen. Code. No demurrer was interposed by defendant upon the ground stated; and, even conceding the information to be objectionable for the reasons now urged by appellant, she must nevertheless be deemed to have waived the point.

The lease and attached certificate of acknowledgment bear date March 3, 1909, and John J. Charnock, whose signature thereto was the subject of the alleged forgery, died about March 23, 1909. The court, over defendant's objections, admitted the testimony of several witnesses as to declarations and statements made without the presence of defendant by the deceased in his lifetime. Appellant justly contends that the testimony so received under such ruling was of a character prejudicial in the highest degree to her substantial rights. Against appellant's contention respondent insists that, while some of the testimony so received was objectionable, defendant neglected to interpose objections to its reception, and that by reason of such failure defendant waived any objection thereto. While this is the general rule, nevertheless the law is well settled that, where a party has once excepted to the admission of a certain line or character of testimony his right to a review of such alleged error does not require him to interpose repeated objections to the reception thereof. Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131. The numerous objections made by defendant to the admission of testimony as to statements made in his lifetime by deceased of and concerning defendant, her efforts to obtain a lease from him, his refusal, etc., all made without her presence, and the rulings of the court thereon and exceptions thereto by defendant, entitle her beyond question to a review of each and all of such rulings.

It is unnecessary to refer to the evidence so received other than in part. Witness Smead, the executor of the will of deceased and in his lifetime his confidential adviser, testified in substance that prior to February 27th he had a conversation with Charnock relative to his sentiments towards Mrs. Driggs; that from his actions and what he said he knew what his sentiments were towards her; that about the 1st of February he told Mr. Charnock that Mrs. Driggs was apt to have forged papers of some kind against his estate, and that he advised him to protect his heirs by getting out deeds to the people he wanted his property to go to, and that Charnock told him to prepare the deeds, which the witness did; that Charnock signed the deeds and stated: "Well, this will balk her, the old woman, in anything that she does." Witness Haas testified in substance that in the latter part of February or 1st of March he had conversations with Charnock in his lifetime relative to defendant, in which Charnock said that Mrs. Driggs and some attorney wanted him to sign a lease, and he says, "I wouldn't sign any lease to any one and didn't sign any papers." George Charnock, a brother of the deceased, testified that his brother John told him Mrs. Driggs had been there and was trying to get a lease, and so on. He just made sport of it. He said: "To think that I would give a lease on land that was already leased and ready to put crops and a man that had been cultivating it for years, and she has no horses or tools of any kind to put a crop in with." He says: "I must be a fool, any one would think of giving a lease to a person under such conditions." "Q. What did he say? A. Well, he didn't sign anything, he told me. I understood him. He didn't tell me right out, but I understood that he did not, had not given any lease." He said Mrs. Driggs was an adventuress; that she was nothing more than an adventuress, and was not really reliable. He said something more, but I don't feel like saying. He told us then that he had made out a will, and he was fixing things so as to head off the old lady, the old woman, as he called her, in case he passed in his checks; he just spoke that way." Witness Stackus testified that deceased said to him that he expected to have some trouble with Mrs. Driggs, and he was deeding most of his property, most of his land, away. "I had talked with him about Mrs. Driggs before, and he had always spoken of her lowly; he called her, and spoke of her as 'that old thing of a woman, I think is going to get—they are trying to get, some of my property.' He called her a reprobate. I was there the Sunday before his death, and had a conversation with him, in which he mentioned Mrs. Driggs. He said that he expected there would be trouble with her, but he thought he had things—business affairs—arranged so that he didn't anticipate any trouble." Witness Reinhart testified: "He told me, he says, 'She is working a good deal as she worked in the Hill case.' He read about the Hill case, and he said to me: 'She is working me about the same as she worked old man Hill; I think that is her game of coming to me with soup.'" Much other testimony of a like character was introduced.

Respondent justifies the rulings of the court in receiving the evidence upon the ground that Charnock and his friends were suspicious of Mrs. Driggs, and believed that she had designs on him; that owing to this fact, and for the purpose of "heading off" Mrs. Driggs in any attempt she might make to forge an instrument affecting his property, he deeded the property described in the lease to his daughter. The suspicion and belief of Charnock and his friends might have been wholly groundless. In no event, however, could it constitute evidence tending to show defendant's guilt. Respondent also insists that, inasmuch as the expressed consideration in the lease was "past kindness and tender care bestowed" upon the deceased by the defendant, the evidence was competent for the purpose of showing no such consideration existed, or, if it existed, no value was placed thereon by Charnock. The forgery, however, did not depend upon the sufficiency or insufficiency of the consideration. Testimony on behalf of defendant to the effect that she had bestowed the tender care and performed the kindly acts specified in the lease, and that it constituted full consideration therefor, could in no wise affect her status under the charge of forging the instrument. If improper in the one case, it must likewise be improper in the other.

Respondent also contends "that sufficient testimony of the acts and declarations of deceased concerning defendant appears in the record, without objection having been made thereto, to cure any possible error in the admission of other similar evidence to which proper objection was made," and for which reason the errors were without prejudice to the substantial rights of defendant. We cannot assent to this; indeed, the circumstances and facts connected with the alleged forgery are of such a nature that it would be difficult to conceive of evidence more prejudicial in its effect upon the jury. Moreover, as we have seen, the record bristles with objections repeated over and over again to the same line of questions.

The mental state of the deceased toward defendant was wholly irrelevant so far as it affected her guilt or innocence. We are aware of no rule of evidence which would warrant the reception in evidence in this case of the statements and declarations of John J. Charnock, deceased, as they are disclosed by the record. They form no part of the res gestæ (section 1850, Code Civ. Proc.), were not authenticated under the solemnity of an oath, nor made in the presence or hearing of defendant, and constituted hearsay pure and simple, if not "vicious and venomous." These views are fully sustained by People v. Landis, 139 Cal. 426, 73 Pac. 153, the facts of which are identical with those in the case at bar, and People v. Irwin, 77 Cal. 499, 20 Pac. 56; People v. Carlton, 57 Cal. 83, 40 Am. Rep. 112; People v. Powell, 87 Cal. 363, 25 Pac. 481, 11 L. R. A. 75; Roosa v. Boston Loan Co., 132 Mass. 439; Bacon v. Charlton, 7 Cush. (Mass.) 581; Meeker v. Boylan, 28 N. J. Law, 274; In re Calkins, 112 Cal. 300, 44 Pac. 577. We have carefully examined the authorities cited by the people, but the points involved therein bear no analogy to the case at bar.

While our attention has been directed to other alleged errors appearing in the record, the improbability of a recurrence of the same upon a new trial renders it unnecessary that we pass upon them.

The judgment and order denying appellant's motion for a new trial are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

12 Cal. App. 240

PEOPLE v. DRIGGS. (Cr. 1,585.)

(Supreme Court of California. Feb. 14, 1910.)

Gertrude Driggs was convicted of forgery, and a judgment of conviction and order denying new trial was reversed by the District Court of Appeal (108 Pac. 62), and the state applies for a rehearing in the Supreme Court. Application denied.

See, also, 10 Cal. App. 445, 102 Pac. 542.

PER CURIAM. Application for a hearing in this court is denied. In denying this application we deem it proper to say that we are not to be understood as approving that portion of the opinion which is as follows: "The mental state of the deceased toward defendant was wholly irrelevant so far as it affected her guilt or innocence."

157 Cal. 371

STUM v. HADRICH et al. (L. A. 2,419.)

(Supreme Court of California. March 18, 1910. Rehearing Denied April 15, 1910.)

PARTNERSHIP (§ 53*)—CREATION OF RELATION —EVIDENCE.

On an issue as to whether plaintiff had sold to defendant a half interest in his business, evidence *held* insufficient to show a sale.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 53.*]

Department 2. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by John A. Stum against L. F. Hadrich and others. Appeal by plaintiff from a judgment for defendants. Affirmed.

Frank G. Bryant, for appellant. Wallace W. Wideman, Frank Herald, and Welch & Thompson, for respondents.

MELVIN, J. Appeal from a judgment in favor of defendants. In November, 1904, respondent Hadrich was the proprietor of a confectionery and catering business in Los Angeles. The stock, fixtures, and good will were worth $8,000. Certain negotiations were had between Hadrich and Stum looking to a sale of a half interest in the business to the latter for $500. Stum was an expert caterer, and it was understood in the discussions between him and Hadrich that, if he purchased a half interest in the business at the sum named, he was to devote his entire time to the management of the establishment. Conversations were held at Hadrich's place of business and at that of one Sparks, in which it was arranged that Stum should pay $50 at once, $100 within a day or two thereafter, and that he and Hadrich should obtain the remaining $350 of the purchase price from Sparks upon their joint note. This amount was to be repaid out of Stum's share of the profits of the business. Stum paid the $50 and received from Hadrich the keys of the store and of the cash register, and, at the latter's request, wrote one letter, signing the name "Stum & Hadrich." This, and ordering the porter to clean up the store on one occasion, seem to have been the only services rendered by appellant. When he tendered $100, two days after his payment of $50, Hadrich refused to accept it and repudiated the sale. Subsequently, through his attorney, Hadrich offered to return the $50, but, as the tender was refused, he paid that sum into court for the use of plaintiff. Stum testified at the trial: "It was agreed between Hadrich and me that the sale should be evidenced by an agreement or contract in writing. This was never done. When we went up to see Wideman (the attorney who prepared the bill of sale) about the contract, I would not sign it as prepared, and left them. Thereafter, on the same day, I tendered the $100 as hereinabove stated."

About half a year following the transactions between Stum and Hadrich, the latter exchanged his business for the property in San Bernardino county in which appellant claims an interest. It was alleged in the complaint that appellant, by reason of ownership of a half interest in the business formerly conducted by Hadrich, was entitled to an undivided half interest in the real property obtained by Hadrich in exchange for the stock, fixtures, and good will of his store in Los Angeles. The other defendants are sued as trustees, alleged to be holders of the title to a portion of this land who had taken their respective parcels of the property fraudulently and with full knowledge of Stum's equities.

Although the contract of copartnership was to be the final agreement within which all of the oral negotiations were to be gathered and expressed, plaintiff did not, so far as the evidence shows, offer to defendant any such agreement for execution, nor did he tender a note to Hadrich for signature, nor in lieu thereof offer defendant $350, the amount agreed upon according to his testimony as the final payment of the purchase price of the half interest in the business. He seems to have done nothing to consummate the proposed sale after Hadrich declined to proceed further with the matter. The testimony in his behalf failed utterly to show a completed sale of a half interest in the business, and consequently there is nothing on which to base a claim to a like interest in the property obtained in exchange for the store, fixtures, and good will.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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157 Cal. 363

CITY OF LOS ANGELES v. SOUTHERN PAC. R. CO. et al. (L. A. 2,246.)

(Supreme Court of California. March 14, 1910. Rehearing Denied April 13, 1910.)

1. RAILROADS (§ 76*)—RIGHTS IN STREETS—CONSTRUCTION OF TRACKS.

Where a city ordinance purported to grant the unreserved and unrestricted use of a street to defendant for railroad purposes, defendant was not compelled at the outset to construct all the tracks it had a right to lay in the street under its grant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 195; Dec. Dig. § 76.*]

2. RAILROADS (§ 75*)—STREETS—USE—EXTENT —DETERMINATION OF CITY COUNCIL.

Where a city council was authorized to grant a railroad certain rights in a street, the council was not required to determine what use of the street was absolutely necessary for the grantee, but might simply determine what street or streets it would devote to the grantee's use, leaving to the railroad company the right to determine what use would be necessary and within the council's jurisdiction to grant, as time and experience should determine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 185; Dec. Dig. § 75.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. RAILROADS (§ 75*)—USE OF STREETS—MUNICIPAL GRANT—AUTHORITY OF CITY COUNCIL.

Where a city council had jurisdiction to grant a railroad company certain rights in a street, an ordinance exceeding the council's jurisdiction was nevertheless valid to the extent of the council's power to grant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 187; Dec. Dig. § 75.*]

4. MUNICIPAL CORPORATIONS (§§ 680, 681*)—GRANTS OF RIGHTS IN STREET—MUNICIPAL AUTHORITY—STATUTES—REPEAL.

Act May 20, 1861 (St. 1861, c. 532) § 21, authorizing any county, city, or town to grant to any railroad company the use of any of its streets or highways absolutely necessary to enable the railroad company to reach an accessible point for a depot therein or to pass through the same on as a direct a route as possible, conferred no greater authority on a city council than Civ. Code, §§ 465, 470, relating to the same subject, by which the act was superseded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1464; Dec. Dig. §§ 680, 681.*]

5. MUNICIPAL CORPORATIONS (§§ 680, 681*)—GRANTS OF RIGHTS IN STREETS—STATUTES.

Civ. Code, § 465, subd. 5, authorizes cities to grant to a railroad corporation the right to construct its road along any street on its route, provided the corporation shall restore the street to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise. Section 470 declares that no railroad corporation shall use any street within a city unless the right to use it is granted by a two-thirds vote of the city authorities, from which the right must emanate. *Held*, that section 470 merely makes the municipal grant a condition precedent to the exercise of power given by the Legislature so far as city streets are concerned, and cannot be construed to confer on the city power to authorize a greater use of the street than that declared by section 465, subd. 5, which limited a city's power so to grant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1464; Dec. Dig. §§ 680, 681.*]

6. MUNICIPAL CORPORATIONS (§§ 680, 681*)—GRANTS OF RIGHTS IN STREETS—POWER OF CITY—"ROAD."

Civ. Code. § 465, subd. 4, provides that a railroad should have power to lay out its road not exceeding nine rods wide, and to construct and maintain the same with a single track and with such appendages and adjuncts as might be necessary for its convenient use, and subdivision 5 authorized the construction of the "road" along any street so as not to unnecessarily impair its usefulness or injure its franchise, etc. *Held*, that the word "road" was not used in subdivision 5 in connection with "appendages and adjuncts" as in subdivision 4, and therefore should be construed only to include the railroad's single or double track, as the case might be, and hence the city had no power to grant a railroad company the right to lay a third track in a street for any purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1464; Dec. Dig. §§ 680, 681.*

For other definitions, see Words and Phrases, vol. 7, pp. 6250–6254.]

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action in the nature of ejectment by the City of Los Angeles against the Southern Pacific Railroad Company and the Southern Pacific Company. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Leslie R. Hewitt, City Atty., John W. Shenk, Asst. City Atty., Lewis R. Works, and Howard Robertson, Deputy City Atty., for appellant. J. W. McKinley, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendants. The action was one in the nature of ejectment to oust defendants of possession of a portion of Alhambra avenue in the city of Los Angeles, occupied by them with a railroad track.

Defendant Southern Pacific Company is in possession of all the railroad tracks of the other defendant, holding and operating trains thereover under a lease from such defendant. In the year 1874 the Southern Pacific Railroad Company constructed a single steam railroad track along the center line of the entire length of what is now known as Alhambra avenue, and in the year 1895 it constructed a second track along the entire length of said avenue parallel to and about eleven feet south of the center line thereof, and has ever since maintained and used the said tracks as part of its railroad system. In the year 1902, it laid a third track along a portion of said avenue, south of the other two tracks, which it has ever since maintained and used for railroad purposes. It is this third track that is in question here. It appears that this track is not a part of the main traveled road of defendant, but is one running to the grounds occupied by the railroad repair shops, and that it is also used for siding and switching purposes. It further appears that the effect of the maintenance of this track in its present condition is to prevent the use of the southerly half of the avenue by wagons or vehicles, but we do not deem this consideration material to a disposition of this appeal.

Defendants base their alleged right to such use of Alhambra avenue upon an ordinance adopted by the city council of the city of Los Angeles on July 24, 1873, and approved by the mayor thereof on July 26, 1873. So far as is material here, that ordinance purported to "set apart" from the public highways of the city of Los Angeles all of San Fernando and Mission streets (the latter being now Alhambra avenue) "to the unreserved and unrestricted use of the Southern Pacific Railroad Company," and to grant to said company "the right of way over and along the same * * * for the building, maintaining, and operating of its railroads by and through the track or tracks which said company shall deem it necessary to build along and over the same and with the privilege to said company to make such embankments and excavations upon said streets as shall be found necessary by the company's engineer to the proper construction of said railroad and its connections with said city." The only reservations or conditions therein were as to the right of the city to maintain zanjas, water courses, sewers, water pipes, and gas pipes, and a provision as to the reversion in the event of nonuse by the grantee. There can be no room for doubt that such use of the street as is being made by the defendants is warranted by the terms of this ordinance. As said by the learned judge of the trial court: "This ordinance purports to grant * * * the 'unreserved and unrestricted use' of the street in question * * * 'for the building, maintaining and operating of its railroads by and through the track or tracks which said company shall deem it necessary to build along and over the same,' * * * excepting or reserving only certain rights as to ditches, street crossings," etc. The language of the ordinance is so plain and unambiguous in this regard as to leave no room for doubt as to the construction that must be placed upon it, and counsel for the city make no claim to the contrary.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is established by the decision in Workman v. Southern Pacific R. R. Co., 129 Cal. 536, 62 Pac. 185, 316, that the grantee was not compelled to construct at the outset all the tracks it had a right to lay in the street under its grant, but that, constructing a single track at first, it might construct any additional track or tracks authorized by the ordinance at any time in the future and "whenever it should become desirable from the necessities or convenience of operating its road." It was further determined by that case that the city council was not required to determine what use of the street was "absolutely necessary," for the grantee, but that it might simply determine what street or streets it would give to the use of the railroad company, leaving to the railroad company the right to determine what use will be necessary, "as time and experience shall demonstrate." We are speaking, of course, of such "use" as might legally be granted by the council.

It is contended by appellants that the ordinance is absolutely void, for the reason that it granted rights beyond the power of the council to give. It is not claimed that the council did not have the right to authorize a limited use of Alhambra avenue by the grantee for railroad purposes, but it is insisted that it had no right to give the railroad company the practically absolute control of the whole street, or any such right therein as would authorize it to maintain the third track under the existing conditions. It is clear, in view of the concession that the city council had the legal right to authorize a limited use by the railroad company of Alhambra avenue, that the ordinance cannot be held to be absolutely void. As said by counsel for respondents, it is undoubtedly valid "to the extent of the right which was within the power of the council to grant," and as said by this court of another ordinance in Workman v. Southern Pacific R. R. Co., supra, it gives "to the company the right to make such use of the street as the city could authorize." Admittedly, the city council at that time had only such power in this regard as had been conferred on them by the Legislature of the state. Their authority to grant such a use of the street by the railroad company as includes the maintenance of this third track must be found, so far as we have been able to ascertain, in sections 465, 470, Civ. Code, as the same stood at the time of the adoption of this ordinance, for no other provision of law bearing on the matter has been called or has come to our attention. Learned counsel for respondents cites certain sections of the act providing "for the incorporation of railroad companies," etc., approved May 20, 1861 (St. 1861, p. 607), under which the Southern Pacific Railroad Company was organized. The particular section of this act relied on is section 21, authorizing any county, city, or town, by a certain vote of its legislative body, to grant to any railroad company the use of any of the streets or highways which may be absolutely necessary "to enable any such company to reach an accessible point for a depot" therein, "or to pass through the same on as direct a route as possible and accommodate the traveling and commercial interests thereof." Read in connection with the other provisions of the act, this section conferred no greater authority on a city council than the provisions of the Civil Code above cited, and by which, we have no doubt, it was superseded upon the going into effect of the Civil Code, January 1, 1873. At the time of the adoption of this ordinance, the only legislative authorization of the use of a public street for railroad purposes was in subdivision 5, § 465, Civ. Code, the section enumerating the powers of railroad corporations. That subdivision purported to empower any such corporation to "construct their roads across, along, or upon any * * * street, avenue or highway * * * which the route of its road intersects, crosses or runs along, * * *" with the proviso that "the corporation shall restore the street, avenue, highway * * * to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise." This subdivision was a part of the original Code, and has never been amended. It is to be observed that this provision is limited to the "road" of a railroad corporation; in other words, that it grants to a railroad corporation the right to use a street, avenue, or highway only as a place for its "road." Nothing is said therein, as in the next preceding subdivision, to which we will refer later, about "such appendages and adjuncts as may be necessary for the convenient use of the same." This, as we have said, was the only purported legislative authorization of the use of any street for railroad purposes. Section 470, Civ. Code, as it then and has ever since stood, providing that "no railroad corporation must use any street, alley or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate," is simply a limitation upon such authorization, making such a grant by the town or city authority a condition precedent to the exercise of the power given by the Legislature so far as streets in incorporated cities or towns were concerned. See Arcata v. Arcata, etc., R. R. Co., 92 Cal. 645, 28 Pac. 676. In other words, section 470, Civ. Code, cannot be construed as conferring on the "town or city authority" the power to authorize any use of a street greater than that declared by subdivision 5, § 465, Civ. Code. The city council of Los Angeles was limited therefore to a grant of the right described in said subdivision 5, § 465, Civ. Code, and, in so far as the ordinance exceeded this, it was without legislative authority and ineffectual to give the railroad company any rights. The power given by that subdivision was simply "to construct their roads across, along, or upon" a street or highway.

What was meant by the term "roads" as therein used? We think it must be held to have meant the single or double-track road referred to in subdivision 4 of the same section as it stood at that time, and until amended after the judgment in this case (St. 1907, p. 99), and which provided that every railroad corporation has power "to lay out its road not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same." Doubtless the words "and with such appendages and adjuncts," etc., as used in this subdivision, include necessary sidetracks, but this subdivision is not the one dealing with the right to use a street or highway. When we come to that subdivision (subdivision 5), we find that right limited to the "road." The words "such appendages and adjuncts," etc., as used in subdivision 4, are words of broad import, including perhaps, as practically decided in Southern Pacific R. R. Co. v. Raymond, 53 Cal. 223, even workshops for repairing the cars and locomotives of the railroad company. In the absence of very clear language to that effect, we are not inclined to construe subdivision 5 as intending or authorizing any such use of a public highway by a railroad corporation as would include the occupation thereof for all such purposes as would be included in the term "such appendages and adjuncts," etc. While such appendages and adjuncts may be a part of the "road" in one sense of the word, they are not a part of the road as the same is described in subdivision 4. As there described, the appendages and adjuncts are things additional to the road proper, things necessary to the convenient use of the road, which the railroad corporation has the general power to construct and maintain in such places as it may lawfully acquire and occupy for the purpose. The omission of any reference thereto in the subdivision relative to the use of public highways shows the intention to confine such use to the road itself, consisting of not exceeding two tracks. In our opinion the subdivision did not authorize the city council to allow a third track to be placed on the street. The amendment of 1907, heretofore referred to, allowing "one or more tracks" instead of a "single or double track," can, of course, have no effect in this case, which must be determined upon the law as it stood at the time of the adoption of this ordinance. The case of Workman v. Southern Pacific R. R. Co., supra, relied on by learned counsel for respondents, is in point here only so far as already indicated. The question there was the right of the railroad company to lay a second track after it had constructed and operated for many years only a single track, under an ordinance giving it the right of way for its "track or tracks." This court said that under the law the railroad company was authorized to construct and maintain "a single or double track," and that the grant contained in the ordinance gave to the company "the right to make such use of the street as the city *could authorize*, and as circumstances may at any time thereafter require." (The italics are ours.) The case of Arcata v. Arcata, etc., R. R. Co., 92 Cal. 639, 28 Pac. 676, involved the question of the right of a board of trustees of an incorporated town to allow a second track, where it had previously given permission for a single track. The second track was called a "side track" it is true, but we do not think this affects the question. What was said in the opinion in that case must be construed with reference to the precise question presented. We are satisfied that the opinion should not be construed as intimating either that the trustees had the right to permit a use not warranted by subdivision 5, § 465, Civ. Code, or that said subdivision authorizes the maintenance of a third track for any purpose. We have examined the cases cited from other states, and find none that affect the question here discussed.

No question is raised as to the right of the city of Los Angeles to maintain this action, if the occupancy by the defendants of the portion of the street occupied by the third track is unauthorized.

The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

(157 Cal. 373)

McNEIL v. MORGAN (McNEIL, Intervener).

(S. F. 5,021.)

(Supreme Court of California. March 18, 1910. Rehearing Denied April 15, 1910.)

1. QUIETING TITLE (§ 35*)—SUFFICIENCY OF COMPLAINT.

A complaint which alleged that plaintiff was the "owner and in possession of the land, and that defendant claimed some right, title, or interest in the premises, but neither in law nor in equity had any claim, right, title, or interest," was sufficient as against the objection that it did not in terms proclaim the adverse nature of the claim respecting which plaintiff sought to have his title quieted.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.*]

2. JURY (§ 14*)—RIGHT TO TRIAL BY JURY—EQUITABLE ACTION.

An action to quiet title to land, instituted by a plaintiff in possession, is in equity, and remains so notwithstanding a petition by the intervener asserting exclusive ownership and right to possession, as such intervener is merely in the position of an original defendant out of possession, and he is not entitled to trial by jury as a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 75; Dec. Dig. § 14.*]

3. EXECUTORS AND ADMINISTRATORS (§ 22*)—APPOINTMENT OF SPECIAL ADMINISTRATOR.

Code Civ. Proc. § 1412, providing that appointment of a special administrator may be made at any time and must be made by entry upon the minutes of the court specifying the powers to be exercised by him, was not mandatory as to the entry of a minute order, and the appointment was complete when the order was signed, and failure of the clerk to enter it on the minutes would not invalidate it.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 22.*]

4. EXECUTORS AND ADMINISTRATORS (§ 420*)—ACTIONS—SPECIAL ADMINISTRATORS.

Code Civ. Proc. § 1582, permitting actions to quiet title against administrators, includes special as well as general administrators.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 420.*]

Beatty, C. J., dissenting.

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Louise R. McNeil against Frank E. Morgan, in which James McNeil intervenes. From an order denying the motion of the intervener for a new trial, he appeals. Affirmed.

Sullivan & Sullivan, Theo. J. Roche, and Cassin & Lucas, for appellant. D. M. Delmas, W. T. Jeter, and Benjamin K. Knight (Wm. T. Jeter and Henry C. McPike, of counsel), for respondent Morgan.

MELVIN, J. This is an appeal by James McNeil, intervener, from a judgment in favor of the plaintiff, Louise R. McNeil, and from an order denying the motion of said intervener for a new trial.

Plaintiff, Louise R. McNeil, brought suit against Frank McLaughlin as administrator of the estate of James McNeil, deceased, seeking a judgment against the estate of said deceased quieting her asserted title to certain real property in the city of Santa Cruz. On the day after it was filed, the defendant answered, and, pursuant to a stipulation of the parties, the cause was transferred to the county of Santa Clara and to a department of the superior court in which the Hon. A. L. Rhodes presided. Both parties to the action also by stipulation in writing waived a trial by jury.

After the cause was set for trial in Santa Clara county, Margaret McNeil and James McNeil, who alleged that they were respectively the surviving wife and son of the deceased, filed their complaint in intervention. In the first cause of action pleaded it was alleged that the land in suit was community property of Margaret McNeil and the deceased; that, after the death of James McNeil, the plaintiff took possession of the said property, claiming to be the owner thereof, and that she was still holding it adversely to the estate and the heirs of James McNeil, deceased. The second cause of action was based upon the theory that James McNeil, deceased, and Margaret McNeil had been tenants in common, each owning an undivided one-half interest in the land. The interveners prayed judgment that the plaintiff had no interest in the real property, that the respective interests of the various claimants be ascertained, and that the said interveners should recover possession of the land.

The plaintiff and Frank McLaughlin, as administrator, answered, denying all of the essential allegations of the complaint in intervention, except that James McNeil was an heir of James McNeil, deceased. After the cause was at issue, the interveners demanded a trial by jury upon all matters of fact involved, but their request was denied by the court. Thereafter Margaret McNeil dismissed her complaint in intervention. This left James McNeil, appellant here, the only intervener.

At the trial it appeared that an appeal had been taken from the order appointing Frank McLaughlin administrator of the estate. The court therefore substituted F. E. Morgan, special administrator, as defendant in the action in the place and stead of said McLaughlin. The special administrator was permitted to file an answer to the complaint. None was filed by him, however, to the complaint in intervention. After the trial and this appeal the special administrator accounted and was discharged. F. J. Hoffman was appointed administrator of the estate of James McNeil, deceased, and the said Hoffman, as administrator, has been substituted as a party in the place and stead of the said Morgan, special administrator.

Appellant questions the sufficiency of the complaint on the ground that it does not in terms proclaim the adverse nature of the claim respecting which plaintiff seeks to have her title quieted. Section 738 of the Code of Civil Procedure authorizes an action to quiet title to real property adverse to that of the person seeking the remedy, and appellant contends that such an action is not available against one whose interest in or claim to the land involved in the action is not opposed to that of plaintiff, but "consistent with and subordinate to plaintiff's assertion of title." It is not necessary to decide this precise question because the complaint in substance does seek repose of title against adverse claimants. The complaint alleges that plaintiff is "the owner and in possession" of the land, and, further, that defendant "claims some right, title or interest in the premises, * * * but neither in law nor in equity has he any claim, right, title, or interest therein or thereto or in or to any part thereof." It seems to us that, if one is the owner and in the possession of property and another asserts a claim to that property which is founded neither in law nor in equity, the asserted claim is necessarily adverse to that of the owner or possessor of the land.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Respondent seeks to justify the refusal of the lower court to accede to the intervener's demand for a jury upon two grounds: (1) That he "is bound by the record of the case at the time of intervention," and was therefore subject to the terms of the stipulation of the original parties to the action in which a jury trial was expressly waived. (2) That an action to quiet title to land, instituted by a plaintiff in possession, remains in equity, and cannot be removed to the domain of law where trial by jury may be demanded as of right by the mere averment of an intervener that he is the owner entitled to the possession of the property. It is true, generally speaking, that one who intervenes in an action is bound by the record of the action at the time of intervention. For example, it has been held that such a party is bound by depositions taken prior to his intervention (Rainbolt v. March, 52 Tex. 246), but, the right of trial by jury being a very important privilege preserved by our Constitution, we would be loath to extend the rule in such manner as to deprive an intervener of a trial upon matters of fact by a jury in an action where he would enjoy the right to such manner of trial in an action commenced by him originally. "An intervention merely adds new parties for the purpose of determining all conflicting claims to the matter in controversy, and does not affect the nature of the action so that plaintiff in an action at law is not deprived of his right to a jury trial by an intervention praying for equitable relief"—citing Reay v. Butler, 7 Pac. 669. "While, on the other hand, if the case is properly triable by jury, a jury may be demanded by the intervener, although it has not been demanded by either of the original parties"—citing Lacroix v. Menard, 3 Mart. N. S. (La.) 339, 15 Am. Dec. 161; 24 Cyc. 114. It is not necessary for us to decide this interesting question, however, because the court was justified in refusing a jury trial upon the second ground stated by respondent, namely, because the intervener was not entitled to a jury trial as matter of right, even if there had been no stipulation of the other parties waiving a jury. In Angus v. Craven, 132 Cal. 696, 64 Pac. 1091, in discussing section 738 of the Code of Civil Procedure, the following language was employed: "The purpose of the section is evidently to afford a remedy similar in character to that of the old bill of peace, but extending it to cases which the latter remedy did not reach. See Curtis v. Sutter, 15 Cal. 259. Courts, however, in guarding the constitutional rights to a jury trial, have repeatedly held that where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated, where, at the commencement of the action, the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff, by first bringing his action to quiet title, could not, by such inversion of parties, avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession. But this is as far as this court has gone in Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; Newman v. Duane, 89 Cal. 597, 27 Pac. 66; Gillespie v. Gouly, 120 Cal. 515, 52 Pac. 816; Moore v. Copp, 119 Cal. 434, 51 Pac. 630, and kindred cases. As was substantially said in Donahue v. Meister, supra, the decision of the question whether in an action brought under section 738 either party is entitled to a jury must depend greatly upon the facts in that particular case. It has never been held by this court that an action to quiet title under the Code cannot be maintained as an equitable action, where the plaintiff was, and for a considerable period of time had been, in actual possession, and defendant had never been in possession, or that in such case a defendant can overthrow the equitable character of the action by simply answering that he had title, and praying that he, for the first time, be let into possession. A complaint showing that plaintiff is the owner of the land, and in actual possession of it, and that defendant asserts some right or title thereto which is unfounded, followed by an answer admitting plaintiff's possession, and not showing a prior possession in defendant, seems to present the very action contemplated by the Code provision; and, under these conditions, its continued equitable character is not affected by the particular kind of right which the defendant sets up."

Intervening in a case in which the possession of the property had been alleged by the original plaintiff who also asserted exclusive ownership, James McNeil is in exactly the position of an original defendant out of possession who asserts title and the right of possession as against the person in actual possession. As such a defendant he would not have a right to a trial of the matters of fact by jury unless he had been recently dispossessed by the nominal plaintiff. In such a case he would be treated as really a plaintiff in possession entitled to demand a trial by jury of the issues of fact involved. Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283. The rule announced in Angus v. Craven, supra, has been followed in Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384, where the court, speaking through Mr. Justice Collins, said: "This action was brought to determine an adverse claim made by defendant to 80 acres of land in Chicago county in the possession of plaintiff. By an amendment to the original complaint the latter's right to the land and the extent of her possession were set forth in detail, but the nature of the action was not thereby changed. It was still an action to determine an adverse claim. In his answer the defendant denied the alleged ownership of the plaintiff, admitted, however, that she was in possession, and then alleged that this possession was wrongful, unlawful, and without any right. Defendant further alleged that he was the owner in fee simple, setting out that his title was derived from the United States government through certain conveyances. He demanded that he be declared the owner in fee simple, and entitled to possession. In her reply, plaintiff alleged title by adverse possession, under the statute. When the case came on for trial, defendant moved that a jury be impaneled to try the issues. The motion was denied, and the case was thereupon tried by the court without a jury.

"(1) The character of this action has been heretofore stated. It was brought to determine an adverse claim to real property; the plaintiff being in possession, and the answer setting up a counterclaim in ejectment. Except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to this action, and it was triable by the court and not by a jury. Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122. See, also, Larkin v. Wilson, 28 Kan. 513; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091, in which the same rule is announced. Under the complaint, the case was for trial by the court without a jury, and the fact that the answer contained a counterclaim in the nature of ejectment did not change the procedure." The rule announced above has long been established in California, and we are convinced it was properly applied in this case by the learned judge of the superior court who refused the intervener's demand for a jury.

Appellant objects to the substitution of the special for the general administrator. He insists that there was no warrant in law or in fact for such substitution. We cannot agree with this contention. The special administrator was appointed by an order duly signed by the judge of the court in which the probate proceeding was pending. In his petition for appointment as special administrator the defendant Morgan asked that he be given power, among other things, to "commence or maintain suits." The order recited that the court on reading his petition appointed him special administrator "with the powers of said estate enumerated," and directed that a minute order "to that effect" be entered "specifying the powers to be exercised by said special administrator." Objection was made to the introduction in evidence of this order upon the ground that it did not appear that a minute order had been entered in accordance with the court's direction. We do not think that the entry of such an order is "mandatory" as appellant contends, under the provisions of section 1412 of the Code of Civil Procedure. Estate of Sackett, 78 Cal. 300, 20 Pac. 863, cited in that behalf, does not sustain that view, for it was there merely held that, the order appointing the special administrator not being before this court, it could not be determined whether any error was committed by the court below in disallowing a certain item in the special administrator's account. The appointment of Morgan was complete when the order was signed, and the failure of the clerk to enter it upon the minutes was a mere neglect of a ministerial duty. It was entirely within the power of the probate court to appoint a special administrator with authority to commence and maintain or defend suits and other legal proceedings (Section 1415, Code Civ. Proc.), and it was also within the scope of the authority of the court to try this case and make the order substituting the special for the general administrator as a party (section 385, Code Civ. Proc.). The language of section 1582 of the Code of Civil Procedure is general, providing that actions to quiet title may be maintained against administrators. Obviously, special, as well as general, administrators, are included within this term. If this section were held to apply only to general administrators, as distinguished from those specially appointed, it would be necessary to postpone the trial of the action to quiet title until after the determination of the appeal from the order appointing the administrator. Such a rule would be obviously unjust. The substitution of the special for the general administrator was properly ordered by the court on suggestion of the general administrator's disability.

It follows that the judgment and order should be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

I dissent: BEATTY, C. J.

12 Cal. App. 645

GEORGE J. BIRKEL CO. v. HOWZE et al.

(Civ. 750.)

(Court of Appeal, Second District, California. Feb. 15, 1910.)

GAMING (§ 11*)—GAMBLING CONTRACTS—OPTION TO REPURCHASE STOCK.

A contract reciting that certain shares of corporate stock have been delivered on an agreed valuation, and that the right and option is reserved in the person receiving the stock, at any time after the expiration of one year, on demand to reassign and redeliver them, and receive the money paid, with interest, is not within Const. art. 4, § 26, providing that all contracts for the sale of corporate stock on margin, or to be delivered at a future day, shall be void.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 11.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the George J. Birkel Company, a corporation, against John Howze and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Clair S. Tappan, for appellants. E. S. Williams, for respondent.

ALLEN, P. J. The complaint filed by plaintiff sets out a written instrument in the words and figures following: "Sept. 1st, 1906. George J. Birkel Company, Los Angeles, Calif. —For value received, we herewith hand you twenty-five (25) shares of Mount Washington Company stock certificates No. 60, 61, 64, at a total value of twenty-five hundred ($2,500) dollars. We agree, at the expiration of one (1) year from date, on demand, to purchase said stock for twenty-five hundred dollars, with interest added at six per cent. per annum from date. [Signed] Jno. Howze, Robert Marsh, J. E. Marsh."

It is averred that on August 6, 1907, plaintiff gave notice to defendants that on September 1, 1907, it would demand of defendants that they pay the sum of $2,500, with interest, for said stock under said agreement; that accordingly the certificates mentioned evidencing the shares specified were duly indorsed by plaintiff so as to assign and transfer the same to defendants, and a tender made and a demand of payment; that defendants refused to accept or pay for said shares of stock. Defendants, in their answer, admit the execution of the instrument, but deny the other allegations of the complaint, and allege further that the contract attempted to be set forth in plaintiff's complaint is void, inasmuch as it is repugnant to the provisions of section 26, art. 4, of the Constitution of the state of California. Upon the trial of the action the court found in favor of plaintiff upon all of the issues, and rendered judgment accordingly; defendants appeal therefrom upon the judgment roll.

The only question, therefore, presented upon this appeal is as to the character of the written instrument—the basis of the action. The constitutional provision referred to is: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void." It is appellants' contention that this instrument upon its face is one indicating a gambling transaction. With this we do not agree. This instrument, under section 1643, Civ. Code, is entitled to such a construction as will make it lawful, operative, and capable of being carried into effect, if it can be done without violating the intention of the parties. As we read the instrument, it declares upon its face that certain shares of stock have been delivered to plaintiff upon an agreed valuation, and that the right and option is reserved in plaintiff at any time after the expiration of one year, upon demand, to reassign and redeliver the shares and to receive the money paid, with interest. Agreements of this kind are not within the spirit of the constitutional provision referred to. The object sought by this constitutional provision was to strike down a species of gambling in mining stocks—an evil then rife in this state. Cashman v. Root, 89 Cal. 382, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482. "It is not the purpose of this provision of the Constitution to interfere with legitimate business, or to make void all time contracts for the purchase of shares in incorporated companies." Kullman v. Simmens, 104 Cal. 600, 38 Pac. 363. It is true that this form of contract could be used to effect a prohibited transaction, but, if its true character is different from that expressed upon its face, the burden is upon the party seeking to be relieved therefrom to show such variance. There is nothing in this record indicating that the transaction is other than the one which upon its face it purports to be. In addition to this, it is said by our Supreme Court in Gay v. Dare, 103 Cal. 459, 37 Pac. 466, that in all classes of cases where a purchaser pays the price, but stipulates that he may, if he so desires, return the property and receive back the price paid, it is usually held not to be a contract of purchase, but is the exercise of an option of rescission, and the title upon the exercise of the option at once vests in the original vendor.

Viewing this case, therefore, from either standpoint presented, we think the judgment of the trial court was warranted and the same should be affirmed; and it is so ordered.

We concur: SHAW, J.; TAGGART, J.

12 Cal. App. 648

PEOPLE v. SHEHADEY. (Cr. 107.)

(Court of Appeal, Third District, California. Feb. 16, 1910. Rehearing Denied by Supreme Court April 15, 1910.)

1. CRIMINAL LAW (§ 1110*)—APPEAL—TRANSCRIPT.

Though an order appearing in the transcript on appeal in a criminal case did not on its face show that the time to pass sentence was extended for the purpose of hearing a motion for new trial, a certificate authorized under rule 14 (78 Pac. x), showing that by the minute entry the time was extended for such purpose, imported verity, and not that any change in the minute entry was made; the implication being that the transcript failed to give the entry as it in fact existed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1110.*]

2. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS.

All the attending circumstances, such as the seriousness of the wound inflicted on deceased, may be considered in determining whether he made his dying declaration under a sense of impending death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430–437; Dec. Dig. § 203.*]

3. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS—ADMISSIBILITY.

Where deceased stated that defendant shot him, that he was going to die, and would not live long enough to see a doctor, and bade goodbye to those present, dying five minutes later, his statement was admissible as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430–437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 221*)—DYING DECLARATION—SUFFICIENCY OF EVIDENCE.

Evidence *held* to support the dying declaration of deceased that accused shot him.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 221.*]

5. CRIMINAL LAW (§ 572*)—ALIBI—SUFFICIENCY OF EVIDENCE.

In a murder trial, evidence held insufficient to establish an alibi.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 572.*]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

S. Shehadey was convicted of murder, and from the judgment, and from an order denying his motion for new trial, he appeals. Affirmed.

C. H. Fairall and R. B. Stalder, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of murder in the first degree and was sentenced to imprisonment for life. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The points urged in the brief for reversal of the judgment and order are (1) that there was no sufficient foundation for the admission of the dying statement of deceased; (2) that, if the dying statement of deceased can be considered, it is not supported by evidence sufficient to sustain a verdict of conviction; (3) that there was nothing in the conduct of the defendant, subsequent to the homicide, indicating guilt on his part; (4) that defendant established an alibi.

1. At the argument the point was made for the first time that the time appointed for pronouncing judgment was extended to a date unauthorized by section 1191, Pen. Code, as amended in 1909, and hence, upon the authority of Rankin v. Superior Court, 106 Pac. 718, the order denying defendant's motion for a new trial must be reversed and a new trial ordered as provided by section 1202, Pen. Code, as amended in 1909. The verdict was rendered June 9, 1909, and the court thereupon fixed Saturday, June 26, 1909, at 9 o'clock a. m., "as the time for passing sentence." Section 1191, Pen. Code, was amended April 14, 1909, and took effect June 13, 1909, so that when the order was made, June 9th, the court was acting under the old law, by which the court was not limited in its power to defer sentence, and the time for sentence was properly fixed for June 26th. The transcript, as filed, showed, on that day, to wit, June 26th, the following: "On motion of the defendant, it is ordered that the time for passing sentence herein be and the same is continued to July 2, 1909, at 10 o'clock a. m." And the transcript shows that on that day defendant came into court with his attorney, and asked for a new trial. The order as appearing in the transcript does not on its face show that the time to pass sentence was extended "for the purpose of hearing or determining any motion for a new trial," in which case the court, under section 1191, could have extended the time 10 days. Since the transcript was filed, however, the Attorney General has filed a certified copy of the "Minute Entry of June 26, 1909, vol. 3, page 220, Minutes of the Superior Court, Mariposa County," reading as follows: "June 26, 1909. "People v. S. Shehadey. Present: J. J. Trabucco, Judge, officers of the court, the district attorney, the defendant and his attorney, G. G. Goucher. On motion of the defendant, it is ordered that the time for passing sentence herein be and the same is hereby continued to July 2, 1909, at 10 o'clock a. m., so as to enable defendant to prepare affidavits of newly discovered evidence on motion for new trial." The continuance thus given, counting from June 26th, as we may, was within the 10 days allowed by section 1191. Defendant replies: "We admit the power of the court to change its records to conform to the truth, but there is nothing in the record before the court at this time to show that such change has been made upon the order of the court." The answer is that the latest certificate, showing what the minute entry in fact is, comes to us importing verity, and not that any change in the minute entry has been made. The implication is that the transcript failed to give the minute entry as it in fact existed and the certificate was authorized under rule 14 (78 Pac. x), by which either party may "for the purpose of correcting any error or defect in the transcript suggest the same in writing, * * * or may produce the same duly certified without such order." It is not claimed by defendant that the minute entry as last certified is not correct. It appears by the foregoing that the court was acting within its powers, and not in violation of section 1191, and it is therefore unnecessary

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to consider further the scope and meaning of that section.

2. The defendant kept a small store at the town of Varian, Mariposa county, a station on the Yosemite Valley Railroad, on the Merced river, and lived with his family in the rear part of the store building. Near by he also kept a saloon. T. F. Halloran, whom he was charged with killing, was a section hand of the railroad company at that point, and up to about two weeks before his death had boarded and lodged with defendant's family, but had moved into a small cabin 67 feet distant from the Shehadey saloon, or Tent saloon, as sometimes so called, which latter is 67 feet from the Shehadey store or residence. From Halloran's cabin to the railroad section house is 266 feet. From the window in the section house, as testified to by civil engineer N. C. Ray, he could see the door of Halloran's cabin, and could also see a man when walking all the way to the Shehadey saloon. Deceased died from a gunshot wound inflicted by a No. 12 shotgun loaded with No. 7 shot and fired at very close range. The witnesses differed as to the time the shot was heard, varying from 8 p. m. to about 9 p. m. of April 5th. The moon was full and shining brightly. It was testified that the deceased appeared at the section house a few minutes after the noise of the shot was heard. He "was in his shirt sleeves and drawers" and "in his stockings feet." The section house was occupied by one Hernandez and his wife and they kept boarders. There were three or four men in the house at this time. Two of them went for John Varian, the postmaster at Varian, who lived about a half a mile distant. He went at once to the section house, and found Halloran lying on a quilt suffering from "a large wound, a little to the right of the navel side, right under the short rib. One of his hands had the middle finger gone from the first joint, and the other two fingers the points were injured." The evidence, aside from the alleged dying statements of deceased, was circumstantial, and not in itself conclusive, or very strongly incriminatory. It is not probable that defendant would have been convicted but for the statements in question, and it is, therefore, important first to inquire as to their admissibility.

Witness John Varian testified: "Halloran said that he was going to die, and that he would like to tell me something about his estate, how he wanted it divided, which he stated. He said that defendant shot him, that he came to the door, and tried to force the door, and he was in bed at the time, and finally defendant went off from the door and came up to the door and hollered to him, and told him that Si wanted to see him. He went to the door, and, as he opened the door, he said defendant shot him. I told Halloran that I did not think that he was going to die. I said to him as soon as the doctor would get there he would fix him in shape, and he said, 'I will never live long enough to see a doctor.' Before Halloran died, I went to Halloran's cabin at his request to get $20 in coin in his pants and some blankets, as he was getting cold, and he requested me to take charge of his cabin, which I did. Halloran died about 11:40 a. m., April 5th" (a. m. should read p. m., as clearly appears). On cross-examination the witness testified: "Halloran said he knew defendant because he knew him by his voice and clothes. * * * It was near 9 p. m. when they came after me. It took me about 12 minutes to go up to the section house. * * * When Halloran died, there were present Mr. Plyler, myself, some of the section men, and two wood choppers."

Witness Plyler testified: "I am a merchant. * * * My store is about one-fourth mile from defendant's store and Varian station. * * * Two Mexicans came after me on the night of April 5th, and I arrived at Halloran's bedside before he died. He was lying on the floor in the section house. He had a big hole on the right side of his body. The inside part of it came away out. Nearly three inches protruded. Halloran said 'that Shehadey came to my door and told me Si wanted to talk to me, and shot me all to pieces.' He said good-bye to all of us and died. He died within five minutes after he made the last statement. He made the statement more than once that he was going to die." The witness arrived at the section house about 10:15 p. m. of the 5th of April. The testimony of the coroner was that there "was an oblong wound measuring 2¾ inches in length and 1¾ inches in width on the right side of the abdomen of deceased. An eighth of an inch of the first finger of the right hand was shot off. About one-fourth of an inch of the second finger of the right hand was off the same as the others. There were no other wounds of consequence. I found shots in the entrails and in the flesh near the wound in the abdomen. I picked these shots out of the intestines and some from the edges of the wound."

We are aware of the strictness of the rule governing the admissibility of dying declarations, and that the courts should and do exercise extreme caution in their admission. The sense of impending death is deemed a sufficient substitute for an oath, but the test of cross-examination—a most valuable medium of ascertaining the truth—is wanting. In People v. Sanchez, 24 Cal. 17, 24, Mr. Justice Sanderson stated the rule in these words: "An undoubting belief existing in the mind of the declarant at the time the declarations are made is indispensable to that sanction which the law exacts." In People v. Bemmerly, 87 Cal. 117, 25 Pac. 266, the court said: "It is enough, if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." 1 Greenl. Ev. § 158. The cases hold that all the attending circumstances may be considered in determining whether the deceased made the dying declaration under a sense of impending death. People v. Yokum, 118 Cal. 437, 50 Pac. 686; People v. Lem Deo, 132 Cal. 199, 203, 64 Pac. 265. Among the circumstances that may be considered as influencing the mind of the declarant is the seriousness of the wound inflicted upon him. It seems to us that the learned trial judge was justified in accepting the statements as coming within the rule and in letting them go to the jury.

3. It appeared that defendant and deceased, while the latter was living with the family of the former, had some angry words growing out of a small account for goods purchased by deceased from defendant; also, that defendant had shown some bitterness towards deceased because of his undue attentions of the wife of defendant. In this connection defendant had made some threats of bodily injury to deceased. Whether it was because of this disagreement, or because defendant's wife on account of her sickness could no longer cook for deceased, that he left and went to his cabin, does not very clearly appear. Judging from defendant's feeling towards deceased at that time, it is altogether likely that he quit defendant's house because of the unfriendly attitude of defendant towards him.

Witness Nickerson, chief engineer of the Yosemite Valley Railroad, received a letter from defendant, dated March 13, 1909. Defendant is a Syrian by birth, and could neither read nor write the English language. This letter was written by his stepdaughter at his dictation, and he admitted having dictated it. The letter is principally a complaint against deceased, and in it defendant alludes to his demand upon deceased to pay his bill, and also refers to his interference with his family.

Aaron Varian testified that he was employed hauling freight for defendant; that he arrived at his store with a load on the evening of April 5th. He testified: "While defendant and I were returning to the store from the barn, we could see a light in Halloran's cabin and defendant said: 'There is that damned son of a bitch that has got a light in his house.' He was somewhat angry." John Varian, Jr., testified: "I had a conversation with defendant on or about March 17, 1909, relative to Halloran, wherein I asked him how Halloran was getting along. Shehadey said, 'Oh, that son of a bitch, some day when I am feeling right, I will fix that Irish son of a bitch.' At that time Halloran was not boarding at Shehadey's. He was boarding over at his cabin where he built his house. When defendant spoke of Halloran, he said it kind of laughing."

Richard Carter testified that at the time Halloran left defendant's house and moved to his cabin he had a conversation with defendant. "I told defendant that Halloran was eating his breakfast, and defendant said he was going to make out Halloran's bill right away, and, if he did not pay it that day, he would kick his head off. Defendant also said that Halloran wanted to play with his wife, and he did not want any man to play with his wife, that he could make his own babies, and make them quick if he wanted to." Witness Wiley was present and testified to this conversation. This testimony was put forward as tending to show motive. Obviously, as the provocation to a murderous assault, the facts present no very persuasive proof, and yet we cannot say but that in defendant's mind they might have been a contributing cause leading to a strong feeling for revenge.

Mrs. Louisa Hernandez, wife of Benino, who kept the section house, testified: "Before the wounded man came to the house, I looked out of the window in the dining room, and saw a man dressed in white leave the house where the wounded man lived and walk rapidly toward the saloon. I don't know if he went into the house or the saloon. It was three or four minutes after I saw this man before the wounded man came to my house. I heard a shot just a little while before I looked out the window." On cross-examination, she testified: "When I heard the shot, my husband and friend were at my bed, and I was in the kitchen. I naturally looked out of the window immediately I heard the shot. It was moonlight, and I could see everything, but did not look very long. When I saw the white figure, it was right at the door of the wounded man's cabin. The white figure went towards the house or the saloon; and I think it was a man. When I last saw him, he was up on the hill, the bank, the grade. I saw a gun in his hand. * * * I did not have much time. I was only there a few moments. The figure I saw while looking out the window wore white pants or white drawers; don't know which. I only had a glimpse of the figure. It was 8 o'clock p. m. when the wounded man came to the house by my watch in the kitchen."

It was in evidence that defendant had a shotgun of No. 12 bore, and that he kept ammunition for such a gun in his store. There was evidence that the defendant was dressed that evening in light-colored clothes. Hernandez had a gun of this bore, but he testified that it had not been used for some time before. Deputy Sheriff Walter Davis testified that he reached Varian about midnight, and Halloran was dead. "The Shehadey store is a wooden structure, and his residence is in the rear part of the store. I went around the building several times, but heard no noise of any kind in it. I went to the front door of Shehadey's store and residence a little after midnight, and called in a loud voice as follows: 'Solomon, Shehadey, Shehadey.' I received no reply. I arrested defendant about daylight on the morning of the 6th day of April, as he came out. I told him that this piece of business last night was pretty bad. He said he did not know anything about it. I said, 'There is a man shot,' and he said, 'I don't know nothing about it,' and I said the section boss was shot. I asked him if he had a gun, and he said he had. He went into the room and pointed to the gun. I told him to walk past, and I came and took the gun. The gun was standing at the head of the bed. The bed had the appearance of having been occupied. * * * Both barrels of the gun were empty." The testimony of defendant, his wife, and stepdaughter was that defendant went to bed with sick headache about 6 p. m., was called up to wait upon certain customers who bought some articles, and went to the saloon and had a drink with defendant, and that he returned from the saloon to the house and went to bed again and remained there until morning; that they none of them knew of the shooting nor heard of it until the next morning, although the whole neighborhood seems to have been aroused and aware of the tragedy. Undersheriff Paine took charge of defendant on the 6th, and took the gun from Deputy Sheriff Davis. "Defendant said it was his gun. I observed both barrels. They had been cleaned since they were fired. The left barrel was very much cleaner than the right. * * * I had a conversation with defendant. He said that he did not hear any shot, and heard no noise during the night, as he was asleep. He said he went to bed at 7 and was asleep by 7:30. * * * In a conversation with defendant, I asked him if he and deceased ever had any trouble, and he said they had a little difference about a bill. Defendant also stated that deceased had bothered his wife by going into her room and kind of making free with her. J. H. Ellis asked him in my presence if it didn't make him 'mad for Halloran to bother your wife,' and he said, 'I think my wife is all right; that is her business.'" The three persons who called at the store on the night of the 5th testified that defendant drank with them and was slightly intoxicated, and that they parted with defendant at 8:45 p. m. The homicide was committed after these persons left defendant, and it must have been very soon thereafter. Defendant's wife and stepdaughter did not retire, according to their testimony, until about 11 o'clock, but they testified that they heard no shot, and knew nothing of the homicide that night. The section house where the deceased lay was but 114 feet distant from the Shehadey store and Halloran's cabin was about 135 feet distant. It would seem hard to believe that with all the coming and going of that night to this section house no one at Shehadey's heard what it was about. Without further comments, our conclusion is that the dying declarations of the deceased find support in the evidence.

4. The proof of alibi rests largely upon the testimony of defendant, his wife, and stepdaughter and upon the variance in the testimony as to the time when the shot was fired. Mrs. Hernandez testified that the wounded man came to her home at 8 o'clock as shown by her watch in the kitchen. Other testimony of the people's witnesses shows that it must have been after half past 8 o'clock and near to 9. There was time for defendant to have gone to the cabin from his saloon, after parting with his customers, and committed the crime and returned to his house before 9 p. m., as the distance was but 67 feet. The jury evidently did not accept the testimony of defendant and his family as to his whereabouts the night of the 5th of April. We have set out most of the facts and circumstances on which the verdict rested. But in this as in all similar cases there was no doubt an atmosphere surrounding the trial which, while indefinable, had its influence upon the jury, but could not be incorporated in the record. This atmosphere is sometimes charged with local prejudice and passion and improperly influences the jury. But a careful reading of the record here fails to disclose any evidence that witnesses were testifying under outside pressure in any degree. There was no evidence that any person other than defendant had any feelings of enmity against the deceased, nor was there any evidence casting the slightest suspicion on any one other than defendant.

There are no assignments of error committed in the course of the trial. Defendant seems to have been ably defended, and his cause is well presented here.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

12 Cal. App. 658

TACKETT v. HENDERSON BROS. CO. et al.

(Civ. 684.)

(Court of Appeal, Third District, California. Feb. 18, 1910. Rehearing Denied by Supreme Court April 15, 1910.)

1. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO USE—FAILURE TO INSPECT.

Failure to discover that a live wire was lying on the ground near a walk from 1 o'clock p. m. on Friday until 6:30 o'clock p. m. the following Sunday is such negligence as renders the owner liable for the resulting death of a child, where the same could have been discovered by reasonable care and inspection.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 16.*]

2. ELECTRICITY (§ 18*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

A boy 11 years of age is not guilty of such contributory negligence in touching a wire lying on the ground near a walk as to prevent recovery against the owner for his death thereby, where there was nothing to indicate that it was charged with electricity.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 18.*]

3. PRINCIPAL AND AGENT (§ 159*)—LIABILITY OF PRINCIPAL FOR NEGLIGENCE OF AGENT.

The owners of property are liable for the negligence of persons acting within the scope of their employment in the management of the property for them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 599–613; Dec. Dig. § 159.*]

4. NEGLIGENCE (§ 4*)—NATURE—"DUE CARE"—"ORDINARY CARE."

The terms "due care" and "ordinary care" as used in the law of negligence are relative terms, and mean a degree of care commensurate with the danger involved.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 3, pp. 2221, 2222; vol. 8, p. 7643; vol. 6, pp. 5029–5042; vol. 8, pp. 7739, 7740.]

5. ELECTRICITY (§ 14*)—INJURIES INCIDENT TO USE—CARE REQUIRED.

A person or corporation using wires charged with electricity is bound, while the public is not, not only to know the extent of the danger arising from them, but to use the very highest degree of care practicable to avoid injury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by J. L. Tackett against Henderson Bros. Company, a corporation, Maria Cary Sanborn, and others. Plaintiff had judgment, and defendants other than the corporation appeal. Affirmed.

A. L. Levinsky, for appellants. J. A. Plummer, for respondent.

BURNETT, J. There is no serious controversy as to the facts herein, which may be stated as follows: The appellants own all the wires, poles, and electrical appliances used for distributing electricity in the town of Lodi, San Joaquin county; Cary Bros. being the managers of the plant. The electricity which they distribute is purchased by them from the American River Electric Company. This company has no control nor supervision over the wires or electrical appliances belonging to appellants. Appellants strung the wire in controversy a year before the electrocution of plaintiff's minor child, caused by coming in contact with said wire. This wire was given two wraps around a pole, carried across a sidewalk over an office building, and attached to an iron pipe of a water tank. It was an ordinary galvanized wire, uninsulated, and having the appearance, as some of the witnesses stated, of being used as a guy wire, and not as one charged with electricity. Said wire was used as a "third leg" or ground wire of the system, and it thus saved the expense of another wire. From the date of its erection until the death of said child no attention seems to have been paid to this wire. At a time when the current was shut off an employé of Henderson Bros., thinking that said wire was a guy wire, cut it in order to change the iron stand pipe to which it was attached. The wire was cut between 1 and 2 o'clock of Friday, August 2d, and remained in that condition until Sunday evening between 6 and 7 o'clock of August 4th. At this time the deceased, who was nearly 11 years old, was walking north on Sacramento street with his mother, he being on the sidewalk and she being in the street. When he saw the wire he called to his mother, saying: "This is the electric wire." He then grasped hold of it, and this resulted in his immediate death. Appellants were not notified that the wire was to be cut, or any change was to be made in it, nor did they have any knowledge that it had been cut until after the death of the said child, Millard M. Tackett. The wire did not fall by reason of any structural infirmity or defective fastening. The entire length of the wires owned by appellants in the town of Lodi was about 15 miles, which could be inspected in one day, and the scene of the catastrophe was only a short distance from the office of the company. It appears also that other persons saw the wire, and attempted to take hold of it, believing from its appearance that it was not charged; the testimony showing that even electrical experts, seeing a wire wrapped as this, would conclude that it was simply a guy wire.

Many questions of law are discussed by appellants, and various reasons are assigned for a reversal of the judgment, but the vital propositions involved are: (1) Were appellants chargeable with negligence? and (2) was the deceased guilty of contributory negligence in taking hold of the said detached wire?

As to the first, upon special issues submitted, the jury found that the "defendants Cary Bros., by the exercise of reasonable care and inspection, could have discovered the condition of the fallen wire between about 1 o'clock Friday afternoon and about 6:30 o'clock the following Sunday afternoon," and also that "the wire which was placed in position by the defendants Cary Bros., at the time it was placed in position, and up to the time when it was cut loose from the iron pipe on the tank, was dangerous to any person passing underneath." In reference to this latter finding it may be observed that the menace from the wire in position lay in the fact, as has already been indicated, that its appearance and adjustment were such as to lead to the belief that it was not charged with electricity. This finding, however, need not be considered at length, since the general verdict as to negligence follows from the answer to the aforesaid special issue as to the ability of appellants to ascertain the condition of the wire after it was cut, and before the accident.

We think it was unquestionably the duty of appellants to make frequent inspection of the system, and upon reason and authority it must be held that their ignorance of the condition of said wire amounts to actionable negligence, with the burden imposed of responding in damages for any injury occasioned thereby. That they omitted a plain and imperious duty in the premises appears from the testimony of the manager that: "So far as I knew, the wire as I strung it across there remained in the same condition it was put up until the day somebody cut one end. I paid no further particular attention to that wire that I know of after it had been put up. I told Mr. Bauer under certain conditions that wire was dangerous. * * * I cannot tell how long it had been prior to the occurrence that I had given the wire any attention." It is apparent, of course, that no attention was paid to it during the interval to which we have referred, as otherwise it would not have been allowed to remain hanging loose. The contention of appellants in this connection is that they are relieved of responsibility because they had no actual knowledge of the condition of the wire. But in view of the character of the agency with which they were dealing, and the solicitude of the law for human life, the failure to exercise diligent and proper care to obtain information is equivalent to actual knowledge of the situation, as far as their civil liability is concerned.

The ground for the strict exaction of the law in reference to the obligation of appellants is well set forth in the opinion of the court in Mitchell v. Raleigh Electric Company, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735, as follows: "The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most dangerous and deadly power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and, being odorless, the only means of its discovery lie in the sense of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." Many cases to the same effect in connection with the foregoing are cited in Shawnee Light & Power Co. v. Sears, 21 Okl. 13, 95 Pac. 449, wherein it is held that: "An electric light company, using the public streets of a municipality for its poles, wires, and appliances in conducting its business, is required to exercise the highest degree of care, and to maintain in the best possible condition the best appliances known to the science to render its business safe and to use that degree of care, caution, and circumspection in keeping with the dangerous character of its business." In the Sears Case, supra, the chief complaint of appellant was directed against an instruction informing the jury that it was "the duty of defendant to keep its appliances in a safe condition for those who might be brought in close proximity with them in traveling along the public streets, and if plaintiff, without fault on her part, was injured as complained of, then she was entitled to recover damages in the action." In reference to this instruction the court said: "At the time instruction No. 3 was given by the court, plaintiff's evidence had shown that, without fault on her part, proceeding on the public highway in a place where she had a right to be, she came in contact with the appliances of the defendant company at the edge of the footwalk; that the appliance was one in a most exposed place, and where people were liable to come in contact with it, and one which in the operation of its plant the defendant did not use for the transmission of its current, and in which its current would not then have been except for the want of due care and regard for safety on its part or its servants. Under these circumstances the instruction was given, and the question arises: Was the company liable from a showing of these facts? We hold that it was, and that this is sustained by a great weight of authority in this country and in England"—citing, on [page 24 of 21 Okl.], page 453 [of 95 Pac.] a long list of authorities.

The Supreme Court of Montana stated the

rule in slightly different phraseology as follows: "The owner or operator of an electric plant is bound to exercise a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wires wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered. It would hardly do to say that the defendant can only be required to exercise due diligence after it receives notice of any defect in its appliances, or of any change in the physical conditions surrounding them, for this would be placing a premium upon negligent ignorance." Bourke v. Butte Electric & Power Co., 33 Mont. 267, 83 Pac. 473. In Mitchell v. Charleston L. & P. Co., 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577, it was held that: "Where a company permitted for a day and a half a circuit breaker to be displaced so as to allow a trolley system to come in contact with a telephone wire, it is guilty of negligence, irrespective of how the displacement occurred."

In Pennsylvania the rule as to gas companies is stated as follows: "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of leaks that might occur from deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in business." Similarly, in District of Columbia v. Woodbury, 136 U. S. 463, 10 Sup. Ct. 995 (34 L. Ed. 472), it is held as to those having the care of the streets that they are responsible for their condition if they have actual or constructive notice thereof, and that it is their duty to keep themselves informed concerning the same, and "if a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that fact, and did not know it because they failed to exercise proper diligence, then the law imputes notice to them; in other words, they have notice in contemplation of law and that is constructive notice." The same principle is affirmed in the courts of this state. In Giraudi v. Electric Imp. Co., 107 Cal. 124, 40 Pac. 109 (28 L. R. A. 596, 48 Am. St. Rep. 114), it is said: "Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them." In Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, it is held that, "where the death was caused by a live wire negligently allowed by the city to remain upon a beaten path four feet wide over a vacant lot which had been used for many years by residents of the neighborhood in going from their homes to a railroad station, it was sufficient to prove the negligence of the city."

Many other cases are cited by respondent in line with the foregoing, which emphasize the great care required of such companies for the protection of life and property, and our attention has been called to none holding that careless ignorance exonerates from liability. Of course, when the injury to the wire is done by another without the knowledge of the owner, the latter would be entitled to a reasonable time to repair the damage, but here we are satisfied that the failure of appellants for such an interval to ascertain the condition of the wire cannot be justified nor excused.

If the deceased had accidentally touched the wire, there could be no difference of opinion among reasonable persons as to the liability of appellants. The problem, however, is somewhat complicated by the fact that the act was voluntary on his part, and hence the claim is made of contributory negligence. This is rendered more plausible by the consideration that he was an unusually bright boy, but, after all, the question is: Was his conduct under the circumstances indicative of the want of that care which is to be expected, and which the law demands of a boy of his age, seeing what he saw and knowing what he knew? In the solution of the question we cannot lay out of view the fact that he was a mere child, that he did not know of the dangerous character of the wire, and that there was nothing in its appearance to indicate that it was a live wire. That a person of this boy's age is not held to the same degree of caution as is required of an adult will not be challenged by any one, and it is abundantly supported by the cases. That he did not know the wire was dangerous is shown by his conduct in grasping it, res ipsa loquitur. It is not at all probable that the boy would have seized the wire if he had any knowledge or intimation of the hazard involved. His actions show that he was deceived by the appearance of the wire; and, since appellants were responsible for that condition likely to mislead even experienced electricians, they cannot escape liability upon the ground that the deceased should not have been deceived. The question is at least open to frank and reasonable discussion, and as we view it, the conclusion that the lad was not chargeable with contributory negligence is not unreasonable. We, therefore, feel bound by the finding of the jury adverse to the contention of appellants.

As to this point we refer also to some of the decisions expressing views in line with the foregoing. In Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786, it is said: "A child of 10 years of age is not chargeable with contributory negligence because he took hold of a wire in the street charged with a deadly current of electricity, if there was nothing from which even an adult could have inferred that the wire was carrying any current of electricity whatever." Therein is announced the rule that: "A child is held to such care and prudence as is usual among children of his age and capacity." In the course of the discussion we find this language: "We should be very loath to declare an adult guilty of negligence for grasping a wire such as this one, under circumstances such as the defendant contends surrounded the deceased. We certainly cannot declare that this boy, whose conduct must be judged with due regard for his boyish nature and habits, negligently caused his own death." In Temple v. McComb City Electric Light & Power Company, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, it is held that: "If a boy climbs into a tree through the branches of which an uninsulated electric wire has been placed by an electric light company, and he is injured by coming in contact with such wire, the company is liable therefor, when the tree is such as any small boy would be attracted to and use in his play." In the Giraudi Case, supra, the rule is clearly stated by our Supreme Court as follows: "The mere fact that a dangerous agency is used raises no presumption that the public know enough of its nature to avoid the danger which may arise from its use, and the public—aside from the consumers using the commodity—owe no duty to those introducing it; but it is the duty of those making a profit from the use of a dangerous element, such as electricity, to use the utmost care to prevent injury to any class of people, and they must protect those possessing less than ordinary knowledge of the character of the commodity. * * * Where a person injured from contact with electric wires was ignorant of the danger that might result from the contact, a less degree of care is demanded of him than would have been required if he had been informed of the danger; and what constitutes reasonable care must be judged by the circumstances of the case of which the jury are the judges." See, also, Griffin v. United Electric Light Co., 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477. Without multiplying authorities, we conclude that it would be harsh and brutal to hold that beyond reasonable controversy the deceased was guilty of contributory negligence, and that it was against the mandate of the law to submit the determination of this question to the judgment of the jury. To hold with appellants would be to indorse the doctrine that a snare may be laid for the unwary, and that the guilty may take refuge behind the childish credulity of the innocent.

The cases cited by appellants in opposition to these views do not reach the point. We notice specifically only two California decisions. Studer v. S. P. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39, and George v. Los Angeles Ry. Co., 126 Cal. 358, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184. In the former it was held that: "A child between 12 and 13 years old, who attempts to cross between the cars of a freight train standing at a crossing, and while in the act of climbing over the couplings, is killed by the sudden and unannounced starting of the train, is chargeable with contributory negligence as matter of law"—and furthermore that: "Children, as well as adults, must use the discretion which persons of their years ordinarily have, and cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless." The danger there was obvious to any child of that age of ordinary intelligence, and it was held that the risk was so great and so manifest that the deceased had no right to assume it. In the George Case the question of contributory negligence was submitted to the jury, who found for the defendant, and the Supreme Court held it was proper to leave this question to the jury, "free from any presumption as to plaintiff's incapacity." In those cases the danger was open to the observation, and could be comprehended by children over 10 years old, of average intelligence. Here the danger was hidden and concealed, and by reason of the negligence of appellants would not be suspected even by adults, and therefore an altogether different situation is presented.

The court's instructions, as we view them, stated the law correctly. There seems to be no valid objection to instruction No. 3, charging that: "The owners of property are liable for any acts of negligence upon the part of persons who may be managing such property for them, and if you believe from a preponderance of the evidence that the Cary Bros. were guilty of the negligence charged in the complaint, and that their negligence was the proximate cause of the death of Millard Tackett, and that at the time of the death of said Tackett the Cary Bros. were acting as managers of the electric system at Lodi for the defendants Blanch D. Cary and Maria Cary Sanborn, then your verdict should be, not only against the Cary Bros., but also against the said Blanch D. Cary and Maria Cary Sanborn." The instruction is hypothetical, does not assume any fact as proven, embodies a correct principle of law, and is based upon the evidence. The only criticism that could be directed against it is that it does not specifically require that the acts of the managers, in order to bind the principal, must be within the scope of their employment, but that element is necessarily implied, and the jury were explicitly so directed in another instruction.

An instruction was also given that: "The terms 'due care' and 'ordinary diligence' as used in the law of negligence are relative terms, and mean a degree of care commensurate with the danger involved. * * * Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect may not be apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company or persons, however, using such a dangerous agent are bound to know the extent of the danger, and to use the highest degree of care practicable to avoid injury to any one who may be lawfully in proximity to its wires, and liable to come accidentally in contact therewith. * * * Where one places or maintains a wire charged with a highly dangerous current, or a wire likely to become charged with a highly dangerous current, over a public street, the law requires that he must use the highest or utmost degree of care in the construction, maintenance, and operation of said wire, and he must use the best materials and most approved methods of construction to prevent injury to any one who may lawfully or accidentally come in contact therewith and also use due care and circumspection over such wire to prevent it from sagging down within reach of pedestrians lawfully using a public street or sidewalk space adjacent thereto. Any failure to observe these requirements renders the person so failing liable for all damages that may thereby be caused to others who, without fault of their own, come in contact with such wire or wires." The objection to this instruction made by appellants is that: "The jury were instructed that, while the public may be presumed to know the danger, they are not bound to know its degree, and furthermore that these appellants were compelled to exercise due care and circumspection to prevent the wire from sagging down, which was not a fact in the case, because the wire did not sag down, and therefore these appellants had performed their duty. It sagged down by reason of having been cut without notice to these appellants, and it was an instruction not based upon the evidence, and, like the last instruction, permitted the jury to romance, guess, and surmise."

The proposition however, as to the degree of knowledge has been affirmed in many decisions, among them the case of Fitzgerald v. Edison Electric Illuminating Company, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732, wherein it is said: "A person or company using wires charged with an electric current is bound while the public is not, not only to know the extent of the danger arising from them, but to use the very highest degree of care practicable to avoid injury, etc. The duty is not only to make such wires safe by proper insulation, but also to keep them so by constant oversight and repair." It is also directly upheld in this state by the Giraudi Case, supra. There was evidence also—in fact, it is undisputed—that the wire was 'sagging' or hanging down over the sidewalk for two days. It is true that, as before seen, it was cut by another, but appellants' negligence consisted in allowing it to remain so. The objections of appellants are thus seen to be without merit.

Many objections were made to the admissibility of evidence. We do not feel called upon to review them in detail. We think no prejudicial error was committed. Some of the questions were proper on behalf of the defendants other than appellants; and, if the answers thereto should not have been considered as against the latter, it is sufficient to say that there was no request to so limit them, and there were other questions where an objection was overruled that were not answered at all.

We find no material conflict in the special findings of the jury, nor do we think they are opposed to the general verdict. The case seems to have been fairly tried, the verdict is a very moderate one, and we think the judgment and the order denying the motion for a new trial should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

157 Cal. 410

WELDON v. ROGERS. (L. A. 2,447.)

(Supreme Court of California. March 24, 1910.)

1. APPEAL AND ERROR (§ 843*) — REVIEW — SCOPE—MATTERS NOT NECESSARY TO DECISION—VENDITIONI EXPONAS.

On appeal from an order requiring the sheriff to sell property on which an execution had been levied, entered after the return, the matter of the correctness of the return is collateral, the title of the purchaser at a sheriff's sale not depending on the return.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. § 843.*]

2. EXECUTION (§ 146*)—LEVY—ABANDONMENT.

A levy under an execution on an original judgment is not abandoned by the subsequent issuance of an execution on a judgment on the bond given by the judgment debtor on his appeal from an order refusing to vacate an order for an execution on the original judgment, though the judgment creditor at one time mistook his remedy.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 382, 389, 391–393; Dec. Dig. § 146.*]

3. EXECUTION (§ 146*)—ALIAS EXECUTION—IRREGULARITY.

The issue of an alias execution while a levy on a prior execution remains undisposed of is an irregularity which may be corrected by the vacation of the alias, and, unless the circumstances establish the abandonment of the levy under the prior writ, abandonment will not be inferred merely from the irregular issue of the alias.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 382, 389, 391–393; Dec. Dig. § 146.*]

4. EXECUTION (§ 146*)—DELAY IN SALE—EFFECT.

Mere delay in making a sale under an execution does not operate as an abandonment of the levy, the time within which the sale may be had being under the control of the court.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 382, 386; Dec. Dig. § 146.*]

5. EXECUTION (§ 351*) — ORDER OF SALE — AMOUNT TO BE COLLECTED.

Where there could properly be no credit on an original judgment by reason of a sale under an execution on a judgment on a bond given by the judgment debtor on appeal from an order refusing to vacate an order for an execution on the original judgment because the execution was void, the purchaser at that sale being therefore entitled to a return of his money, the court, in ordering a sale under the execution on the original judgment, properly ordered a sale for the full amount of the original judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1074½; Dec. Dig. § 351.*]

6. EXECUTION (§ 98*) — SALES — POWER OF COURT.

Under Code Civ. Proc. § 187, providing that, where jurisdiction is conferred on a court, all the means necessary to carry it into effect are also given, and in the exercise thereof any suitable mode may be adopted, etc., the court has complete authority over its records and the power to pursue any suitable method for effectuating its judgment which appears most conformable to the Code, and it may permit a sheriff to withdraw from the files a returned writ of execution for his use in making a sale of property levied on.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 195–202; Dec. Dig. § 98.*]

7. SHERIFFS AND CONSTABLES (§ 84*) — AUTHORITY OF SUCCESSOR AS TO PENDING PROCEEDINGS.

Under Pol. Code, § 4171, providing that, when any process remains with the sheriff unexecuted at the expiration of his term, it shall be executed by his successor, the successor of a sheriff who made a levy of personalty under an execution, and who made a return before the termination of his office may complete the sale.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 111; Dec. Dig. § 84.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Sophie B. Weldon, as executrix of T. J. Weldon, deceased, against Ralph Rogers. From an order requiring the sheriff to sell property levied on under an execution and from the part of the order which authorized the sheriff to withdraw the execution from the files of the court, defendant appeals. Affirmed.

See 154 Cal. 632, 98 Pac. 1070.

McNutt & Hannon, for appellant. J. W. McKinley and Louis Luckel, for respondent.

MELVIN, J. This is an appeal from an order of the superior court of Los Angeles county made and filed on the 8th day of March, 1909, requiring the sheriff of that county to sell the real and personal property upon which levy had been made under and pursuant to a writ of execution issued on the 10th day of April, 1905. Defendant also appeals from that part of the order which authorized the sheriff to withdraw the execution from the files of the court for the purposes stated in the order.

The original execution in this case was issued on the date last mentioned under the provisions of section 685 of the Code of Civil Procedure which had been amended during the first five years of the life of the judgment. Under this execution levy was made upon certain real and personal property of the defendant, and then an appeal was taken from an order refusing to set aside the order enforcing the judgment. An undertaking on appeal was given, appellant claiming and respondent denying that this bond was potent to stay the execution. In order that this question might be authoritatively determined, defendant, on July 18, 1905, gave notice of motion for a writ of supersedeas. Pending the hearing thereon, all proceedings were stayed by order of this court from September 14, 1905, to October 16th of the same year when the motion for the writ of supersedeas was denied. The sheriff, however, without any suggestion from the respondent had returned the writ showing the levy, upon certain property. The date of this return was August 11, 1905. This is the writ contemplated in the order from which the present appeal is taken. Subsequent to the denial by this court of the writ of supersedeas, the defendant filed an undertaking in double the amount of the judgment, conditioned that if the order appealed from or any part thereof should be affirmed, or the appeal dismissed, appellant would pay to respondent the amount involved. On July 23, 1907, this court affirmed the order of April 10, 1905, enforcing the judgment. Weldon v. Rogers, 151 Cal. 432, 90 Pac. 1062. Supposing that the undertaking in double the amount of the judgment had operated as a stay, respondent had not directed anything to be done by the sheriff under the original levy. Instead, a judgment on the bond was entered against the sureties and the appellant, and execution thereon was issued. On appeal this judgment was held void with respect to defendant because it was entered ex parte as to him, and this court also determined that, under section 942 of the Code of Civil Procedure, the bond did not operate as a stay, and that, therefore, neither the sureties nor the appellant were liable. Weldon v. Rogers, 154 Cal. 632, 98 Pac. 1070. On February 23, 1909, plaintiff gave notice of motion for an order directing the clerk to issue a writ of venditioni exponas, or an order commanding the sheriff to sell the property upon which levy had been made under the original writ, and, as we have seen, this appeal is from the order granting that motion.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant's first contention is that there never was any valid levy on his personal property, owing to the fact that the sheriff's return shows that he transposed the notices of attachment so that the cashier of the Pacific Savings Bank was notified of a levy on the stock of defendant in the Ralph Rogers Company, while the secretary of the last-named corporation was apprised of a similar attachment on defendant's stock in the Pacific Savings Bank. Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441, is cited as authority to the effect that such mistake is fatal to the validity of the levy. That case, however, is authority against appellant's contention, for it is there held, as to the sheriff, "that his power to sell comes from the judgment and execution, and is not to be measured by his proceedings under the writ; * * * that the performance of the acts described in the statute as a levying of the execution is material only in reference to the intervening rights of third persons, or persons who are not parties to the writ; that it is, undoubtedly, the duty of the officer to proceed strictly according to the statute, and if he does not do so, the sale may be set aside, upon motion, or he may be made to respond in damages to any one who has been injured by his neglect; but it would be gross injustice to hold that by proof of such neglect, made, perhaps, years after the sale, the purchasers' title shall be defeated." It has been frequently held that the title of the purchaser at sheriff's sale does not depend on the return to the writ. Hibberd v. Smith, 67 Cal. 564, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; McFall v. Buckeye Grangers' Warehouse Ass'n, 122 Cal. 471, 55 Pac. 253, 68 Am. St. Rep. 47. It is therefore clear that the matter of the correctness of the sheriff's return is one collateral to this appeal.

The next and principal point made by the appellant is that the levy of April 10, 1905, under the writ of execution of that date, was abandoned and could not be revived thereafter. The only authority cited in this behalf is Freeman on Executions, § 271, where it is said, among other things, that "the only proper object of a levy is to compel satisfaction of the writ out of the property seized; and if the plaintiff, by his long delay in following his levy by a sale, or by directions to return the writ unsatisfied, or by any other course of action, indicates that his employment of the writ is not to coerce the prompt payment of his debt, then the levy is abandoned. When property levied upon is not sold before the return day, the proper writ to enforce a sale thereof is a venditioni exponas; while the proper writ to authorize a new levy is an alias fieri facias. Hence, the suing out of the latter instead of the former writ has sometimes been held to be conclusive, and sometimes to be prima facie evidence that the plaintiff had abandoned his levy." We are asked to hold here that the execution of January 14, 1908, constituted practically an alias writ, and that whether we consider the issuance of such writ as conclusive or prima facie evidence of abandonment, the order reviewed in this appeal, based, as it was, upon the records alone, is void because made without jurisdiction. We fail to see, however, how the later execution, purporting to be based upon the undertaking on appeal, must be taken as an alias to the execution on the judgment; or how the mistaken resort of respondent to that void process was evidence of an abandonment of the original levy. Freeman, in the very section cited by appellant, observes that "the issue of an alias or second execution, while a levy on a prior writ remains undisposed of, is an irregularity which might very properly be corrected by the vacation of the second writ. It indicates misguided zeal in attempting to obtain satisfaction rather more than a desire to permit the first writ to become dormant, or to abandon any advantage gained by it. Unless other circumstances tend to establish the abandonment of a levy, we do not understand how it can be inferred merely from the mistaken and irregular issue of an alias writ. Nor is an abandonment of a regular and adequate levy inferable from a subsequent irregular levy."

While we do not question the fact that respondent at one time mistook her remedy, and that the pursuit of appellant's property under the original execution was postponed on account of the appeal disposed of by the decision in 154 Cal., 98 Pac., we do not see that her course of action indicated an intention to forego any advantage which she may have theretofore obtained by reason of the existence of the writ issued in 1905. That the issuance of a second writ is not necessarily an abandonment of the first one has been held in Dunham v. Bentley, 103 Iowa, 140, 72 N. W. 437; Bouton v. Lord & Hatheway et al., 10 Ohio St. 458; Mason v. Hull, 55 Ohio St. 272, 45 N. E. 632; West v. St. John, 63 Iowa, 292, 19 N. W. 238; Menge v. Wiley, 100 Pa. 619. Nor does mere delay in making the sale operate as an abandonment of the levy, as was said by this court in Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 224, 29 Pac. 629 (28 Am. St. Rep. 115) speaking of the validity of a sale by the sheriff after the return day of the writ: "Having the right to subject the property to a sale for the satisfaction of the judgment, the time within which it may be done is but directory, and under the control of the court." The court did not err in ordering a sale for the full amount of the judgment. Although under the void execution of January 14, 1908, there was, according to the return thereon, a sale made by the sheriff of Orange county, the purchaser under that writ was entitled to a return of his money, and there could properly be no credit upon the original judgment by reason of such sale. The withdrawal of the writ from the files for the sheriff's use was proper, the court having complete authority over its records, and having power, also, to pursue any suitable method for effectuating its judgments and orders, which may appear most conformable to the spirit of the Code. Code Civ. Proc. § 187.

Appellant is of the opinion that as far as the personal property is concerned, any sale thereof should have been made by the sheriff making the levy and not by his successor in office. In this behalf he cites section 62 of Freeman on Executions (3d Ed.). Although the general rule in the absence of statutory mandate to the contrary was that the officer who made the levy under a writ of execution on personal property must complete the sale, we have in this state section 4171 of the Political Code, which is but a re-enactment of a law that has existed in California since 1883. See section 107 of the county government act (St. 1883, p. 322). This section provides that "when any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office." Appellant would have us make the distinction that the rule above announced does not apply to process which did not remain with the sheriff unexecuted, but which, before his term expired, had been returned. The very order of the court, however, withdrawing the writ from the files for the sheriff's use, was in effect a finding that the process was returned without proper authority, and that, therefore, the writ had, in contemplation of law, remained with the sheriff unexecuted.

The order from which this appeal is taken is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

157 Cal. 406

McKELVEY v. WAGY et al. (L. A. 2,439.)

(Supreme Court of California. March 22, 1910.)

1. Mortgages (§ 453*)—Foreclosure—Complaint.

The complaint in mortgage foreclosure, making part thereof, by attachment as an exhibit, the mortgage, providing for reimbursement of the mortgagee for expenditures in payment of taxes and in searching the title, and praying for general relief, need contain no further allegations to authorize inclusion of such items in the judgment.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 453.*]

2. Trial (§ 394*)—Trial by Court—Findings of Fact.

The mere fact that a finding of fact is not set off by itself and marked as such does not prevent its consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 924; Dec. Dig. § 394.*]

3. Trial (§ 394*)—Trial by Court—Findings of Fact.

The statute requiring that findings of fact and conclusions of law shall be separately stated is directory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 924–926; Dec. Dig. § 394.*]

4. Trial (§ 395*) — Trial by Court — Findings of Fact.

A general finding that all the allegations of the complaint are true is sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 929; Dec. Dig. § 395.*]

5. Trial (§ 388*) — Trial by Court — Findings of Fact.

Findings of fact are unnecessary where no evidence is introduced in support of an affirmative defense.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 388.*]

6. Costs (§ 260*)—Frivolous Appeal—Penalty.

In case of a frivolous appeal, a penalty will be imposed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983–996, 1002, 1003; Dec. Dig. § 260.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Barry McKelvey against James I. Wagy and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Woodruff & McClure, for appellants. E. S. Janes, for respondent.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

MELVIN, J. Appeal from a judgment of foreclosure. Defendants James I. Wagy and Julia I. Wagy on July 2, 1906, gave their note for $7,000, payable on or before one year after date, with interest at the rate of 7 per cent. per annum. This note was secured by a mortgage on certain real property in Los Angeles county. Mrs. Jane Johnson was sued as one claiming some interest in the property by purchase from the Wagys.

In the answer the defendants James I. and Julia I. Wagy did not deny the due execution of the note and mortgage, and defendant Johnson merely made denial on information and belief. The defendants pleaded payment of all interest to September 1, 1908, except $130, and averred that plaintiff extended time on said payment for 90 days. They also alleged that about July 1, 1908, plaintiff agreed, in consideration of the payment of interest at the rate of 8 per cent. instead of 7 per cent. per annum, to extend the time of settlement of the note and interest until January 1, 1909.

Plaintiff introduced in evidence the note and mortgage and certain receipts for the taxes which he had paid, and another voucher showing the payment by him of $10 for searching the title to the property. On the witness stand plaintiff stated that having prepared to institute foreclosure proceedings in August, 1907, he was induced by James I. Wagy to forego suit at that time in consideration of the payment to him by the Wagys of $50, together with the interest due on the note July 2, 1907, and the promise that the note and interest at the rate of 8 per cent. per annum (instead of the 7 per cent. mentioned in the note) would be fully paid on January 2, 1908. In January, 1908, according to plaintiff's testimony, defendant James I. Wagy paid him $280, being interest on the note from July 2, 1907, to July 2, 1908, at 8 per cent. In September, 1908, another payment of $150 was made by the Wagys and duly credited. Shortly afterwards Wagy asked for an extension of the time of payment to January 2, 1909, promising to pay, in consideration therefor, the interest then due and 8 per cent. interest. McKelvey, the plaintiff, said that he would accept this offer if the accrued interest would be paid within one week, but no further sum was paid to plaintiff as a result of this offer, and in October, 1908, this suit was commenced. This testimony was not contradicted by any one, the defendants offering no evidence at all. Yet in spite of this plain, uncontroverted statement of fact, appellants' counsel in their brief insist that an extension of the time to January 2, 1909, for payment of the note had been proven, and that the suit was therefore prematurely commenced.

Appellants object to the items in the judgment of $154.08 for taxes and $10 for searching of title, on the ground that the complaint contained no averments upon which to base said motions; but the mortgage itself which, by copy attached as an exhibit, is made a part of the complaint, provides for the reimbursement of the mortgagee for all sums expended in the payment of taxes and in searching the title; and the prayer of the complaint asks, among other things, for general relief.

Findings were not waived, and appellants' claim of error is predicated upon failure to file formal findings. In the decree and order of sale, however, the court did find that "all the allegations in said plaintiff's complaint contained are true." The mere fact that this finding was not set off by itself and marked as such does not prevent us from considering it. The statute requiring that findings of fact and conclusions of law shall be separately stated is directory. Reiner v. Shroeder, 146 Cal. 411, 80 Pac. 517; Butler v. Agnew, 9 Cal. App. 327, 99 Pac. 395; Spencer v. Duncan, 107 Cal. 426, 40 Pac. 549. A general finding that all of the allegations of a complaint are true has been repeatedly upheld by this court. Gale v. Bradbury, 116 Cal. 39, 47 Pac. 778; Johnson v. Klein, 70 Cal. 186, 11 Pac. 606. And it has been decided here that findings are unnecessary where no evidence is introduced in support of an affirmative defense. Robinson v. Muir, 151 Cal. 118, 90 Pac. 521; People v. McCue, 150 Cal. 195, 88 Pac. 899; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66.

This is a frivolous appeal. Defendants, who offered no evidence on their own account, are appealing upon matters which were so plain as to be almost axiomatic. That appellants had any faith in any of the questions involved in the appeal I greatly doubt. They must have had some motive for instituting this appeal other than a belief that serious error had occurred. Perhaps the suit was brought for delay, but, whatever the impelling reason, the practice of appealing upon frivolous matters should be discouraged. A penalty of $50 damages to plaintiff is therefore imposed, and the judgment from which the appeal was taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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FICKERT v. ZEMANSKY et al., Board of Election Commissioners. (S. F. 5,362.)

(Supreme Court of California. March 19, 1910.)

ELECTIONS (§ 126*)—NOMINATIONS AND PRIMARY ELECTIONS—CANDIDATES.

Primary Law 1909 (St. 1909, c. 405) § 12, subd. 4, provides for the leaving of a blank space under each group of names of candidates, in which the elector may vote for any person whose name is not printed on the ballot by writing his name therein, and by section 23 the person receiving the highest number of votes is the nominee of the party, although his name was not printed on the ballot. Section 12, subd. 8, restricts a voter's right in voting for delegates to his party convention to qualified electors of his party. Pol. Code, § 1366a, provides that the elector shall not be permitted to vote on behalf of any party or for delegates to the convention of any party other than the party designated in the registration. *Held*, that where, on a primary election, no person was named for the candidate of the Union Labor party for the office of district attorney, but a blank space left where the elector might write the name of the person he desired to vote for, and plaintiff's name was written in by the greatest number of electors of that party, he was entitled to have his name placed on the printed ballots as the candidate of the Union Labor party for the office of district attorney at the general election, although he was also the candidate of the Republican party for the same office.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

In Bank. Application for writ of mandate by Charles M. Fickert to compel J. H. Zemansky and others, composing the Board of Election Commissioners of the City and County of San Francisco, to print plaintiff's name upon the ballot for the general election as a nominee of the Union Labor party for the office of district attorney. Writ granted.

George Hewlett and Ira S. Lillick, for petitioner. Thomas V. Cator and Hugh J. McIsaac, for respondents.

PER CURIAM. This was an application for a writ of mandate to compel the board of election commissioners of the city and county of San Francisco, when it prepared the ballots to be used by voters at the general city and county election to be held on November 2, 1909, to print the plaintiff's name upon said ballots as the nominee and candidate of the Union Labor party for the office of district attorney of the said city and county. Upon the hearing, the writ was issued as prayed, but we deem it proper for guidance in future cases that the reasons for the decision should be given.

At the primary election previously held, under the primary law of 1909 (St. 1909, p. 691), for the nomination of party candidates to be voted for at the November election, no nomination papers had been filed proposing any person as the candidate of the Union Labor party for district attorney. On the primary ballot of that party the name of no person was printed as candidate for that office, but a blank line was left thereon as the law directs, whereon a Union Labor voter could write the name of the person whom he desired to nominate as the candidate of his party for that office. At said primary election divers persons were voted for as the Union Labor candidate for district attorney by thus writing the name on said blank line, and the plaintiff had received the highest number of such votes, and was thereby made the candidate of that party for that office.

The board placed its refusal to print plaintiff's name on the general election ballot as candidate of the Union Labor party upon the admitted fact that plaintiff was a member of the Republican party and not a member of the Union Labor party and upon the fact that he had been, at said primary election, duly nominated as the candidate of the Republican party for the same office. The theory was that one party cannot, at a primary election, nominate as its own candidate a member of another party, and that the voter of a party, in writing on the blank line placed on the primary ballot for that purpose, the name of some person as his nominee for an office, must confine himself to members of his own party.

There is nothing in the primary act or in any other law of this state that purports to preclude the nomination as a candidate for office by the electors of one party of a member of another party. The primary act provides for the leaving of a blank space under each group of printed names of candidates, in which the elector may vote for any person whose name is not printed on the ballot by writing his name thereon (section 12, subd. 4), and the person receiving the highest number of votes for the nomination is the nominee of the party, although his name was not printed on the ballot. Section 23. Nowhere is it intimated that the elector is to be restricted in thus voting to members of his party; a clear distinction in this regard being made as to his right in voting for candidates for nomination for public office, and his right in voting for delegates to his party convention, he being restricted in the latter case to "qualified electors of his party." Subdivision 8 of section 12. Section 1366a of the Political Code has no application. The provision therein "nor shall he (the elector) be permitted to vote on behalf of any party or for delegates to the convention of any party other than the party so designated in the registration," simply means that the elector registered as a member of a particular party cannot participate at the primary in the selection of the candidates for any other party. For instance, if he be registered as belonging to the Union Labor party, he cannot cast any vote upon the question who shall be the Republican or Democratic nominee for any office, or who shall be the delegates to the Republican or Democratic convention, but is confined to the selection of candidates and delegates for his own party. This is the whole effect of the provision. Its whole object is to confine the control of a party to the electors thereof, and to prevent electors of another party from interfering with such control.

The question we have here discussed was not involved in Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181. Nothing said in the opinion in that case warrants the conclusion that an elector voting at his party primary may not write in the blank space placed on the ballot for each office the name of any person he wishes to have made the nominee of "his" party for that office, regardless of the political affiliations of such person, or that if a person whose name is thus written in receives the highest number of votes therefor at the hands of the electors of that party, he is not the nominee thereof simply because he belongs to another party or is an avowed candidate for a nomination for the same office at the hands of another party. Such a conclusion would find no support in the law.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Therefore petitioner, who, from the showing made here, received the highest number of votes for the Union Labor nomination for district attorney of the city and county of San Francisco, was the nominee of that party for that office, and was entitled to have his name printed on the ballot for the general election as such nominee, notwithstanding that he was a member of the Republican party and was registered as such, and notwithstanding he was a regular candidate at the primary election for the Republican nomination.

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157 Cal. 386

PAULEY v. BRODNAX et al. (L. A. 2,325.)

(Supreme Court of California. March 19, 1910. Rehearing Denied April 18, 1910.)

1. EJECTMENT (§ 94*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In ejectment for a tract claimed by plaintiff to be located within a half section owned by him, evidence *held* to sustain a finding that the land claimed was not so located.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 94.*]

2. BOUNDARIES (§ 35*)—EVIDENCE.

In ejectment for land claimed to be located in a half section owned by plaintiff, in which the original survey stakes were shown to have been destroyed and other stakes set up in their place, a stake found many miles from the land claimed, but in the territory originally surveyed by those who surveyed plaintiff's land, was properly excluded from evidence; it not appearing that such evidence could have assisted the jury in determining the boundaries of the land claimed.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

3. BOUNDARIES (§ 35*) — ADMISSION OF EVIDENCE.

In ejectment to recover land claimed by plaintiff to be located in a half section owned by him, a diagram drawn by a witness to illustrate his testimony as to location of boundary stakes, etc., was properly admitted in evidence, where the court instructed that it was only admitted to illustrate witness' testimony, and should not be considered as evidence of the location of the boundaries; not being objectionable as tending to confuse the jury.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

An instruction in ejectment that defendants had reclaimed and tilled land occupied by them was harmless to plaintiff, if erroneous, where most of the facts regarding the improvements and cultivation were brought out by plaintiff's counsel.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

5. EJECTMENT (§ 110*) — ACTIONS — INSTRUCTIONS.

In ejectment for a tract claimed by plaintiff to be located in a half section owned by him, an instruction that defendants had reclaimed the lands occupied by them and tilled the soil, etc., preceding a statement of defendants' contention that the land occupied by them was not in the section owned by plaintiff, was proper, being merely a recital of the manner of defendants' possession; the court having also instructed that the action could not be defeated by showing that defendants made improvements on the land.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 110.*]

6. BOUNDARIES (§ 41*) — ACTIONS — INSTRUCTIONS.

In ejectment for a tract claimed by plaintiff to be located in a half section owned by him, in which the evidence showed that the original stakes had been lost, an instruction that if stakes or monuments were found which plaintiff claimed fixed the location of the boundaries of the tract in question, or of the quarter corners of the original official survey, the burden was upon plaintiff to show by a preponderance of the evidence that such stakes were those of the original official survey, and establish or locate particular or designated boundaries of such original survey, and, unless he did so, they should be disregarded as evidence of the boundaries of the tract claimed. *Held* that, while the words "establish and locate," etc., might seem to place too great a burden upon the stakes and monuments in establishing the boundaries, in that they should be considered in their relation with each other and with natural objects in fixing the boundaries, the instruction, construed as a whole, merely meant that the stakes and monuments must be shown to be official, and so identified that the tract sought to be bounded from them could be ascertained, and was proper.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 41.*]

7. EJECTMENT (§ 110*) — ACTIONS — INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In ejectment for a tract claimed to be located within a half section owned by plaintiff, where the stakes of the original official survey were lost, the court charged the language of the Revised Statutes of the United States, requiring public lands to be divided by north and south meridian lines, crossed at right angles so as to form townships six miles square, and further charged that when the field notes of a government surveyor show that section corners were established on such straight lines between the township corners and fix their location by courses and distances, they are presumptively correct and can only be overcome by a preponderance of the evidence that the surveyor actually established corner monuments at points other than shown by the field notes, and that the fixed monuments would control courses and distances only where the boundaries are fixed and known, otherwise the courses and distances shown by the field notes of the original survey being considered. *Held*, that the part of the instruction quoting the federal statutes was not erroneous as tending to impress the jury that the particular township in which the land claimed was located was six miles square, being simply explanatory of the rest of the charge.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 110.*]

8. Boundaries (§ 33*) — Courses and Distances.

While, under the direct provisions of Code Civ. Proc. § 2077, subd. 2, permanent and ascertained boundaries, or monuments are paramount when inconsistent with the measurement, where the monuments are unknown, the field notes of a government survey showing the courses and distances are presumed to be correct.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 33.*]

9. Appeal and Error (§ 1064*)—Harmless Error—Instructions.

In ejectment for land claimed to be located in the half section owned by plaintiff, the court instructed that the fourth standard parallel, if established in part, must be assumed to extend in the same general direction, unless diverted by some fixed monument, and also stated, "if you further find from the evidence that two or more permanent survey stakes have been found on the standard line, which indicate and fix the course thereof," etc. The testimony as to stakes on the line claimed by the surveyor to be the fourth standard parallel had been stricken, but there was evidence that the surveyor fixed such line with reference to natural monuments. *Held*, that error in charging as to the effect of the stakes when the testimony thereon had been stricken was harmless, the gist of the charge being that the parallel line is presumed to extend in the same general direction when established in part, and not as to the effect of the stakes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

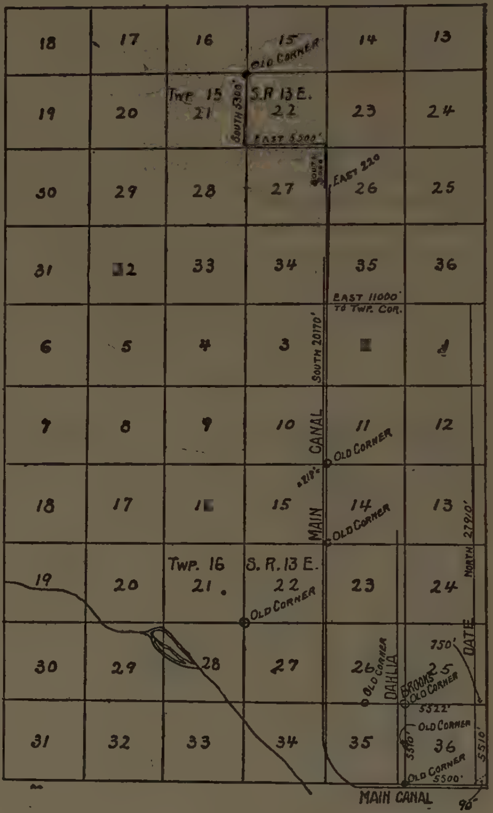
Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Charles W. Pauley against Thomas W. Brodnax and others. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Hunsaker & Britt and Cassius Carter, for appellant. W. J. Mossholder, C. F. Holland, H. R. Comly, Powers & Holland, and Marks P. Mossholder, for respondents.

MELVIN, J. This is an appeal from a judgment in favor of defendants and from an order denying plaintiff's motion for a new trial. The action was one in ejectment, and presents some of the problems arising from the efforts to retrace the old surveys of the United States government in the Imperial valley. While admittedly there was a conflict of evidence at the trial, appellant contends that in no material particular was his proof traversed, and that the verdict was contrary to the evidence. He also complains of certain rulings on the admission of evidence and in the instructions to the jury.

At the trial there was no contention that plaintiff was not entitled to the N. ½ of section 36 in township 16 S., range 13 E., San Bernardino base and meridian, which was involved in the action; but defendants denied that any of the land occupied by them was located in that half section. Plaintiff, depending upon the official surveys of Derby made in 1854 and Mathewson made in 1856, sought to re-establish the lines of the section 36 in question from the measurements tied to the monuments of the original surveys, which they asserted had been rediscovered by their witnesses. To illustrate appellant's position, we reproduce a diagram made by one of the surveyors, Mr. Ward, who testified in his behalf:



It will be noticed that Ward's diagram shows three monuments on the west line of section 36 designated by him as "Old Corners." Appellant asserts that these three monuments, which were mesquite stakes, were the original posts set by Mathewson in 1856 when he ran the section lines to conform to the township boundaries previously established by Derby. The most northerly of these stakes which, according to appellant, was set at the corner common to sections 25, 26, 35, and 36, was first shown to Mr. Ward in 1902. Subsequently it disappeared, and in 1904 Mr. Ward set a white stake in its place. Later the mesquite stake was found in the possession of one Donovan, was procured by defendants, and was introduced in evidence by them at the trial. The other two stakes had been found by Mr. Ward by running south from the alleged corner stake somewhat farther than the distances indicated in Mathewson's field notes.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Witness Ward stated that these stakes were practically in alignment, the deviation being but a matter of a few feet. Witness Van Horn testified that he was present when Mr. Ward examined the stake which is alleged to have been at the northwest corner of section 36. The location of these stakes 500 feet east of the Dahlia canal was described at the trial by other witnesses who had been in that locality as early as 1901. Alverson, a surveyor, testified that in 1904 he ran south from the locality of the most northerly of these three stakes and found the other two. He gave it as his professional opinion that the most southerly of these stakes, marked "35" on one side and "36" on the other was set by Mathewson to mark the corners on the fourth standard parallel of sections 35 and 36.

But appellant contends that, even if the three stakes near the Dahlia canal be rejected, his right to the greater portion of the land occupied by defendants is established by reference to other monuments. He asserts that his witnesses have discovered and identified the following monuments mentioned in Mathewson's field notes: A tree common to the corners of sections 10, 11, 14, and 15; a bearing tree south 15° W. 170 links from the corner common to sections 14, 15, 22, and 23; and a palo verde tree at a quarter section corner between sections 33 and 34. According to the measurements of witness Caines the three stakes were 867 feet further east of the palo verde tree than the 2 miles indicated in Mathewson's field notes. Ignoring the stakes, this appellant urges, would move the western line of section 36 867 feet west. As fixing the northern boundary of the section, appellant calls attention to the testimony of respondents' witness Henderson that he found the distance from the tree (claimed by appellant as being at the corner of sections 10, 11, 14, and 15), to a line running east to the white stake set by Mr. Ward to be 16,470 feet south—an excess of 630 feet. Readjusting the lines according to these measurements, and allowing nothing for errors in Mathewson's work, still, so appellant contends, the N. ½ of section 36 would include more than two-thirds of the lands of respondents. But it is earnestly contended that the distances between Mathewson's monuments were always greater than the field notes indicated, and that this discrepancy accounts for the excess found in measuring from the trees, claimed as monuments, to the stakes on the alleged western boundary of section 36. In measuring from the trees near the center of township 15 S., range 13 E., to the tree indicated by appellant as the corner of sections 10, 11, 14, and 15 in township 16, Messrs. Ward and Alverson found an excess of 200 or 300 feet in a mile not shown in Mathewson's field notes. All of the surveyors who testified for plaintiff said that such excess existed. Witnesses for appellant testified to the finding of the original stake marking the corner of sections 15, 16, 21, and 22 of township 15 S., range 13 E. This they accomplished by running lines from the trees known as the "Imperial Bearing Trees," near the present city of Imperial, and mentioned as appellant's witnesses assert in Mathewson's notes. Respondents' witness Mr. Henderson said, referring to these trees, that he would not accept them as bearing trees without other evidence than the markings which he saw upon them. Mr. Bates also testified that he would consider it questionable if these trees were what appellant's theory would make them. Mr. Butler, another surveyor, was similarly in doubt. But appellant's counsel argue that mere doubts are of no value when opposed to the positive testimony of their witnesses with reference to the location and markings of the alleged monuments. Appellant's counsel call our attention to the relation between the "bearing trees" in township 15 and the palo verde tree at the quarter section corner on the line between sections 33 and 34 in township 16. The evidence, they say, establishes these bearing trees and the palo verde tree almost in the same line north and south although they are nine miles apart, and this correspondence in alignment, they argue, can hardly be merely accidental. Counsel warn us against giving great weight to the failure of their witnesses to find the water courses corresponding with any degree of accuracy to those mentioned and described by Mathewson in his field notes, as there have been numerous overflows and floods in the valley during the half century since the government surveys were made. We have thus followed carefully the arguments of appellant's counsel based upon the essential matters of proof in order that we might fully test the assertion that there was no material impeachment of the evidence adduced by them and that the verdict against plaintiff was clearly contrary to the evidence. Let us now examine the evidence offered on behalf of respondents.

The first criticism of respondents is directed to the great excess of measurements over the calls of the field notes which must be made in order to tie the alleged fixed monuments to the stakes on the purported east line of section 36 in township 16. Commencing their survey at the two trees near Imperial, designated by them as the bearing trees marking the corner common to sections 15, 16, 21, and 22 in township 15, these surveyors found the purported section 36, to use the phrase of respondents' counsel, "more than a half mile too far south, and nearly a mile and a quarter too far east to be identified as plaintiff's land." Upon this point Mr. Alverson, one of the witnesses for plaintiff, testified as follows: "We found that instead of counting two miles from the corner common to 15, 16, 21, and 22, running two miles east in order to bring us exactly north of the southwest corner of section 36, we had to run an additional 1,122 feet; in other words, before we got directly north of the southwest corner of 36, as shown on this diagram (Exhibit G), in running from the old corner common to sections 15, 16, 21, and 22, township 15 south, we had to run two miles and 1,128 feet. We assume that those monuments found were corners, no matter what the excess. The southwest corner of section 36 is 2,876 feet in excess of the nine miles called for from the Imperial bearing trees in township 15. The excess called for in the field notes is 228 feet. The excess not called for in the field notes is 2,648 feet. There is practically a half mile excess in measuring from this northerly corner to the southerly line in this township 16 and practically 1,128 feet excess in the easterly."

Next our attention is called to the fact that the jurors saw the northerly stake which was found on the supposed western line of section 36, and were the best judges of its genuineness or spuriousness as one of the markings of the original survey. We are also reminded that witness Van Horn swore that he saw no stakes when visiting that immediate locality in 1901. Another evidence of the falsity of appellant's conclusions with reference to the three stakes, according to respondents' counsel, is the fact that Mathewson described the land on the west boundary of section 36 as perfectly level, while the land along the line of the stakes was said by witnesses at the trial to be rough and full of hummocks. The field notes describe the north line of section 36 as level, while the north line of that section as plaintiff claims its location crosses an arroyo which has evidently been many years in existence because it contains good sized trees, one of the largest being about 16 inches in diameter. All these circumstances tend to prove, say respondents' counsel, that appellant's surveyors were mistaken in their efforts to locate section 36.

The jury was also given an opportunity to note the intersection with the north boundary line of township 15 of a line run due north from the so-called "Imperial Bearing Trees." This intersection is at a point 403 feet west of the old channel of New river, whereas a line drawn from the corner common to sections 15, 16, 21, and 22, as shown on the official map, would meet the north boundary line of the township at a point more than a mile and a half west of New river. Respondents' criticism is also leveled at the markings on the bearing trees which it is claimed were too distinct and fresh to have existed more than half a century. Respondents called Mr. Henderson, the surveyor, who under contract and with written instructions from the government of the United States made a survey of the exterior boundaries of these townships in Imperial valley. In doing this work he was required to fix the fourth standard parallel. According to his testimony, the fourth standard parallel which forms the southern line of section 36 passes to the north of some of the property in question and his location of this line would place all of the land of the defendants outside of the north half of section 36, township 16. Although certain testimony of Henderson with reference to alleged stone monuments was stricken out, one means whereby he assured himself that he was on the fourth standard parallel was an observation on Signal mountain agreeing with that of Derby taken from section corners 3 and 4, range 12 E., township 17 S. He also testified that he ran north to the third standard parallel and found it. From the foregoing discussion it will be seen that there was a substantial conflict of evidence both as to the authenticity of alleged monuments and the courses and distances. So sharp has been this conflict that we cannot say there was no material contradiction of plaintiff's evidence. There was testimony ample, if believed, to justify the jurors in finding in favor of the defendants and the court in denying the motion for a new trial.

Appellant assigns as error the court's refusal to admit in evidence a certain stake found by witness Alverson many miles away from the land in dispute. It was with a number of other stakes, and its relevancy, if it be relevant at all, would depend upon the fact that it was found in territory originally surveyed by Derby and Mathewson. There was nothing of greater authenticity respecting its origin than there was with reference to the stakes found near the land claimed by plaintiff. We cannot see how its introduction in evidence could have assisted the jury. Clearly the ruling rejecting it was correct.

The court permitted defendants to introduce the diagram drawn by witness Henderson to illustrate his testimony, and appellant assigns this as error upon the theory that it tended to confuse the jury and was not founded upon any monuments. The court was careful, however, to explain to the jury that the drawing was merely admitted in evidence "for illustrating the witness' testimony so far as it was applicable, not as evidence any further than illustrating the testimony of the witness." In the instructions the jury was again warned that the diagrams were not to be considered "any evidence at all of the location on the ground of the boundaries of said section or of said fourth standard parallel south."

Nor was there error in the court's instruction that defendants had reclaimed the land occupied by them, tilled the soil, etc. Most of the facts regarding the improvements and tilling of the soil were brought out by plaintiff's counsel in establishing the rental value of the land. This part of the instruction, therefore, could have done no harm even if it were erroneous; but as it was merely a recital of the manner of the possession by defendants of the property, followed by a statement of their claim that the land so occupied by them is not in section 36, we can see that it has a logical place in the court's directions to the jury. The court was careful to limit the effect of this instruction, for the jury was told that "plaintiff's suit cannot be defeated by a showing that the defendants placed improvements upon the land or any part of it."

Objection is made to an instruction which was as follows: "If you find from the evidence that stakes or monuments have been found which are claimed by plaintiff to indicate and fix the location of the boundaries of the land in question, or of sectional or quarter corners of the original official government survey of said land, or of land in the vicinity, or surrounding territory, then you are instructed that the burden is upon the plaintiff to show by a preponderance of evidence, that such stakes or monuments are those of the original, official government survey, and, also, that such original stakes or monuments establish and locate particular and designated boundaries, section, or quarter corner of such original survey; and unless such stakes or monuments are of such official and designated character as above specified, and shown to be such by a preponderance of evidence, then they should be disregarded by you as evidence of the boundaries of the land in question, or of section or quarter corners of said official government survey." This instruction in effect admonished the jury that, unless the supposed monuments were what they purported to be, they must be disregarded. Perhaps the words "establish and locate," taken in their strongest sense, might seem to impose, as appellant says, too great a burden upon the stakes and monuments, because the stakes and monuments are to be considered in connection with their relation to one another and to natural objects described in the field notes. Read as a whole the instruction clearly means that the stakes and monuments must be shown to be official in their character, and so identified that the tract of land sought to be delimited by them or by measurements from them may be correctly ascertained.

The court gave as an instruction a part of section 2395 of the Revised Statutes of the United States,[1] as follows: "The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the lines of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the courses of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require." This instruction would not have a tendency to impress the jury, as appellant seems to fear, with the idea that this particular township was six miles square. It is simply explanatory of the method of running surveyors' lines, and makes clearer the rest of the instruction, which is as follows: "Therefore, when a government surveyor, in the field notes returned by him to the government, shows that such section and quarter section corners are established on such straight lines between the township corners, and fixes their locations by courses and distances, these field notes are to be accepted as presumptively correct, and can only be overcome by a preponderance of evidence that such surveyor actually established such corner monuments at points other than those indicated by the government field notes. The rule that fixed monuments shall control courses and distances only prevails when the boundaries are fixed and known, and monuments exist. And where the boundaries are not fixed and known, and the location of the monuments themselves is uncertain, or left in doubt by the evidence, then courses and distances as shown by field notes and maps of the original survey will be considered in fixing the boundaries." This is merely another way of saying: "The survey as made in the field and the lines actually run on the surface of the earth * * * must control." Kaiser v. Dalto, 140 Cal. 172, 73 Pac. 830. When the monuments are known of course they prevail: "When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount." Code Civ. Proc. § 2077, subd. 2. But when the monuments themselves are unknown, the presumption in favor of the correctness of the field notes must prevail.

The instruction to the effect that the fourth standard parallel, if established in part, must be deemed to extend in the same general direction unless diverted by some fixed monument would be above criticism if the instruction did not contain the following language: "And if you further find from the evidence that two or more visible, permanent, identified, and undisputed stakes or monuments of the survey of said line have been found on said standard line, and which indicate and fix the location, course, and direction thereof." Doubtless the court overlooked the fact that the testimony of Mr. Henderson with reference to monuments on this line claimed by him to be the fourth standard parallel had been stricken out. However, there was evidence that Henderson fixed this line by reference to natural monuments such as Signal mountain and certain points on New river; and respondents maintain that the language with reference to stakes or monuments that might have been found on the standard line is immaterial. The jury of course knew that all testimony with reference to monuments on this line had gone out, but the gist of the instruction was not the effect of monuments on the line.

[1] U. S. Comp. St. 1901, p. 1471.

but the rule that such a line once established in part is presumed to extend in the same general direction. The error therefore was harmless.

No other alleged errors require particular notice.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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157 Cal. 405

CHRISTENSON LUMBER CO. v. SEAWELL, Judge. (S. F. 5,505.)

(Supreme Court of California. March 21, 1910. Rehearing Denied April 20, 1910.)

APPEAL AND ERROR (§ 612*)—TRANSCRIPT OF RECORD—CERTIFICATION BY JUDGE—NECESSITY.

On appeals under Code Civ. Proc. §§ 953a, 953b, 953c, the judge is not required to certify the transcript which the clerk may certify, but is only required to correct, approve, and certify in lieu of a bill of exceptions the stenographic notes of the trial containing the proceedings and evidence which would form no part of the record, unless authenticated as the statute provides.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.*]

In Bank. Mandamus by the Christenson Lumber Company against James M. Seawell, as judge of the superior court of the city and county of San Francisco. Writ denied.

Charles M. Bufford, for plaintiff.

PER CURIAM. Petition for writ of mandate.

The petitioner was allowed to intervene in an action between other parties. Subsequently demurrers of the defendants in the action to the third amended complaint of the plaintiffs, and to the complaint in intervention, were sustained and the action, including the intervention, dismissed. Separate appeals from the judgment were taken by the defendants and the petitioner, following the procedure prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure, and they have presented to the defendant a transcript on appeal with a request that he certify it. His refusal to do so is based upon the fact that the transcript so presented contains nothing but the pleadings and orders constituting the judgment roll in the action. We think the defendant correctly construes the statute as not applying to a transcript which the clerk may certify. What a judge is required to correct, approve, and certify under the new practice in lieu of a bill of exceptions is the stenographic notes of the trial containing the proceedings and evidence which would form no part of the record unless authenticated as the statute provides.

Writ denied.

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157 Cal. 401

SPARKS v. CALDWELL et al. (L. A. 2,386.)

(Supreme Court of California. March 21, 1910.)

PLEDGES (§ 58*)—ENFORCEMENT—RIGHT OF ACTION PLEDGED.

Defendants, who were the payees of a negotiable note, indorsed thereon, "For value received, I hereby guarantee the payment of the within note, waiving demand," etc., and signed the same, and transferred the note as collateral security. Civ. Code, § 2888, provides that, "notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien." *Held*, that an answer of defendants in a suit on the note setting up such transfer stated a good defense, and it was error to strike the same as frivolous, although the answer failed to allege that the full amount of the note was not due; the amount due not being important, and the pledgee of the note not having the right to sue the pledgor.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 58.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by H. S. Sparks against H. J. Caldwell and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Watkins & Blodget, for appellants. John W. Kemp and Keefer & Bowers, for respondent.

MELVIN, J. This is an appeal from a judgment in favor of plaintiff. The suit was on a promissory note for the principal sum of $2,100 made by one Frank R. Bear in favor of the appellants Caldwell and Tungate. The note was indorsed as follows: "For value received, I hereby guarantee the payment of the within note, waiving demand, presentment for payment, protest and notice of protest. H. J. Caldwell, D. W. Tungate." In their answer appellants admitted delivery of the note to respondent, but alleged that it was transferred as collateral security for the payment of a note for $2,000 previously made by them and payable to Sparks, the respondent. Upon motion their answer was stricken out as frivolous, and judgment on the pleadings was given according to plaintiff's prayer.

The one question presented is whether or not a pledgee can sue a pledgor as guarantor of a collateral security in the nature of a negotiable instrument.

Respondent contends (1) that there is nothing to prevent the pledgee of a negotiable note from suing upon the pledged security without bringing an action on the principal obligation; and (2) that, even if the rule be otherwise when the pledge is transferred by mere indorsement and delivery, nevertheless in cases like his where a distinct contract of guaranty is made in favor of the pledgee, he may sue upon the pledged note and recover upon it even when the amount of the note and interest is in excess of the indebtedness which the collateral note was intended to secure. Both of these positions are met, we think, by two Californian cases. In Haber v. Brown, 101 Cal. 452, 35 Pac. 1038, this court said: "The case has been discussed thus far upon the theory of the complaint that the original transfer of the note in suit to Dinkelspiel & Co. was an absolute transfer thereof by indorsement in the ordinary course of business. But the answer, proofs, and findings show that the transfer was by way of pledge, or collateral security, to secure the indebtedness of John H. Carter and of the firm of Carter & Barker to Dinkelspiel & Co. The Civil Code expressly provides that, 'notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien.' Civ. Code, § 2888. It is settled in this state that, as between the pledgor and pledgee, the general property in a pledge remains in the pledgor, notwithstanding an apparent transfer of legal title to the pledgee. Cross v. Eureka Lake, etc., Canal Co. 73 Cal. 306 [74 Pac. 885, 2 Am. St. Rep. 808], and cases cited. The pledgee is but a trustee for the pledgor (Wheeler v. Neubould, 16 N. Y. 398; Hawks v. Hinchcliff, 17 Barb. [N. Y.] 492), and is accountable to the pledgor for any surplus realized above the amount of indebtedness existing at the date of enforcement of the pledge. Civ. Code, § 3008. The transfer of a pledged note and mortgage to the pledgee does not transfer the title any farther than to enable the pledgee to collect the note and mortgage from the maker thereof. Ponce v. McElvy, 47 Cal. 159. In no event, even under the law merchant, could an indorsement of negotiable paper by way of collateral security authorize any recovery against the pledgor beyond the amount remaining due upon the principal debt. Williams v. Smith, 2 Hill [N. Y.] 301. It is unnecessary to decide whether, under the code rule respecting the retention of title in the creator of any lien, regardless of the form of the transaction, the indorser of negotiable paper by way of pledge is liable to the pledgee as an indorser under the law merchant. But it seems clear, in view of the code provision, that a mere indorsement of nonnegotiable paper by way of pledge should be restricted in effect to an authority from the pledgor to the pledgee to enforce the obligation in his own name as trustee and agent for the pledgor, and to apply the proceeds in payment of the debt secured, accounting to the pledgor for any surplus collected. It could not operate as an assignment of the general title so long as the pledge subsists, and could only operate as such in case of an agreement that the pledge should be extinguished, and the amount of the collateral security applied as a payment upon the debt secured, or in case of a transfer of the collateral security by the pledgee to third parties." And in the case of Ponce v. McElvy, cited in the foregoing quotation, this language was used: "The note and mortgage made to Ponce by Le Coat was received by the defendant Powell merely as collateral to secure the payment of the note of Ponce, as given by the latter to George. It was, as between these parties, a pledge. The assignment which Ponce made was not intended to transfer the title any further than to enable the assignee to obtain satisfaction of the debt from Le Coat. To give it any effect other than this would be to do violence to the obvious intention of the parties, which was to create a security for the protection of the note to George—nothing more." Respondent, while admitting the apparent force of these decisions, seeks to differentiate them from the case at bar. For example, our attention is called to the fact that in Haber v. Brown, supra, the pledge was nonnegotiable paper, the pledgor merely indorsed the collateral, and the pledgee did not take the steps necessary to charge the pledgor as an indorser, while in the case at bar the pledge was a negotiable note, there was a contract of guaranty as well as an indorsement, and the pledgee took the necessary steps to charge the pledgors as indorsers and guarantors. These differences, in view of the allegations of the answer, would be immaterial. It is alleged in the answer that the note was transferred as collateral security for the payment of another note for $2,000 given by appellants to Sparks on July 30, 1906, due 60 days later, and still owned by Sparks. In view of section 2888, Civ. Code, we fail to see how the form of the contract indorsed upon the collateral note affects the matter at all, nor do we see how this case differs in principle from Ponce v. McElvy, supra.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But the answer fails to allege that the full amount given by the judgment is not due. Therefore, according to respondent, no legitimate defense is presented, and the order striking out the answer must have been correct. But we think the amount due is not the important point. The title to the note is the all-significant matter. According to the answer the title remained in the appellants, and the respondent was clothed only with the power as their agent to collect the amount due from the maker of the note and to apply such sum to the payment of his debt. It follows that the order striking out the answer as frivolous and as surplusage was erroneous.

The judgment is reversed, and the cause remanded.

We concur: HENSHAW, J.; LORIGAN, J.

(157 Cal. 381)

GRAY v. WALKER. (S. F. 5,324.)

(Supreme Court of California. March 19, 1910.)

1. TRUSTS (§§ 17, 18*)—NECESSITY of WRITING.

In the absence of a confidential relation, or facts raising a trust by operation of law, a trust in lands cannot be imposed on the grantee under an absolute deed, unless it is declared by a writing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15–24; Dec. Dig. §§ 17, 18.*]

2. QUIETING TITLE (§ 44*)—TITLE OF PLAINTIFF—EQUITY.

A finding of ownership in a plaintiff suing to quiet title is not sustained by proof that the defendant owns the legal title, subject to an equity in favor of plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 91; Dec. Dig. § 44.*]

3. QUIETING TITLE (§ 34*)—PLEADING—ELEMENTS OF ACTION.

A complaint, alleging that plaintiff is the owner and in possession of certain land, that defendant claims an interest therein, adverse to plaintiff, and that such claim is without right, contains every element of a complaint to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69–77; Dec. Dig. § 34.*]

4. QUIETING TITLE (§ 35*)—SUFFICIENCY OF COMPLAINT—SHOWING TITLE IN ANOTHER.

A complaint, alleging all the essentials of a complaint to quiet title, is not defeated by an allegation that plaintiff had given an absolute deed to the land, where the deed was given long enough before suit to have enabled plaintiff to re-acquire title by adverse possession.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 35.*]

5. TRIAL (§ 396*) — PLEADING — APPLICATION OF FINDINGS.

Where an action is tried on a fifth amended complaint, and the court makes a general finding that all the allegations of plaintiff's complaint are true, an objection that the finding refers to the original complaint is hypercritical.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 396.*]

6. ADVERSE POSSESSION (§ 16*) — CONSTRUCTION OF STATUTE—"USUALLY CULTIVATED OR IMPROVED."

Code Civ. Proc. § 325, providing that adverse possession, not based on a written instrument, judgment, or decree, may be established by showing that the land was "usually cultivated or improved," means that the land should be cultivated or improved in the manner and to the extent usual in the case of similar property.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 16.*]

7. ADVERSE POSSESSION (§ 20*)—IMPROVEMENT OF LAND—STATUTES.

Under Code Civ. Proc. § 325, providing that the elements of adverse possession, not based on a written instrument, judgment, or decree, are either, first, that the land be protected by substantial inclosures, or, second, usually cultivated or improved, improvements alone are sufficient if they are improved in the manner or to the extent usual in the case of similar property.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 106–108; Dec. Dig. § 20.*]

8. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS—ADVERSE POSSESSION.

On an issue of adverse possession not based on a written instrument or judgment, testimony of plaintiff that he held actual possession of all the property for the requisite time is not inadmissible as a conclusion, since it tended to prove actual occupancy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2171, 2172; Dec. Dig. § 471.*]

9. APPEAL AND ERROR (§ 1011*) — REVIEW — CONFLICTING EVIDENCE.

A conflict of testimony presents a question which is to be answered finally in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

10. ADVERSE POSSESSION (§ 95*)—PAYMENT OF TAXES—EVIDENCE.

On an issue of adverse possession, evidence *held* to show that the taxes had been paid by the one claiming adversely.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 95.*]

11. ADVERSE POSSESSION (§ 93*)—PAYMENT OF TAXES—REDEMPTION FROM TAX SALE.

Where payment of taxes is relied on to establish adverse possession, the fact that in one year the land was sold for delinquent taxes and redeemed by the one claiming adversely would not prevent the acquisition of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 525–527; Dec. Dig. § 93.*]

12. APPEAL AND ERROR (§ 761*)—REVIEW—BRIEFS—WAIVER OF ERROR.

Errors in rulings on evidence, specified in briefs, but without any citation of authority or argument to sustain them, will not be noticed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096; Dec. Dig. § 761.*]

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Suit by John Gray against William Walker. From a judgment for plaintiff, defendant appeals. Affirmed.

R. E. Hewitt, for appellant. E. Huffaker, for respondent.

SLOSS, J. Appeal by defendant from a judgment quieting plaintiff's title to three parcels of land in Alameda county. The evidence is incorporated in a bill of exceptions.

The fifth amended complaint, upon which, with the answer thereto, the action was tried, alleged that on December 23, 1896, plaintiff was seised and possessed of, and ever since has been and now is the owner in fee simple absolute of, the lots in controversy; that on December 23, 1896, plaintiff executed and delivered a deed of said land to the defendant, his uncle, with the understanding that said defendant would reconvey the same upon request; that said conveyance was made at the request of defendant, "and for the further reason that the plaintiff at said time was suffering mentally and physically from injuries received some two years prior to said time by a horse falling upon him." It was further alleged that there was no consideration for the deed; that ever since its execution plaintiff had held possession of said lands against the defendant and the whole world, and for five years had paid all taxes levied and assessed upon said lands, and had "improved and treated said real estate as his own, without a suggestion or an objection from any one in the world." The refusal of the defendant to reconvey on request is averred, as is the fact that he claims an interest in the property adverse to plaintiff; such claim being, as is alleged, without right. A demurrer to this complaint was overruled. Of the various grounds of demurrer specified, but one—i. e., the want of facts sufficient to constitute a cause of action—is here argued. The contention of appellant is that the plaintiff cannot, by the mere averment of an oral agreement that the title conveyed should be held in trust for him, or be reconveyed to him, overcome the effect of his deed of December, 1896. In the absence of a confidential relation or of facts raising a trust by operation of law—and it is plain that this complaint sets up no such case—a trust cannot be imposed upon the grantee under an absolute deed, unless it be declared by a writing. Feeney v. Howard, 79 Cal. 526, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Babcock v. Chase, 111 Cal. 351, 43 Pac. 1105; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543. The language of this complaint would seem to indicate clearly that there was no intent to rely upon a writing, and that the alleged agreement to reconvey was verbal. In any event, there was no proof of a writing, and the decree cannot, if the complaint may, be sustained on the theory that the title to the property was held by the defendant subject to a trust in favor of plaintiff. Furthermore, a finding of ownership in a plaintiff suing to quiet title is not sustained by proof that the defendant owns the legal title, subject to an equity in favor of plaintiff. Buchner v. Malloy, 155 Cal. 253, 100 Pac. 687, and cases cited.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But, independently of every allegation concerning the deed, the complaint contains a statement of all the facts necessary to constitute a cause of action. It avers that plaintiff is the owner and in possession of certain land, that defendant claims an interest therein adverse to plaintiff, and that such claim is without right. Here we have every element of a complaint to quiet title. Code Civ. Proc. § 738. Furthermore, if we read with these facts the averment that plaintiff made a deed to defendant in 1896, the cause of action is not destroyed. The plaintiff may have acquired a perfect title by adverse possession after the execution of the deed, and, in fact, the complaint undertakes, by separate averments, to set up such acquisition of title.

The court found, in general terms, that "all the allegations and averments of plaintiff's complaint are true." It is objected that this is a finding in favor of the facts alleged in the original, rather than in the fifth amended, complaint. We think this suggestion hypercritical. Each of the pleadings in question was a complaint, and the finding should be taken as intended to refer to the complaint on which the case was tried. The answer, mentioned in the same finding, was the answer to that complaint.

There are various specifications of insufficiency of evidence to support findings; but, in view of what we have said concerning the complaint, it will appear to be unnecessary to do more than to examine the evidence on the question whether plaintiff acquired a title by adverse possession. As he was not claiming under a written instrument, a judgment, or a decree, the elements necessary to constitute adverse possession are those set out in section 325 of the Code of Civil Procedure. Under that section the land must be either (1) protected by a substantial inclosure; or (2) usually cultivated or improved. There is no showing in the record that any of the three lots in question was either inclosed or cultivated. On the other hand, there was evidence tending to show that, for more than the statutory period, improvements had been maintained by plaintiff on each of the three lots. The requirement of the statute that the land be "usually cultivated or improved" means that it should be cultivated or improved in the manner or to the extent usual in the case of similar property. Allen v. McKay, 120 Cal. 332, 52 Pac. 828. If so improved, it is not necessary that it should be either cultivated or inclosed. Daniels v. Gualala M. Co., 77 Cal. 300, 19 Pac. 519. While the evidence on the point is not very full, there is nothing in the record to indicate that the plaintiff's improvements on the lots in question were not such as to comply with the statute. The plaintiff testified that he had, from December 23, 1896, to the date of the trial, held actual possession of all the property. This testimony was proper, as tending to prove actual occupancy (Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739), and, in the absence of a clear showing that the improvements relied on were inadequate, is sufficient to support the finding under consideration. The plaintiff's further evidence, if true, showed that his possession was both hostile and exclusive. It was contradicted by the defendant's witnesses; but, as we have so often said, a conflict of testimony presents a question which is to be answered finally in the trial court.

It is urged that the other requirement of section 325, viz., payment of taxes for five years, was not shown. But the evidence was ample on this point. The plaintiff introduced tax receipts showing the payment of all taxes assessed on two of the lots for more than the statutory period. On the third lot the taxes had been paid by Mary Walker, a witness for defendant. But plaintiff testified that he had given her the money to pay these taxes, and that she had kept the receipts, for the reason that she owned an adjoining lot, which was assessed with the one claimed by plaintiff. This was, in effect a payment by plaintiff.

The fact that in one year the land was sold for delinquent taxes, and subsequently redeemed by plaintiff, did not prevent the acquisition of title by adverse possession. Owsley v. Matson, 104 Pac. 983.

Certain errors in admitting or excluding evidence are specified. The objections, rulings, and exceptions are merely stated in appellant's brief, without any citation of authority or any argument beyond the bald declaration that "in deciding these objections against the defendant the court erred." We do not feel called upon to consider points so presented. Duncan v. Ramish, 142 Cal. 689, 76 Pac. 661; Bell v. S. P. Co., 144 Cal. 573, 77 Pac. 1124; Bird v. Potter, 146 Cal. 286, 79 Pac. 970.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

157 Cal. 517

In re KENNEDY'S ESTATE. (S. F. 5,133.)

(Supreme Court of California. April 1, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 181*)—SETTING OFF HOMESTEAD—ALLOWANCE OF SUPPORT—RELATION TO TESTAMENTARY DISPOSITION.

The power of testamentary disposition of property as conferred and defined by statute is not paramount, but is subordinate to the authority conferred on the probate court to appropriate the property for the support of the family of the testator, and to set apart a homestead for the widow and minor children, as well as for the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

2. EXECUTORS AND ADMINISTRATORS (§ 181*)—SETTING APART HOMESTEAD—DEFEATING DEVISE.

Though property be specifically devised by will, the probate court may set apart such property as a homestead to the family, and thus defeat the devise.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

3. EXECUTORS AND ADMINISTRATORS (§ 195*)—SETTING ASIDE HOMESTEAD—TITLE GIVEN.

Where a homestead is set apart absolutely by order of the probate court, the title of the person to whom it is so set apart is in no way derived by will, even though such person was the devisee, but comes solely from the homestead order, and money paid from the funds of the estate by order of the court for the maintenance of the widow and children is on the same basis.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 724; Dec. Dig. § 195.*]

4. TAXATION (§ 860*)—INHERITANCE TAX—CONSTRUCTION OF STATUTE.

The provision of Inheritance Tax Law (St. 1905, c. 314) § 1, that all property "which shall pass by will or by the intestate laws" shall be subject to the tax, means to pass by virtue and force of the law governing testate or intestate succession.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1675; Dec. Dig. § 860.*]

5. TAXATION (§ 856*)—"INHERITANCE TAX"—NATURE OF TAX.

An inheritance tax is not a tax on property as such, but one on the right of succession, a tax on one for the privilege of succeeding to property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1673; Dec. Dig. § 856.*

For other definitions, see Words and Phrases, vol. 4, p. 3609.]

6. TAXATION (§ 866*) — INHERITANCE TAX — SETTING APART HOMESTEAD — ALLOWANCE FOR SUPPORT — WHAT COVERED — "PASS BY WILL."

St. 1905, c. 314, authorizing an inheritance tax, provides in sections 1, 2, 7, 9 and 28 that all property which shall pass by will shall be subject to a tax, and provides for the rate of tax and method of collection, and also by section 12 provides that, when any debt shall be proven against the estate after the tax has been paid, etc., a refund of a proportion of the tax shall be made. Code Civ. Proc. § 1465, provides that during the administration the probate court may set apart a homestead for the surviving spouse and minor children. Code Civ. Proc. §§ 1466, 1467, provides that the probate court may make a reasonable allowance for maintenance of the family, which shall be paid in preference to all debts, except funeral charges and expenses of administration. *Held,* that the homestead set apart by the probate court and the allowance as well did not pass under the will, but by the order of the probate court, especially in view of section 12, and hence the words in the taxing act, shall "pass by will," did not cover such property, and a tax on their value was erroneous.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 866.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings to collect an inheritance tax from the Estate of John F. Kennedy. From an order fixing the amount of the tax, the county treasurer of the city and county of San Francisco and Alice Kennedy, the widow, separately appeal. Modified and affirmed.

Campbell, Metson, Drew, Oatman & Mackenzie, for appellant Kennedy. Hartley F. Peart, for appellant Treasurer.

ANGELLOTTI, J. These are separate appeals by the treasurer of the city and county of San Francisco and Alice Kennedy, surviving wife of deceased, from an order fixing the amount of inheritance tax to be paid by Mrs. Kennedy under the provisions of the act of March 20, 1905 (St. 1905, p. 341), and directing payment thereof.

Deceased died testate, giving by his will all his property to his wife. The value of all his property was $82,752.50. The debts of deceased and the expenses and charges of administration, exclusive of family allowance, aggregated in amount $9,975.93. Under an order for family allowance duly made in accord with the provisions of section 1466, Code Civ. Proc., there was paid to the widow during administration the sum of $4,600. Under the provisions of section 1465, Code Civ. Proc., there was also regularly selected, designated, and set apart to her absolutely by the court in probate as a homestead certain real property of the deceased of the value of $14,000. In fixing the amount upon which the tax should be calculated, the superior court deducted from the whole value of the estate the debts, expenses, and charges of administration ($9,975.93), and the family allowance paid ($4,600), but refused to deduct the value of the property set apart as a probate homestead, thus leaving $68,176.57 as the amount upon which the tax was to be calculated. The property going to the widow in this case, and the act in terms exempting from the tax in favor of the widow "property of the clear value of ten thousand (10,000) dollars transferred to the widow" of a decedent, the court deducted the further sum of $10,000, fixing the amount of $58,176.57 as the amount upon which the tax against the widow must be calculated, resulting in a tax of $888.53. The treasurer's claim is that the $4,600 family allowance should have been included in fixing the amount upon which the tax was to be paid, and the widow claims that the value of the property set apart as a homestead should have been excluded.

We are of the opinion that there is no question of "exemption" presented by these appeals, but that the real question is whether the act purports to impose any tax as to property of a decedent disposed of in the course of administration as was this property. The only exemptions provided for by the act are those specified in section 4 thereof, being of property "transferred" for charitable, etc., purposes, "property of the clear value" of certain designated amounts to various classes of relatives of the deceased, and "property of the clear value" of $500 to more distant relatives and strangers in blood. There is absolutely nothing in the act purporting to "exempt" even the amount of charges of administration or debts of the deceased from any tax imposed by the act; section 12 relied on as implying such an intent as to debts to our minds implying an entirely different intent.

The all-important section of the act in this controversy is the section imposing the tax, the section declaring the property that shall be subject to the tax. That is section 1. So far as material here, it provides: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, * * * to any person or persons, or to any body politic or corporate, in trust or otherwise, * * * shall be and is subject to a tax hereinafter provided for * * *; and such tax shall be and remain a lien upon the property passed or transferred until paid and the person to whom the property passes or is transferred * * * shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." Section 2 prescribes the rates to be paid by different classes of persons "entitled to any beneficial interest in such property" when the property or interest "so passed or transferred" exceeds in value the exemption specified in section 4, and does not exceed in value $25,000, while section 3 prescribes the rates for amounts in excess of $25,000. Section 4 provides for exemptions as already stated. Section 7 makes all taxes "due and payable" at the death of decedent, and provides that they may be paid "within eighteen months" thereafter without any charge for interest. Section 9 provides that any administrator, etc., having in charge any legacy or property for distribution, "shall deduct the tax therefrom," or, if it be not money, shall collect the tax from the legatee or person entitled to the property, and that he shall not deliver any specific legacy or property until he shall have collected the tax thereon. Section 12 provides: "Whenever any debts shall be proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so deducted or paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or to the state controller, or by them, if it has been so paid." Section 28 provides that the words "estate" and "property" as used in the act "shall be taken to mean the real and personal property or interest therein of the testator, intestate * * * passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees, or successors." The act is entitled "An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection, and to direct the disposition of its proceeds," etc.

Section 1465, Code Civ. Proc., provides that at any time during the administration of the estate subsequent to the return of the inventory the court, if no homestead has already been selected, must select, designate, and set apart and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children, and the effect of an order under this section setting apart absolutely certain real property as a homestead is to vest such property in the surviving husband or wife, if there be no minor child, and to relieve it from administration as a part of the estate. Section 1468, Code Civ. Proc.; Estate of Moore, 96 Cal. 531, 31 Pac. 584. Section 1466, Code Civ. Proc., provides that if the property set apart is insufficient for the support of the widow and children, or either, the court or judge in probate must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, and by section 1467, Code Civ. Proc., it is provided that any such allowance must be paid in preference to all other charges except funeral charges and expenses of administration. By its terms the taxing act is limited to such property as "shall pass, by will or by the intestate laws of this state," from the deceased to some other person. It must be borne in mind that we are speaking regardless of other provisions applicable to grants, etc., made by a deceased in contemplation of death or intended to take effect in possession or enjoyment after death, for these provisions can have no application here.

In one sense of the word all of the property of deceased of which he died seised did "pass, by will," to his sole devisee at the moment of his death—that is, she, by reason of the will, at once became vested with the title to the full property (Brenham v. Story, 39 Cal. 188)—but she took under the will "subject to certain burdens, as the payment of the debts of the deceased, and the right of the court to appropriate some portion of the estate for the support of the family of the deceased" (Id. p. 185). It is thoroughly settled that, as was said in Sulzberger v. Sulzberger, 50 Cal. 385, "the power of testamentary disposition of property, as conferred and defined by the statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of debts." And to the extent that this power is exercised by the probate court in any estate the devisees and legatees take no beneficial interest at all. Although real property be specifically devised by a will, the probate court may set apart such property as a homestead to the family, and thus defeat the devise. Sulzberger v. Sulzberger, supra; In re Davis, 69 Cal. 458, 10 Pac. 671; Estate of Huelsman, 127 Cal. 275, 59 Pac. 776; Estate of Firth, 145 Cal. 236, 78 Pac. 643. Where it is so set part absolutely as a homestead, the title of the person to whom it is so set apart is in no way derived by will, even though she was the devisee, but comes solely from the homestead order. Of a similar situation it was said in Estate of Huelsman, supra, "notwithstanding, then, the specific devise of one-half of the farm to the widow, her title to all of it is deraigned from the homestead order." Money paid from the funds of the estate by order of the court for the maintenance of the widow and children, if any, is on the same basis. It is paid regardless of and even in opposition to the terms of the will and those receiving it take it not "by will," but solely by reason of the order of the court diverting it from the purposes to which it was appropriated by the will. It is clear, therefore, that the widow did not receive any beneficial interest in the real property set apart as a homestead or in the $4,600 paid her as family allowance by reason of the will. That she would have received it as sole devisee and legatee had there been no order for homestead or family allowance is absolutely immaterial. The rule applicable is necessarily the same here as it would be if the legatee or devisee were another person. What the widow takes under such orders of the probate court she does not take by will. It is equally clear that she does not take property so set apart by the probate court "by the intestate laws of this state." The language "pass, by will or by the intestate laws of this state," means to pass by virtue and force of the law of this state governing testate or intestate succession. In re Joyslin's Estate, 76 Vt. 88, 56 Atl. 281. "The term 'intestate laws' is intended to cover the statute of descents which relates to the descent of real estate, and the statute of distribution which provides for the distribution of the personal property of decedent after the payment of his debts, * * * and after the setting apart to the widow and minor children of the exemptions specified. * * * These exempt articles are in no way governed by the statute of distribution." Estate of Page, 39 Misc. Rep. 223, 79 N. Y. Supp. 384. "A homestead right, or a right to have a homestead, is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this state for the benefit of his family. Upon the death of an intestate, his property goes by succession to his heirs, subject to administration. * * * Setting apart a homestead is a part of the probate proceeding, as much as is a family allowance." Estate of Moore, 57 Cal. 442.

If, then, the widow is liable at all for a tax as to the property set apart as a homestead and the money paid as family allowance, it must be upon the theory that within the meaning of the inheritance tax statute such property passed to her as sole devisee and legatee at the moment of the testator's death, and must be regarded as having so passed, although subsequently diverted and removed from administration by the probate court in due course of administration, and thus not constituting any part of the distributable assets of the estate. This theory, however, not only appears to us to be inconsistent with the provisions of the tax act, but is absolutely opposed to the decisions rendered by the courts of other states in cases involving similar questions. It is recognized by this court and by the courts generally that a tax of this character is not a tax on property as such, but one upon the right of succession, a tax upon one for the privilege of succeeding to property. See In re Wilmerding, 117 Cal. 284, 49 Pac. 181, and cases cited. It was said in the case just cited: "The same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state." The act construed by the Supreme Court of Connecticut in Appeal of Gallup, 76 Conn. 617, 57 Atl. 699, was materially the same as our tax act;

the description of property being "any property * * * which shall pass by will or by the inheritance laws of this state," etc. The court said that the design of this act was a tax based on the distribution of the net proceeds of the decedent's property, after payment of his debts and costs and charges of administration and after deduction of amounts and articles exempted, to the persons upon whom it devolves. The New York Court of Appeals said of a similar statute in Estate of Gihon, 169 N. Y. 443, 62 N. E. 561: "The collateral inheritance tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts, and rightful claims of third parties are paid or provided for. It is on the net successions to the beneficiaries." In that case a deduction of certain fees and disbursements in a will contest was upheld. The court said that this was an expense of administration, and therefore chargeable to the estate, and not to the legatees or devisees. In Pepper's Estate, 159 Pa. 508, 28 Atl. 353, the Supreme Court of Pennsylvania, construing a similar act, in holding that there should be deducted from the amount upon which the tax was calculated a sum paid in compromise of a claim, said that the legatees were not liable thereon for the reason that the amount paid was never received by them, and that "under the act it is only so much of the estate which actually passes to them by virtue of the will that is liable to the tax." Of a similar act the Supreme Court of Iowa said in Estate of Stone, 132 Iowa, 140, 109 N. W. 457: "The collateral inheritance tax is on the right to succession to property, and not on the property itself, and it is collectible out of each specific share or interest, not out of the general property of the estate." And in Morrow v. Durant, 140 Iowa, 437, 118 N. W. 781, 784, the same court held that money properly devoted by the executor to the erection of a monument to the deceased and thus taken from legatees was not to be included, because the tax is only on the property that passes to the legatees, and that in such cases the money so used does not pass to the beneficiary. In Wolfe's Estate, 89 App. Div. 349, 353, 85 N. Y. Supp. 949, 953, it is said: "If no transfer is effected, because it turns out that there is no property to transfer, no tax can be collected." In Estate of Thomas, 39 Misc. Rep. 223, 79 N. Y. Supp. 571, in fixing the amount of inheritance tax, the court said: "Where the legal representative makes a proper payment in the course of administration, the transfer from the estate is subordinate and subject thereto"—citing Estate of Gihon, supra. In the Matter of Page, 39 Misc. Rep. 223, 79 N. Y. Supp. 382, it was held that, in view of a statute providing in effect that certain enumerated articles should go to the widow and minor child or children and not be considered as assets for the purposes of administration, such articles did not "pass" by will or by the intestate laws of the state, but that the beneficiaries took absolutely by the express terms of the statute, and whether the decedent died testate or intestate, and that such property was not subject to the tax. In the Matter of Maresi, 74 App. Div. 76, 77 N. Y. Supp. 76, it was held, following Estate of Gihon, supra, that the costs and expenses of an action instituted by the executor of the will to obtain a judicial construction of the will and instructions as to distribution must be deducted as a necessary expense of administration in estimating the amount of tax. No case cited or discovered by us hints at any different doctrine than that declared by these decisions, except, perhaps, the case of Estate of Millward, 6 Misc. Rep. 425, 27 N. Y. Supp. 287, where there is some language of the surrogate that may be construed as supporting a contrary view. But, if so construed, it is but the expression of a single judge plainly in conflict with the views later expressed by both the Supreme Court of New York and the Court of Appeals of that state. All these cases are based not on the theory that there is any express or implied exemption provided by the tax act under consideration, but upon the theory that the act does not purport to impose the tax as to such property, being confined by its terms to such property as actually passed to the beneficiary; that is, to his distributable interest. No substantial distinction can be found in any matter material to the question involved here between any of the acts so considered and our own act. The decision of this court in Estate of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, that the surviving wife's share of the community property is subject to this inheritance tax was based solely on the proposition, established in this state by several prior decisions, that the wife takes such property solely by succession as an heir of the husband, and therefore "by the intestate laws of this state."

The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes and never can be distributed to him. Suppose in this very case the real property set apart as a homestead had been devised by the will to another person than the wife. Suppose, also, that the money paid as family allowance exhausted the property available to pay a legacy given to still another person. Under the treasurer's theory that the property had passed to the devisee and the legatee, within the meaning of the act, at the moment of the death of deceased, the devisee and legatee would be liable for the whole tax thereon although both devise and legacy had been wholly defeated, so far as any practical effect is concerned, by the orders of the probate court. As we have seen, the fact that the wife was here the devisee and legatee is of no consequence in determining the proper construction of this act. Happily no such conclusion appears to be warranted by the act. Section 12, relied on as implying an "exemption" as to debts due from a deceased, is rather a clear recognition that no tax was intended to be imposed as to property that was lawfully diverted by the probate court from the purposes declared by the will or by the laws of succession; the object thereof being simply to provide a method for the repayment to the legatee, devisee, heir, or next of kin of a proper proportion of the money theretofore paid by him as a tax where the property already delivered is diminished by the subsequent proving of debts against the decedent.

In view of what we have said, it is apparent that such cases as Trippet v. State, 149 Cal. 526, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210, Estate of Martin, 153 Cal. 225, 94 Pac. 1053, and Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, are in no way pertinent to the question here involved. The doctrine of those cases is simply that the right of the state to the tax imposed by the act vests upon the death of the testator or intestate, and cannot be surrendered or limited by any subsequent act of the Legislature. For instance, in Estate of Stanford, supra, in the act in force at the death of the testator, there was no exemption as to legacies or devises to nephews, nieces, or educational institutions. By an act enacted subsequent to his death, the original act was amended by providing for such exemptions, and it was specially provided that the amendment should apply to the estates of persons who had died prior to the amending act. It was very properly held that this could not be done and that the right of the state was determined by the act in force at the time of the death of the testator. This doctrine was affirmed in Trippet v. State, supra, where it was held that the act in force at the death of the testator gave to the state a right which vested immediately upon such death, and which could not be surrendered by subsequent legislative act or by a repeal of the law under which the right became vested, as such a surrender would be a gift or donation from the state in violation of section 31 of article 4 of the Constitution. Estate of Martin is practically to the same effect. While undoubtedly correct, these decisions do not touch the point here under discussion. Whatever tax was imposed by the act in force at the death of the deceased, the right thereto vested in the state at the moment of his death, and could not be legally divested by any department of the state, executive, legislative, or judicial. But it was only as to the tax imposed by such act that the right so vested, and, when it is determined that the act imposed no tax as to property lawfully diverted by the court in probate with the consequence that it could never be distributed to the devisee, legatee, or heir, it is apparent that no vested right of the state is impaired.

To summarize: Under the tax act of March 20, 1905, property of a decedent set apart absolutely as a homestead by the court in probate under the provisions of section 1465, Code Civ. Proc., and moneys paid under order of the probate court under section 1466, Code Civ. Proc., do not pass by will or by the intestate laws of the state, and the persons taking under such orders are not liable for any tax under such act; and the devisees, legatees, and heirs to whom said property would have been distributed under the will or the succession laws of this state if such property had not been so diverted by the court in probate are not liable for any tax on account thereof, for such property never passed to them within the meaning of the act.

It follows that the learned judge of the trial court was correct in his conclusion as to the family allowance, but erred as to the real property set apart as a homestead. The tax fixed by the order was excessive therefore by $280.

It is ordered that the order of the superior court be, and the same is hereby, modified by reducing the amount of tax fixed thereby from $888.53 to $608.53, and as so modified the order is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

157 Cal. 488

LEGG & SHAW CO. et al. v. WORTHINGTON et al. (Sac. 1,739.)

(Supreme Court of California. March 30, 1910. Rehearing Denied April 28, 1910.)

1. ATTACHMENT (§ 316*)—CARING FOR GOODS—COMPENSATION—ORDER ALLOWING.

Under Code Civ. Proc. § 1206, providing that in cases of attachment, etc., any person having a claim against the defendant for labor done may give notice thereof, and that, unless the claim is disputed, it must be paid out of the proceeds of the sale, and, if disputed, an action must be begun within 10 days for the recovery thereof, etc., where the court, subsequent to the filing of claims under section 1206, made an order allowing compensation to the sheriff for caring for the attached property, the compensation was properly allowed as part of the costs in the judgment, since the rights acquired under section 1206, are purely statutory, and there could therefore be no trust fund created in the hands of the sheriff which could not be subjected to any lawful order of the court with reference to fees.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 316.*]

2. ATTACHMENT (§ 316*)—CARING FOR GOODS —ORDER ALLOWING COMPENSATION—COSTS.

Under Code Civ. Proc. § 1206, an order, made subsequent to the filing of a claim under that section, allowing compensation to the sheriff for caring for attached goods, and taxing them as costs in the judgment, is as effective as if made within the time required by law; the court having jurisdiction to amend its process in furtherance of justice, and no opposition being made to such amendment by those having notice and being entitled to object.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 316.*]

3. MOTIONS (§ 61*)—COLLATERAL ATTACK ON ORDER.

Where no appeal was taken from an order fixing the amount of compensation for keeping attached goods, where the sheriff acted under the attachment proceedings, and served due notice upon all interested counsel, who were all present and participated in the proceedings, the order became final.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 83; Dec. Dig. § 61.*]

4. ATTACHMENT (§ 286*)—INTERVENER RIGHTS —EXTENT.

Under Code Civ. Proc. § 1206, providing that in cases of attachment, etc., any person having a claim against the defendant for labor done may give notice thereof, and, unless the claim is disputed, it must be paid out of the proceeds of the sale, etc., the right of the interveners is a mere priority, entitling them to enjoy the fruits of the attachment and sale in preference to the plaintiff, but otherwise they have no superior rights to plaintiff.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 286.*]

In Bank. Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by the Legg & Shaw Company and others against the Morning Star Gold Mining Company, in which W. A. Worthington and others intervened. From an order denying a motion to require the sheriff to pay the interveners the proceeds of an attachment sale, they appeal. Affirmed.

Thomas S. Ford, for appellants. Nilon & Arbogast and Fred Searls, for respondents.

MELVIN, J. This is an appeal by certain intervening lien claimants from an order made after final judgment. In November, 1905, Legg & Shaw Company, a corporation, filed a complaint against the Morning Star Gold Mining Company, a corporation, praying judgment for $677.31 on account of goods sold and delivered. Attachment issued on the same day on which the complaint was filed. On December 2, 1905, the sheriff made return of said writ, certifying that he had attached certain of the property of the defendant corporation by taking said property into his custody and placing a keeper in charge of it. On June 8, 1906, judgment for plaintiff by default was entered, and on the same day plaintiff filed its cost bill, which included, among other items $416 keeper's fees. On June 17, 1906, appellants presented their claims in accordance with section 1206 of the Code of Civil Procedure, and on June 18th the property which had been held under attachment was sold at public auction for $295. Thereafter the lien claimants gave notice of a motion to have the sheriff pay over to them the proceeds of the sale minus $15.70 admittedly due the sheriff as costs. This motion coming on regularly to be heard was duly argued on August 6, 1906. It appeared that no order had ever been made by the court allowing the sheriff to have a keeper or fixing the keeper's compensation. It was further shown that the amount paid to the keeper and mentioned in the cost bill had been advanced by the plaintiff. On August 13, 1906, the court made an order, which was entered in its minutes, to the effect that the sheriff might be permitted to withdraw his return of sale under the writ of execution for the purpose of amendment, and in the meantime plaintiff was to be permitted to move to have the court fix the amount of keeper's fees. To this order the counsel for the preferred creditors duly excepted. The sheriff did not then amend his return, however, and nothing was done, either by the plaintiff or by the lien claimants, until January 5, 1909, when the preferred creditors gave notice of a motion to set aside the order submitting their motion of August 6, 1906, and to resubmit the said motion in which they asked the court to order the payment to them of the money realized from the sale under execution. The hearing of this matter was duly and by consent continued to January 26, 1909. On January 20, 1909, the sheriff gave notice of a motion to have the court fix the amount of keeper's fees. On January 26, 1909, both motions were heard and submitted. On February 15, 1909, the court made a formal order permitting the sheriff to amend his return. It was also ordered, adjudged, and decreed that the compensation of the sheriff for the keeping of and caring for the property under attachment and execution was fixed at $525, and that item was allowed as a part of the costs in the judgment for plaintiff. On February 23, 1909, the sheriff filed his amended return. In this he accounted for a bar of gold bullion valued at $66.38 and omitted from the former return. He also certified that the sum of $361.38, the entire amount realized from the sale, plus the value of the bullion, had been applied upon his fees, costs, commissions, and compensation of keeper, leaving unsatisfied, not only the judgment, but also $173.32 of the costs. On March 15, 1909, the court formally denied the motion of the lienholders that the sheriff be required to pay them the proceeds of the sale, excepting the small amount of costs which they conceded to be payable to the sheriff from that fund. It is from this last order that the present appeal is prosecuted.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Section 1206 of the Code of Civil Procedure as it stood in 1906 was as follows: "In cases of execution, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks and laborers or any other person who renders services or performs work, who have claims against the defendant for labor done or work performed, may give notice of their claims and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on, or, in the event of a levy upon money, at any time before the transfer of such money under execution; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, or in the event of a levy upon money, out of such money, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented and claiming preference under this section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim or priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale or money as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim."

Appellants' first contention is that, inasmuch as the keeper's fees can only properly be due after allowance by the court, and as no such order of court was made prior to the filing of their claims, therefore the money in the sheriff's hands when their demands were made, in accordance with the provisions of section 1206 of the Code of Civil Procedure, became subject to their liens, and could not thereafter be exhausted by a nunc pro tunc order of court made long subsequent to the intervention of appellants, whereby the compensation, to be paid the keeper was sought to be fixed. We think this position is untenable, because the rights of appellants are purely of statutory origin, and there could therefore be no trust fund created in the hands of the sheriff in this action which could not be subjected to any lawful order of the court with reference to fees. But we are cited to Galindo v. Roach, 130 Cal. 389, 62 Pac. 597, as holding that a cost bill cannot be amended after the time limited by section 1033 of the Code of Civil Procedure. and that no additional items may be adjudged due after the passing of the period set by section 473 of the Code of Civil Procedure. Respondents admit that the item $416, due to the keeper, which was included in the sheriff's first return, had no place there until after the court had fixed the amount of such fees. St. 1889, p. 269. But they point to the fact that in Galindo v. Roach, supra, there was objection to the correction of the cost bill, while here no opposition was made to the court's permitting an amendment to the sheriff's return on the writ and to a similar change in the cost bill. The court having jurisdiction to amend its process in furtherance of justice, and no opposition being made to such amendment by those having notice and being entitled to object, the order of the court is as effective as if made within the period of the limiting statute.

But appellants deny the court's jurisdiction to amend the cost bill on the ground that this was not done in the attachment proceeding. The answer to this contention is that the sheriff did act under the attachment proceeding, and served due notice upon the attorneys for the appellants, as well as upon those who represented plaintiff (defendant being in default), and when the matter was regularly heard all interested counsel were present and participated. No appeal has been taken from the order fixing the amount of the keeper's compensation, and it has become final.

But the appellants argue that, if the court had jurisdiction to make the order allowing the keeper's fees after the expiration of six months, there was an abuse of discretion in the present case. Respondents' answer to this is that no appeal was taken from that order, and that the order from which an appeal was taken does not involve the exercise of discretion. We think this position is correct. The order fixing the amount of the keeper's compensation having become final, the refusal of the court to order the payment to the interveners of the proceeds of the sale follows as a matter of course, and the latter is the only order involved in this appeal. The entire argument of the appellants seems to be based on the theory that by serving the notices prescribed in section 1206 of the Code of Civil Procedure their rights attached to the property in the sheriff's hands, and upon sale to the fund realized therefrom. But their right under section 1206 of the Code of Civil Procedure is a mere priority, entitling them, under certain circumstances, to enjoy the fruits of the attachment and sale in preference to the plaintiffs. They are treated as interveners, and surely they would have no superior rights to those of the plaintiffs, except that of first recourse to the moneys realized from the sale. If they had not appeared at all, the plaintiffs could not complain of the proceedings taken after due notice and without objection in correction of the sheriff's return and in amendment of the bill of costs. Surely these appellants, who are the beneficiaries of a special statutory privilege which must be strictly followed, are not given rights which will permit them to wait until such action of the court as would bind the other parties to the suit becomes final, and then review the whole case upon an appeal from an order which is merely the logical result of the previous action of the court, from which no appeal has been taken.

The order of the superior court from which this appeal was taken was proper, and it is therefore affirmed.

We concur: LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

157 Cal. 448

In re BLAKE'S ESTATE.

In re SOULE.

(S. F. 5,087, 5,088.)

(Supreme Court of California. March 28, 1910. Rehearing Denied April 27, 1910.)

1. Executors and Administrators (§ 315*)—Distribution of Estate—Decree—Sufficiency.

Where the decree of distribution of the estate of a testator omitted a clause in the will as to a devise over, but by reference to the will embodied the entire will in it, the omission was of no consequence.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1299; Dec. Dig. § 315.*]

2. Trial (§ 404*)—Findings of Fact—Conclusions of Law.

Where the only question, that of the proper construction of a testamentary trust, was determined by the court from the face of the will and a decree, the conclusion of the court that testator failed to make any distribution of the corpus of the trust property on the termination of the trust in a specified event was a conclusion of law, and was not a finding of fact, though inserted among the findings of fact.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 404.*]

3. Trusts (§ 331*)—Settlement of Account—Effect.

A decree in proceedings under Code Civ. Proc. § 1699, for the settlement of an account of a testamentary trust, rendered without appearance or contest, which settles the account and approves of payments made by the trustee to a beneficiary, operates as a bar to any subsequent attempt to recover such payments; but, in a subsequent suit involving other property of the trust estate, it is not res judicata of the nature of the interest of the beneficiary in the trust, though the payment passed involved that question.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 494; Dec. Dig. § 331.*]

4. Judgment (§ 812*)—Res Judicata.

A judgment in a proceeding in rem, where there has been no contest or litigation, is res judicata as to the matter actually involved and as to any fact affecting the particular matter involved, but no further, and the judgment cannot be invoked as res judicata in a subsequent proceeding affecting other property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1435–1442; Dec. Dig. § 812.*]

5. Wills (§ 629*)—Construction—Rules of Construction.

The rules for ascertaining whether a remainder is contingent or vested are subordinate rules of construction of a will and are applied only in the absence of all other indications in the will to the contrary, and in support of an intention of testator to create a vested remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

6. Wills (§ 440*)—Construction—Intention of Testator.

The court, in construing a will, must, if possible, arrive at the intention of the testator sought for in the language of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

7. Wills (§ 440*)—Construction—Intention of Testator.

Where the terms of a will are free from ambiguity, the language thereof must be interpreted according to its ordinary meaning and legal import, and the intention of testator ascertained thereby.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

8. Wills (§ 439*)—Construction—Intention of Testator.

The presumption against intestacy and the presumption created by Civ. Code, § 1341, that testamentary devises are presumed to vest at testator's death, are subject to the cardinal rule of construction that a will must, as required by section 1317, be construed according to the intention of testator.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 439.*]

9. Wills (§ 630*) — Construction — Vesting of Gift.

A legacy or devise given to one to be paid at a future time vests immediately in the legatee or devisee, while a legacy or devise not given until a future time is contingent and does not vest until that time occurs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480; Dec. Dig. § 630.*]

10. Wills (§§ 634, 671*)—Construction—Estates Devised—Time of Vesting.

Testator gave his residuary estate to a trustee to pay enumerated bequests and to convert the residue into money and invest the same in real estate and pay the net income to his two daughters and granddaughter until they reached the age of 30, directing that, as each arrived at that age, she could demand and receive a third as her distributive share to hold the same to her and her heirs forever, and, if either of the daughters or granddaughter died without issue and before receiving her distributive share, her share should go to the surviving daughters or granddaughter, share and share alike. *Held*, that testator made two gifts, first, a devise to the trustee to pay the income to the daughters and granddaughter, and, secondly, a devise of the corpus both in title and possession to them on their attaining the age of 30; but their attainment of that age was a condition precedent to the vesting of the corpus, and where the grandchild did not reach that age she did not acquire any vested interest in the trust property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510, 1577, 1578, 1586; Dec. Dig. §§ 634, 671.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

11. WILLS (§ 678*)—TRUSTS—VALIDITY.

An express testamentary trust to be exercised for the purpose of conveying title to the beneficiaries is void, and an implied trust for the same purpose is also void.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 678.*]

12. WILLS (§ 630*)—CONSTRUCTION—CONTINGENT GIFT.

Where there is no separate and antecedent gift, independent of the direction and time for payment, the legacy is contingent, and, where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480; Dec. Dig. § 630.*]

13. WILLS (§ 597*)—CONSTRUCTION — CONTINGENT GIFT.

The purpose of an habendum clause in a will, creating a trust and providing that each beneficiary as he attains a specified age may demand and receive a share of the trust property to have and to hold the same to him and his heirs forever, is to limit, define, and make clear the estate granted, and the clause shows testator's intention to give the beneficiaries a fee-simple estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1319; Dec. Dig. § 597.*]

14. WILLS (§ 634*) — CONSTRUCTION — "DISTRIBUTIVE SHARE."

Where testator gave his residuary estate to a trustee to pay enumerated bequests and convert the residue into money and invest the same in real estate and pay the net income to his two daughters and granddaughter until they reached the age of 30, and further provided that, as each arrived at that age, she could demand and receive a third as her "distributive share" to hold the same to her and her heirs forever, and, if either of the daughters or granddaughter died without issue and before receiving her distributive share, her share should go to the surviving daughters or granddaughter, the words "distributive share" merely referred to the quantum of the estate which the beneficiaries were to take if they took at all, and the words could not be considered as terms of devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*

For other definitions, see Words and Phrases, vol. 3, pp. 2135, 2136.]

15. WILLS (§ 634*) — CONSTRUCTION — GIFT OVER.

A devise over must be construed as indicating an intention of the testator not to make a vested devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

16. WILLS (§ 630*)—CONSTRUCTION—MEANING OF WORDS—"AS."

The word "as," in a will creating a trust to pay the income to beneficiaries until they have respectively reached a specified age, and providing that "as" each arrived at that age he should have his share, imports contingency, though the word may not be directly conditional.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480; Dec. Dig. § 630.*

For other definitions, see Words and Phrases, vol. 1, pp. 518–521.]

17. WILLS (§ 634*)—CONSTRUCTION—CONTINGENT ESTATES.

The rule that where the only gift is in a direction to pay and deliver at a future time, and the entire interim income is given to the beneficiary, a present gift of title to him is presumed, is a rule of presumption to be indulged in only when there is no other language employed by testator showing a contrary intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

18. WILLS (§ 595*) — BEQUESTS BY IMPLICATION.

Bequests by implication are sustained where no direct language in a will supports them, and, where from uniformity of language such reasonable construction can be placed thereon as implies an intention to make a bequest, the court will raise an estate by implication in favor of a surviving child on slight indication of an intention to that effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1300; Dec. Dig. § 595.*]

19. WILLS (§ 448*)—BEQUESTS BY IMPLICATION.

The court in construing a will must indulge in the presumption that testator intended to dispose of his entire estate, and, if possible, the will must be construed to prevent intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 964; Dec. Dig. § 448.*]

20. WILLS (§ 440*) — CONSTRUCTION — INTENTION OF TESTATOR.

The court in construing a will must aim to reach the intention of testator from what he has said, which includes not only a determination of what he meant by the explicit use of language, but also the necessary implication arising from the language employed, though less explicit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

21. WILLS (§ 634*)—CONSTRUCTION — ESTATES ACQUIRED—"ISSUE."

Testator gave his estate to trustees to invest the same in real estate and pay the income to his two daughters and granddaughter until they respectively reached the age of 30, and provided that, as each reached that age, she could demand and receive a third of the estate as her distributive share, and, if either died without issue and before receiving her distributive share, her share should go to the survivors. By a codicil he provided that lapsed legacies should revert to the estate. *Held*, that the provision for a devise over, in the event of the death of a beneficiary without issue and before receiving her distributive share, raised a devise by implication in favor of the children of the granddaughter dying before attaining the age of 30; the word "issue" in the devise over being a word of purchase and implying a devise to the issue, who thereby took as purchasers under the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.*

For other definitions, see Words and Phrases, vol. 4, pp. 3778–3782; vol. 8, p. 7693.]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Petition by Alice S. Blake, sole trustee under the will of Francis Blake, deceased, for distribution of the trust property in which the guardian of the minor children of Ethel Pomroy Soule, deceased, and her administrator answered. From a decree of distribution, the minor children and administrator separately appeal. Reversed.

Edward C. Sessions, Jr., pro se. Samuel Poorman, Jr., for other appellants. Charles S. Wheeler and J. F. Bowie, for respondents.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

LORIGAN, J. Francis Blake died in 1888, leaving his widow, Mary C. Blake, two daughters, Alice S. Blake and Helen F. Witcher, and a granddaughter, Ethel Pomroy, then nine years of age, a child of a deceased daughter, as his heirs at law. He left a large estate and an olographic will, by which, having made certain bequests, he then devised the rest and residue of his estate to trustees in trust, first, to pay a large number of bequests, and then: "After the payments of the bequests enumerated in article 3, I direct my said executrix, executors and trustees to convert the rest and residue of my personal estate, if any there be, into money, and to invest the same in improved real property, and to hold all the rest and residue of my estate and pay over the net income therefrom in equal proportions quarterly to my said daughters, Alice S. Blake and Nellie F. Witcher, and my granddaughter, Ethel Pomroy, until they shall respectively arrive at the age of thirty years, and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue of my said estate as her distributive share thereof, and to have and hold the same to her and her heirs forever, *and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my said estate shall go to the surviving daughter, daughters or granddaughter as the case may be, share and share alike.*" The portion of the trust we have italicized above was omitted from the decree of distribution which in due course was made in the estate. That decree, after setting forth the trust clause, omitting the italicized portion, then distributed the residue of the estate (the beneficiary Alice S. Blake having attained the age of 30 years) as follows: "To the said Mary C. Blake (the widow) in her individual right an undivided one-half thereof, being her half of the community property. To the said Alice S. Blake in her own individual right an undivided one-sixth thereof. To the said Mary C. Blake, James Moffitt, and Charles L. Taylor, as trustees under the said last will and testament, and upon the trusts therein mentioned, in trust for the said Nellie F. Witcher under and in accordance with the provisions of the said last will and testament, an undivided one-sixth thereof. To the said Mary C. Blake, James Moffitt, and Charles L. Taylor, as trustees under the said last will and testament, and upon the trusts therein mentioned, in trust for the said Ethel Pomroy under and in accordance with the provisions of the said last will and testament, an undivided one-sixth thereof."

Subsequent to the decree of distribution, Helen F. Witcher attained the age of 30 years, and the property distributed to the trustees in trust for her was turned over by them to her. Thereafter the beneficiary Ethel Pomroy married Beach C. Soule, and two children were born to them. In 1905 she died intestate at the age of 27 years, leaving as her sole heirs at law her husband and their two minor children. After her death, Alice S. Blake, who had become sole trustee of the trust, filed in the superior court an account of her administration of the trust, and a petition for distribution of the trust property, stating in the latter that she was in doubt as to whom the corpus of the trust property should be distributed, and asked the court to judicially determine the question. Answers to the petition were filed respectively by the guardian of the minor children of Ethel Pomroy Soule, deceased, and by the administrator of her estate, in which they joined with the trustee in a request for such judicial determination. Answers were also filed by said Alice S. Blake and Helen F. Witcher, asserting that they were each individually entitled to one-third of the corpus of the trust property. On the hearing the court judicially construed the trust provisions and found and decreed that Francis Blake failed to provide in his will, creating the trust, for the disposition of the corpus of the trust property upon the termination of the trust, in the event of the death of Ethel Pomroy Soule under the age of 30 years, and the said event had occurred, and hence that the said corpus of the trust property "is vested, * * * one-third * * * in Alice S. Blake, individually; one-third * * * in Helen F. Witcher, * * * individually; and one-third * * * in the heirs at law of Ethel Pomroy Soule, deceased"—as the heirs at law of said Francis Blake, deceased. A decree in accordance with this construction of the trust provisions was made.

While separate appeals are taken by the minor children and the administrator of the estate of Mrs. Soule from those portions of the decree immediately referred to, and taken upon separate records, they involve the construction of the same trust provisions. They are presented here—except as to one point—in identically the same briefs, and the questions presented on both appeals can be readily and consistently disposed of in the same opinion.

The only question on this appeal calling for serious consideration is the legal soundness of the construction given by the superior court to the trust provisions contained in the will and embodied in the decree of distribution in favor of the beneficiary Ethel Pomroy.

On the part of respondents, Alice S. Blake and Mrs. Nellie F. Witcher, the contention below was, and here is, that, under the will of Francis Blake, Ethel Pomroy was given a contingent remainder only in the corpus of the trust property; that neither the title nor right of possession to said corpus was to vest in her until she reached the age of 30 years; that as she never attained that age the remainder never vested; that no provision was made in the will for the disposition of the corpus of the trust property in the event which actually occurred, namely, the death of the beneficiary "with issue and before she received her distributive share" of the estate of testator, and, hence, the testator died intestate as to such property, and it descended and should be distributed to his heirs at law. This was the construction given to the provisions of the will by the trial court and the accuracy of which is questioned by the appellants.

As far as the appellant the administrator of the estate of Ethel Pomroy Soule is concerned, it is insisted that under the will and decree devising and distributing the trust property to the trustees there was vested immediately in Ethel Pomroy on the death of the testator a remainder in fee in said property (possession only being deferred) defeasible only upon a condition subsequent, namely, her death "without issue and before she received her distributive share" (attaining the age of 30 years), the happening of which has now become impossible, and that on her death the corpus of the trust property passed to her heirs in fee simple.

On behalf of the surviving minor children it is insisted that even if the contingency by which their mother was to take the corpus of the estate—the attainment of the age of 30 years—did not happen, and the fee of the property therefore never vested in her, still the testator did not fail to dispose of the trust property, but, on the contrary, they insist that the trust clause providing for a devise over on the death of their mother "without issue and before she received her distributive share" was a devise by implication to them of such corpus as her issue; that, even, if the devise failed to vest in fee in their mother, they took the property as donees or purchasers under the will itself as a devise in their favor. In the event, however, that their contention in this respect be by the court deemed untenable, they then stand with the administrator, and insist that the devise to their mother was of a vested remainder defeasible only on condition, subsequent, the happening of which has now become impossible.

Some preliminary matters require attention before approaching the real merits of the appeals, though they will be considered but briefly.

It will be observed that the clause in the will as to the devise over was omitted in the trust provisions set forth in the decree of distribution. In our opinion, however, such apt reference is made to the will in the decree as to embody the entire will in it so that this omission is of no consequence. In fact, we do not understand any point to be made on the omission; all parties relying on the devise over in support of their particular positions as to the construction to be placed upon the entire trust provisions.

It is, however, contended by respondents that the court found as a fact that Alice Blake and Mrs. Witcher were respectively vested with a one-third interest in the corpus of the trust property, and they assert that as there is no specification in the bill of exceptions attacking the sufficiency of this finding, and as it supports the decree, the latter must for that reason be affirmed. We do not, however, consider this a finding of fact, but rather a conclusion of law. It is true that it is found among the findings of fact—19 and 20—but is evidently misplaced. While the court made findings of fact, there was really no question of fact at issue under the pleadings, and none was tried. What are embodied in the findings of the court are simply matters appearing in the decree of distribution, or in the petition of the trustee for a judicial construction of the trust provisions and of the truth of which there were no question made. The only question that was presented to the court—purely a legal question—was: What was the proper construction of the terms of the trust? This was determined by the court from the face of the will and decree, and its conclusion that the testator, Francis Blake, failed to "make any disposition of the corpus of the trust property upon the termination of the trust in the event of the death of Ethel Pomroy Soule under the age of 30 years," was the basis for the further immediate conclusion of law that one-third of the corpus was vested respectively in Alice Blake, Mrs. Witcher, and the heirs of Mrs. Soule. Though these are inserted among the findings of fact, they are really conclusions of law which the court made from the sole matter which was before it for consideration, namely, the construction of the trust provisions of the will.

It is insisted by appellants that it was res ajudicata in the superior court prior to the inauguration of this proceeding for the construction of the trust provisions that Ethel Pomroy Soule took a vested estate in remainder in the corpus of the trust property. This claim is predicated upon the settlement of an account of a former trustee of the trust in which the court approved the payment by him to Mrs. Soule, absolutely, of certain moneys derived from a portion of the corpus of the trust property; the argument being that this approval of such account necessarily involved a determination by the court that the devise made of the corpus of the trust property was a vested one.

We do not think, however, that the principle of res adjudicata has any application here. There was no actual controversy over the settlement of the account referred to. Proceedings towards its settlement were under section 1699 of the Code of Civil Procedure, and jurisdiction was acquired by posting of notice of the hearing. While the decree settling the account would operate as a bar to any subsequent attempt to recover that portion of the proceeds of the corpus of the trust property, payment of which to the beneficiary was approved by the court, it is only to the extent that the payment was sanctioned that the decree can be deemed res adjudicata. Evidently the payment to her was improperly made and approved, under any view of the trust provisions. But the decree did not operate as a bar to the remaindermen or beneficiaries to maintain this proceeding affecting other and different property. The rule of the authorities is that a judgment in a proceeding in rem where there has been no contest or litigation is res adjudicata with respect to the matter or res actually involved in the proceeding and is res adjudicata as to any fact which affected the particular matter or res involved in it, and this is as far as it operates. The judgment cannot be invoked as res adjudicata in a subsequent proceeding which affects other property. Cromwell v. County of Sac., 94 U. S. 351, 24 L. Ed. 195; Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741; Freeman on Judgments, vol. 1, § 253.

Mr. Freeman, in discussing the effect of a judgment in one proceeding when invoked as res judicata in another proceeding involving a different though similar subject-matter, says: "In order to successfully invoke this rule (res judicata) it must be shown that in the former action the issue was in fact litigated and decided. It is not sufficient that it was there so involved that it might have been litigated. * * * In a subsequent action involving a different subject-matter the former adjudication cannot be relied on unless it appears, not that the issue presented was presented and ought to have been litigated in the prior action, but further that it was litigated and decided, as well as involved." Under this rule the judgment settling the account on the proceeding, had without appearance or contest on their part, did not operate as a bar to the remaindermen or beneficiaries to maintain this proceeding.

This brings us to a consideration of the appeal on its merits—the nature of the remainder devised to Ethel Pomroy—whether it is to be considered as a contingent or vested remainder, and, if the former, was there still a devise to the issue of the beneficiary by implication?

Counsel on both sides in support of their respective positions have brought to their aid much of the abstruse learning which has been devoted to the subject of remainders. There is no subject in the law to which more refinement of learning has been applied, nor one where, particularly in ascertaining whether a remainder is a contingent or vested one, more nice, technical, and shadowy rules of construction have been formulated. Counsel for appellants more particularly invoke the aid of these rules, upon the theory that the language of the will is so uncertain as to the nature of the remainder devised as to make them applicable to the proper determination of the intent of the testator in that respect. As to these rules, however, it may be said that there are none of them which may be taken as an unvarying standard by which the meaning or intent of all testamentary devises in remainder may be construed. They have not been harmoniously applied in jurisdictions where they obtain, and whether they are applicable at all must depend upon the particular provisions of each will which is under consideration. They are simply subordinate rules of construction which are applied only in the absence of all other indications in the will to the contrary and in support of an intention on the part of the testator to create a vested remainder.

While appreciating the earnestness with which counsel for appellants insist that the language of the will is so indefinite in its terms respecting the devise to the beneficiaries as to make these rules applicable in ascertaining the intent of the testator regarding it, we are not inclined to agree with him that there is any such indefiniteness. On the contrary, it appears to us quite apparent from a consideration of the trust provisions that the testator plainly and definitely fixed the time when the corpus of the trust property should vest, both in title and in possession, in the beneficiaries, and hence there is no necessity of applying any technical or arbitrary rules of construction in aid of discovering that intent.

The cardinal rule in the interpretation of a will is that "it is to be construed according to the intention of the testator." Civ. Code, § 1317. As said in Estate of Young, 123 Cal. 337, 55 Pac. 1011: "The purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used. Where the terms of a will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby. It is true that presumptions are to be indulged in which will prevent intestacy (Le Breton v. Cook, 107 Cal. 410, 40 Pac. 552), and that testamentary devises are presumed to vest at the death of the testator (Civ. Code, § 1341); but these presumptions, like the auxiliary rules of construction relied on by appellant, are subordinate to the cardinal rule just stated.

Now, coming to a consideration of the terms of the trust, itself, we think that the language of the testator, given its legal import, clearly shows that only a contingent remainder was devised to Ethel Pomroy, and that as far as that question is concerned the trial court properly so held.

There can be no question as to the rule relative to contingent and vested remainders and the difference between them. The difficulties which have filled the books with dissertations on the subject have arisen in an endeavor to determine from indefinite terms of devise to which class the remainder belongs. The general rule is that, where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time, it is contingent and does not vest until that time occurs. As said in the note to Goebel v. Wolf, 10 Am. St. Rep. 470, 113 N. Y. 405, 21 N. E. 388, quoted approvingly by this court in In re Rogers, 94 Cal. 526, 530, 29 Pac. 962: "The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like. * * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. Thus, where the legacy is given, payable or to be paid when the legatee attains the age of 21 years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but where the time is annexed, not to the payment only, but to the gift itself—as when the legacy is given to the legatee at 21, or 'if' or 'when' he attains the age of 21—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and, if the condition be not fulfilled, the legacy never vests."

Examining the trust provisions of the will under this clear distinction between vested and contingent remainders, and giving to the language used by the testator its proper legal import, we perceive no room for question but that the attainment of the age of 30 years by the beneficiary, Ethel Pomroy, was made a condition precedent to the vesting of the corpus of the trust property in her, both in title and possession, and, hence, the devise was of a contingent remainder.

This conclusion reasonably follows, whether we look at the provisions of the trust separately or view them collectively. The testator had devised the legal title in the trust property to his trustees and in the first portion of the trust clause, as far as the beneficiaries, including Ethel Pomroy, are concerned, provided only for the payment to them of the net income of the estate in equal proportions "until they shall respectively arrive at the age of thirty years." The meaning of this provision is plain. The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties. There is nothing in it whereby any title was passed to the beneficiaries. An express trust to be exercised for the purpose of conveying title to the beneficiaries would have been void (Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Estate of Dunphy, 147 Cal. 95, 81 Pac. 315), and an implied trust would have been equally illegal, as what the testator could not do directly he could not do indirectly or effect by implication, so that, unless the other provisions of the will give it, it is quite apparent that none of the beneficiaries would have taken any interest in the corpus of the trust property. Now the only language in the will which can be insisted upon as giving them any interest in the trust property is found immediately following the provision as to the payment of the interim income, namely: "And as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive the rest and residue of my said estate as her distributive share thereof, to have and to hold the same to her and her heirs forever." This is the only clause in the will wherein the testator attempted to make a gift of the corpus of the trust property to the beneficiaries, and the gift springs from the right given "to demand and receive" one-third of the residue "as each arrives at the age of thirty years." Reading this entire provision, aside from any artificial rules of construction, we think it is clear that to whatever the right "to demand and receive" applied, whether to the title or possession of the corpus of the trust property, it was subject to a condition precedent that, before the beneficiaries would have the right "to demand and receive" anything, each must have attained the age of 30 years. While it is insisted by appellants that this right "to demand and receive" applied only to the possession, we do not see how any reasonable construction of the testator's language can support this claim. Of course, it is conceded that the right "to demand and receive" may apply to either a right to demand and receive possession or to the vesting of title, or to both; but under the trust provisions of the will the right "to demand and receive" cannot apply alone to possession because, if it applied simply to possession—the right on attaining the age of 30 to receive the possession of the trust property, title to which had already vested—where can there be found any provision in the will conferring title or vesting the devise? If possession only is to be implied from the right "to demand and receive" the corpus on attaining the age of 30 years, then there must be some other language in the will from which a gift or vesting of title to the trust property at the testator's death may be implied. But clearly there is no other provision in the will except the one under consideration which makes any gift to the beneficiaries at all except save of income, and, if the right "to demand and receive" applies only to possession, there is no gift of title at all. In fact, if it were not for the right "to demand and receive," no estate, either contingent or vested, would be given to the beneficiaries under the will. Undoubtedly, however, the testator intended that the beneficiaries should receive both title and possession, and, if the right "to demand and receive" applies only to the gift of possession, the gift of title, as there are no other words in the will which expressly provide for it, must be implied from this gift of possession. But as the gift of possession is certainly future and contingent on the beneficiary attaining the age of 30 years, it is the rule of authorities that the gift of title implied from this gift of possession is likewise future and contingent. Moore v. Smith, 9 Watts (Pa.) 403; Leake v. Robinson, 2 Merrivale, 363; Stead v. Platt, 18 Beav. 50; Merry v. Hill, L. R. 8 Eq. 619; Gifford v. Thorn, 9 N. J. Eq. 702.

The rule of these authorities is announced in Moore v. Smith, 9 Watts (Pa.) 407: "The ruling principle of a case like this is that, where there is no separate and antecedent gift which is independent of the direction and time for payment, the legacy is contingent; and it seems to be as well founded in reason as rules of interpretation usually are. Where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality; insomuch that, if the one is future and contingent, so must the other be."

But that the gift of the title or the vesting in right of the corpus of the trust property, as also the right of possession, was what the testator intended the beneficiaries should take under the right "to demand and receive" on the contingency that they attained the age of 30 years, is further apparent from a consideration of the trust provision. As the testator says, each beneficiary as she attains that age is "to demand and receive" a portion of his estate as her distributive share to "have and to hold the same to her and her heirs forever." Now this latter portion of the provision—the habendum clause—clearly defines the nature of the interest in the devised property which each beneficiary was "to demand and receive" on attaining the age of 30 years; she was to receive the property "to have and to hold the same to her and her heirs forever." The purpose of a habendum clause is to limit, define, and make clear the estate granted or conveyed. It has a technical meaning, and applies, as used here, to the passage of title in fee. As the only words in the will under which title can pass are those giving the right "to demand and receive," it is quite apparent that in using the language of the habendum clause, which is employed when title in fee is to pass, it was such title which the beneficiaries had a right "to demand and receive" as they attained the prescribed age. As said in Wheeler v. Wayne Co., 132 Ill. 599, 24 N. E. 625, "'to have and to hold,' etc., is but a habendum clause, the purpose of which is merely to define the estate which the grantee is to take in the property conveyed." As used in this will it defined the estate which the beneficiaries were to take under their right "to demand and receive," and, as they could only take it on attaining the required age, no title was passed or could pass to them until that period arrived.

It is true, as asserted by appellants, that an habendum clause is not necessary to be used to pass title under the law of this state. But this is beside the question. Here the testator has used it. He made his own will and undoubtedly gave importance to this language as defining the estate which on attaining the required age he intended the beneficiaries should take. If he had not deemed it important, he would not have employed it. It cannot be rejected, but on the contrary, must be considered and given effect, as must all the language of a will. It has a well-recognized meaning as defining the estate the testator intended the beneficiaries were to take—a fee simple—and it must be construed, to be given any effect at all, as having been employed by him to indicate that intention. Nor is there anything in the use of the term "distributive share" used in the devise, or considering here the use of the words "distributive share" and "share" found in the devise over, militating against the view that but a contingent remainder was devised to the beneficiaries. These are not terms of devise, nor were they attempted to be used as such by the testator. The devise is in the words giving the right "to demand and receive," and a devise to the beneficiaries is found nowhere else in the will. The words "distributive share" in the devise itself simply refer to the quantum of the estate which the beneficiary is to take, if she takes at all, and which is explicitly mentioned by the testator to be one-third of the residue of his estate, and as used in the devise over the words "distributive share" or "share" under no construction can be considered as terms of devise but are used in specifying the contingency upon which the devise over shall be operative.

Aside from these considerations addressed particularly to the devising clause of the will which, of itself, satisfies us that the devise to Ethel Pomroy was of a contingent remainder, this conclusion is further supported by the devise over. While there is a conflict in the authorities elsewhere as to the effect of a devise over in determining whether a remainder which is not fixed by direct words of devise is contingent or vested, the matter in this state is settled.

In the case of In re Rogers, heretofore referred to, the testator had bequeathed to his grandson a legacy of $10,000 to be paid in certain proportions and as he attained certain years of age; the first payment to be made when he attained 15, the final payment when he reached 25. The clause in the will making this bequest provided further that: "If my said grandson die before arriving at the ages herein named, then the remaining or unpaid amounts of said bequests, together with the income thereon, I direct shall be distributed * * * to the brother and sisters of myself and wife * * * share and share alike." During the administration of the estate the grandson died at the age of six or seven years and before any of the bequests were payable to him. On distribution of the estate his mother applied for payment of the legacy to her as his heir at law under the claim that the bequests to her son vested in him on the death of the testator, asserting that a bequest "payable" or "to be paid" to a person "at" or "when" he shall attain the age, etc., vests the estate immediately in him, and his interest is transmissible to his representatives. The question squarely before the court in that case was whether the legacy was vested or contingent. It was held to be contingent, and in reaching that conclusion the court took into consideration the devise over, and said: "If the last clause (the devise over) had been omitted, it might no doubt be successfully claimed that there was a present and absolute bequest, the times of payment only being deferred, and that it vested in the legatee on the death of the testator. That clause, however, makes it clear, we think, that the intention was not to make an absolute bequest, but a conditional one to take effect only if the legatee should reach the ages named for its payment." Hence, in this state the rule is that a devise over is to be construed as indicating an intention on the part of the testator not to make a vested devise, and, applied to the devise here in question, imparts additional force to the conclusion which we think apparent from the language of the devise itself that only a contingent devise was made to Ethel Pomroy; that it was only to take effect in title and possession on the condition of her attaining the age of 30.

While it is insisted by appellants that the word "as," employed in the provision, "and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive," etc., is not conditional, and, hence, the provision quoted in which it is used did not operate to create a condition precedent to the vesting of the corpus but operated to give an absolute interest in fee in it to the beneficiaries and denoted only the time when the remainder should take effect in possession, we perceive no room for discussion on this point, as we are of the opinion that reasonably construed the right "to demand and receive" the corpus of the trust property applies to both title and possession. It appears to us that if there is any one intention clearly disclosed by the will itself it is that the beneficiaries are "to demand and receive" nothing until they attain the age of 30. Futurity is annexed as of the very substance of the gift. And while the word "as" may not be directly conditional, still it imports contingency and is generally so construed. Colt v. Hubbard, 33 Conn. 281; Seibert's Appeal, 13 Pa. 501; Fearne on Remainders, vol. 2, p. 145.

We are mindful, too, of the rule particularly insisted upon by appellants that where the only gift is in a direction to pay and deliver at a future time, or what is asserted to be the equivalent here, the "right to demand and receive" at a future time, and the entire interim income is given to the beneficiary, a present gift of title to him is presumed to have been intended by the testator. Under this rule appellants insist that from the gift of the entire interim income to the beneficiaries here it is to be inferred that the testator intended a present gift of the corpus to them, and that the right "to demand and receive" as used by him only applied to the possession of the corpus, and, therefore, the devise became vested on the death of the testator subject to become divested should any beneficiary die without issue and before obtaining possession of her share of the corpus. The general rule at common law is as asserted by appellants; but, without considering other objections which respondents urge against its application to this particular devise, it is at best but a rule of presumption to be indulged in only when there is no other language employed by the testator showing a contrary intention. But, as we have heretofore pointed out, the language actually used by the testator in connection with the right "to demand and receive," and the other matters in the will to which we have called attention, defines the estate which is to be taken by the beneficiaries in the future under this right as being both title and possession. Futurity applies to both by the express language of the testator so there is no room for indulging in any presumption.

We perceive no reason for pursuing this branch of the inquiry further. In our opinion, taking the trust provisions of the will in their entirety, it was the intention of the testator to make two gifts—a devise to the trustees to pay the income to the beneficiaries, and a devise of the corpus both in title and possession to them on attaining the age of 30 years—that the attainment of this age was a condition precedent to the vesting of the devise at all, and that, as the beneficiary Mrs. Soule did not reach the required age, she never acquired any vested interest whatever in the trust property.

This brings us to a consideration of the claim asserted by the appellants the minor children of Mrs. Soule that, though the devise to their mother was a contingent remainder and the condition under which she was to take, or the devise over was to become effectual, never occurred, still the testator did not fail to dispose of the corpus of the trust property, but the minor appellants took directly as purchasers under the will of Francis Blake the share which would have vested in their mother had she attained the age of 30 years.

In this regard it is insisted that the provision for a devise over in the event of the death of a beneficiary "without issue and before she receives her distributive share" raises a devise by implication in favor of the minor appellants as the issue of their mother. We think this position is sound and sustained in reason and by the authorities. Bequests by implication have from remote times been sustained where no direct language in a will is found to support them, but where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest. As said in the American and English Encyclopedia of Law (1st Ed., vol. 29, p. 382): "Implication may arise under a recital, reference of elliptical expression which necessarily implies something else as contemplated by the testator; from the form of the gift; or from a direction to do something which cannot be carried into effect without of necessity involving something else as a necessary consequence."

While, of course, conjecture and speculation cannot be indulged in to import into the will of a testator something which no language used by him warrants simply because he seems to have omitted something which it is reasonable to assume should have been provided for, still, when he has used language which can be reasonably interpreted to raise a devise, it should be so construed. Looking at this devise over, it would appear to be absurd to say that while the testator provided that in the event of death "without issue" of a contingent devisee a remainder over is to take effect, yet if the contingent devisee leave issue the devise over shall be defeated and without benefit to either the parent or child. To defeat attributing to the phrase such a purposeless effect, courts, as said in 1 Jarman on Wills, "will lay hold of slight circumstances to raise a gift in the child and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parents." And, as said in Underhill on Wills, § 468: "The court accordingly will raise an estate by implication in favor of a surviving child upon slight indication of an intention to that effect."

The presumption must be indulged in that the testator intended by his will to dispose of his entire estate, and, if possible, its provisions must be construed to prevent intestacy. It is apparent under our view of the trust provision that as the devise to the mother of these minors was of a contingent remainder, and neither the contingency upon which she was to take nor upon which the devise over was to pass occurred, the testator, unless a devise by implication was made to the issue of Mrs. Soule, died intestate as to the share which would have gone to her of the corpus of the property.

While the intention of the testator is to be reached from what he has said, this includes not only a determination of what he meant by the explicit use of language, but also the necessary implication arising from language which he has employed, though less explicit. This necessary implication when employed in raising a devise thereby "is called necessary because the court finds it so in order to answer the intention of the testator." Coryton v. Helyar, 2 Cox, 340, 348; Weed v. Scofield, 73 Conn. 670, 49 Atl. 22. A strong probable implication of a devise arising from the will is sufficient (Coale v. Smith, 4 Pa. 376), and the tendency of modern cases is rather to extend than narrow the rule of raising devises by implication (2 Powell on Devises, 211).

Now, if we assume that the words of limitation over on death "without issue" are insufficient of themselves to raise a gift by implication to the issue (though in Burton v. Black, 30 Ga. 638, the inference, it is said, may arise from the phrase itself in the limitation over), yet the rule is that this implication may be drawn from slight circumstances appearing from the will. Now as to the circumstances and considerations indicative of such intention: In article 3 of the will referred to in the trust provision of article 4 the testator provided for the payment of a number of legacies to relatives and friends, mainly the latter, and specified that, except in two instances, if any of the legatees should die before the testator, the legacies should go to the lineal descendants of such legatees. Subsequently in a codicil he provided that lapsed legacies should revert to his estate. It appears, therefore, that the testator knew exactly what language to apply when he wanted the legacies not to lapse on the death of the legatees and when he intended they should lapse and revert. It is to be assumed that the testator would be more solicitous for the welfare of his lineal descendants, as the issue of these beneficiaries would be, than for the lineal descendants of his friends, and as he provided in the first instance that the descendants of his friends should take so as to prevent a lapse of legacies, and knew how to change the provision so as to provide for a reversion of such legacies to his estate, it is a fair and just inference that in providing for the limitation over on the death of a beneficiary "without issue" that he intended the issue should take the share of a parent rather than that such share should revert to his estate, which would be the effect unless the phrase is to be construed as an implied devise to such issue. Aside from this we may look at the possible consequences which would result from a construction of the provisions of a will, for the purpose of determining whether, where the language is not explicit but open to construction, it was the intention of the testator that they should follow. All the beneficiaries were the lineal descendants of testator, and by the trust devise they are all treated with equal favor. Is it at all reasonable to say that, when the testator provided that a beneficiary should take an absolute estate on attaining the age of 30, in providing for a devise over if she should die "without issue," he had no devising purpose when referring to issue, but that such issue were only to take by right of representation a share in the portion of the trust property devised to their mother, as estate of which the testator had died intestate, and along with the surviving beneficiaries who might have actually attained the required age and already received their two-thirds of the entire trust estate, as is exactly the situation here? Or to take one of the illustrations of counsel for the minor appellants: If one of the daughters of testator had died before attaining the age of 30, leaving a numerous family, and the two other beneficiaries had attained 30, married, and died, never having had issue, but leaving their respective husbands surviving them, this situation would be presented: The children of the deceased beneficiary would divide $^{2}/_{27}$ of the trust fund among their number; their father would take $^{1}/_{27}$ thereof; and the remaining $^{8}/_{9}$ might pass forever away from the line of Francis Blake. Of course, it is insisted by respondents that this only presents a situation which the testator should have provided against but has omitted to do. But he has met this situation and provided against such consequences if a devise can be implied from the elliptical expression as to issue, and these circumstances and consequences afford circumstances which naturally support this as the implied intention of the testator.

In making his will the testator recognized that his daughters and grandchildren were the natural objects of his bounty, and he devised his estate to them, contingent, however, on their reaching a designated age. Having bequeathed the interest which they should severally take in his estate and designated when it should vest, he then proceeded to provide for its disposition over should the contingency upon which they should take not be met. In making such provision it naturally suggested itself to him that a beneficiary might die before attaining the age when she would be entitled to her share of his estate, but might leave children. It is to be assumed that the testator would have the same natural solicitude for the issue of the child as for the child herself, and, contemplating the possibility of issue, he provided that in the event of issue the share of the deceased beneficiary should not go over. This was a natural provision. Such issue would be his lineal descendants and naturally entitled to the same consideration from him as their parent. He recognized that in the event of issue their welfare would be a matter of solicitude on the part of their mother, and, having this in view, he provided that the share which would be hers if she attained the age of 30 years should go over only in the event of her dying without issue before she received her share of the estate. He had the possibility of issue in his mind, and, as he intended that the parent should not take unless she attained the age of 30 and intended that the devise over should not be effective if issue survived her, it seems the only reasonable inference to be deduced from the mention of issue at all that they were to take the share which otherwise their mother would have taken. As the devise over was to be ineffectual if the beneficiary died with issue, and the testator intended to dispose of all his estate, this is the only effect which can be given to the mention of issue, if any effect is to be given at all.

That this is the construction to be given to the mention of issue is well supported by the authorities where the effect of such mention was involved when found in the limitation over of a devise. Ex parte Rogers, 2 Madd. 449; Burton v. Black, 30 Ga. 638; Myrick v. Heard (C. C.) 31 Fed. 241; Wetter v. United Hydraulic Cotton Press Co., 75 Ga. 540; Sturges v. Cargill, 1 Sandf. Ch. (N. Y.) 318; 1 Jarman on Wills, 500; Bentley v. Kaufman, 12 Phila. (Pa.) 435; Still v. Spear, 3 Grant, Cas. (Pa.) 307; Kay v. Scates, 37 Pa. 31, 78 Am. Dec. 399; Beilstein v. Beilstein, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692; Kinsella v. Caffrey, 11 Ir. Chan. 154; Hauser v. Craft, 134 N. C. 319, 46 S. E. 756; Luthieullier v. Tracy, 3 Atk. 796.

Quotations from an English and a couple of American cases will suffice, as all the other authorities harmonize with them. In Ex parte Rogers, supra, the executor was directed by the will to place £1,000 in a funds, in trust to pay the interest thereof to a niece during her life, "and at her decease without child or children the principal sum, with all interest due thereon, to go and be divided between her surviving sisters equally." The court held that there was a devise by implication of the thousand pounds to the children of the niece, saying: "The residuary legatees cannot take because the residue only after payment of this legacy was given to them. It could not go to Hester Chambers, because she was only to take if M. D. Rogers died without children. As the testator did not mean to give it to the residuary legatees, and as he did not mean to die intestate as to any part of his property, to whom could it go but to

M. D. Rogers or her children? Why mention children if he did not mean them to take? The existence of children was considered as material; so much so that, if there were any, the legacy was not to go over. By necessary implication the children must be considered as entitled to the £1,000." In Beilstein v. Beilstein, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692, the devise over was in the event that the first taker died without family. It was held that there was a devise to her family by implication, if she left one; the court saying: "The devise over in case Gertie should 'die leaving no family' is an implied devise to the family if she should leave one. It is only if she does not that the devise over is to be effectual, and there is a necessary implication that in the unexpressed contingency of her leaving a family the estate is to go to them." In Burton v. Black, 30 Ga. 638, the rule is recognized that persons may take by inference, and that: "This inference is generally associated with a limitation over; the inference itself being that those are intended to take the property who are designated to prevent its going over. * * * If property is given to A. for life, and if he shall die without issue, then over to B., the issue of A. are the persons whose existence is to prevent the property from going over to B.; and the just inference is that the 'issue,' without further description, are intended to take." The case first quoted from (Ex parte Rogers) is commented on in Ranelagh v. Ranelagh, 12 Beav. 200, but we do not understand it to be there overruled. If it were, there are still other ample authorities cited by us to sustain our conclusion as to a devise by implication. In this latter case the judge deciding it declared his inability to answer the query contained in Ex parte Rogers, "Why mention children, if he (testator) did not mean them to take?"

While there are some authorities—we are only referred to three or four—holding that in a devise over "without issue" the word "issue" is a word of limitation, still the great weight of authority is to the contrary, and that as employed in the devise over under consideration here it is a word of purchase and implies a devise to the issue who thereby take as donees or purchasers under the will.

Those portions of the order appealed from are reversed, with instructions to the trial court upon the findings as made (eliminating therefrom what are inserted as findings 19 and 20, but which are conclusions of law as pointed out in the early part of this opinion) to enter a decree distributing directly to the appellants, the children of Ethel Pomroy Soule, as purchasers under the last will of Francis Blake, deceased, the corpus of the trust property involved in this controversy.

We concur: SHAW, J.; HENSHAW, J.; MELVIN, J.

(157 Cal. 503)

LOWE v. YOLO COUNTY CONSOL. WATER CO. (Sac. 1,684.)

(Supreme Court of California. March 30, 1910. Rehearing Denied April 28, 1910.)

1. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Though a water company is not liable for failure to deliver water to an applicant where there are prior applicants for all its water, refusal to allow it to show there were prior applicants, who were supplied, is harmless; the uncontradicted evidence showing that, after supplying them, there was sufficient water running to waste to supply the later applicant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193; Dec. Dig. § 1056.*]

2. EMINENT DOMAIN (§ 243*)—ESTOPPEL BY JUDGMENT.

The judgment for a water company in a proceeding by it to condemn a right of way for a ditch estops it, in an action against it for failure to deliver water on demand to one over whose land a strip for the right of way was condemned, to deny it was exercising purely a public use for the benefit of the landowners along the line of the ditch, it being only on the theory that it was exercising a public use that it could maintain such proceeding and recover such judgment; its complaint therein describing the public use for which the right of way was sought, as one for the supplying of the farming neighborhood with water for irrigation purposes; and issue on such matter having been joined and determined in such proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 627–629, 700; Dec. Dig. § 243;* Judgment, Cent. Dig. § 1306.]

3. WATERS AND WATER COURSES (§ 263*)—TO GROWING CROPS—ALFALFA.

As land prepared for alfalfa will produce several crops each year for several years without further care, except in the way of irrigation, the measure of damages of one who just after preparing his land for alfalfa, and cutting the first crop, was wrongfully denied water for irrigation by a water company, whereby he lost the two additional crops, which, with irrigation, the land would have produced that year, and a reseeding was necessary, is the value of the two crops lost, less cost of irrigation and cutting, plus cost of reseeding.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 263.*]

4. CORPORATIONS (§ 498*) — LIABILITY FOR EXEMPLARY DAMAGES—ACTS OF OFFICERS.

A corporation may, because of the acts of those whom it has placed in charge of its affairs, be held guilty of malice or oppression, making it liable, under Civ. Code, § 3294, for exemplary damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1909; Dec. Dig. § 498.*]

5. WATERS AND WATER COURSES (§ 263*)—EXEMPLARY DAMAGES—MALICE AND OPPRESSION—EVIDENCE.

The conclusion that defendant water company was guilty of malice and oppression in failing to furnish water to plaintiff for irrigation, making it liable for exemplary damages, is authorized by evidence that its general manager told him not to put in a side gate to receive water from its ditch; that its directors had notified him to tell plaintiff that they would not give him any water for that land, and that plaintiff knew why; that its president told him its directors were bitter towards him because of the condemnation proceeding for its right of way, and that it would furnish him no water till plaintiff paid back the damages he received in that proceeding, and while he was occupying with his ditch a portion of its right of way; and that no attention was paid to his written demand for water which he left with the person in charge of its office, at the same time making tender of water rates, as defendant had, and must have known it had, no right to insist on such matters as a condition precedent to furnishing water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 263.*]

6. EVIDENCE (§ 244*)—STATEMENTS OF OFFICERS OF CORPORATION.

Statements of the general manager and the president of a water company to an applicant for water, as to the reasons for refusing him water, made in connection with such refusal, are admissible to show the motive of the company, on the question of exemplary damages; as such officers are to be presumed, prima facie at least, to have been acting in accord with the desire of its board of directors.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. § 244.*]

7. TRIAL (§ 96*) — MOTION TO STRIKE EVIDENCE.

The motion to strike out, being directed to the whole statement introduced in evidence, which included unobjectionable matter, was properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

8. WATERS AND WATER COURSES (§ 254*)—IRRIGATION COMPANIES—DEMAND FOR WATER.

The leaving of a written demand for water at the office of a water company, during office hours, with the person in charge thereof, is a sufficient compliance with Act March 12, 1885 (St. 1885, c. 115) § 10, as to demand for water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 254.*]

9. WATERS AND WATER COURSES (§ 263*)—WATER COMPANIES — REFUSAL OF WATER — SUFFICIENCY OF DEMAND—RIGHT TO QUESTION.

The avowed position of a water company, expressed through its manager and president, to an applicant for water, being that it would not supply him, even if he paid the charges, and his subsequent demand left at its office, describing with certainty land planted in alfalfa, for irrigation of which water was demanded, and offering to pay, in addition to the amount therewith tendered, any further sum necessary, having been simply ignored, the company, in an action against it for damages for not furnishing the water, may not object to the sufficiency of demand or tender.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 263.*]

10. TRIAL (§ 252*)—WATER COMPANIES—DUTY TO FURNISH WATER—INSTRUCTIONS.

An instruction, in an action against a water company for refusal to furnish an applicant with water, that before it was required to deliver water to an applicant he must make necessary provision for receiving it is properly refused; its refusal to furnish water not having been based on any such ground, and it appearing that the applicant was about to put in his side gate for diversion of the water when notified by defendant's general manager not to put it in, because it would not furnish him water.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

11. WATERS AND WATER COURSES (§ 263*)—WATER COMPANIES — REFUSAL TO FURNISH WATER FOR IRRIGATION—DEFENSES.

It is no defense to an action against a water company for refusal to furnish an applicant water for irrigation, that his ditch for taking water from its ditch be in part on its right of way, if it be there with its consent, or if its refusal was not based on such ground.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 263.*]

In Bank. Appeal from Superior Court, Yolo County; H. M. Albery, Judge.

Action by O. A. Lowe against the Yolo County Consolidated Water Company. Judgment for plaintiff, and new trial denied. Defendant appeals. Affirmed.

A. L. Shinn and N. A. Hawkins, for appellant. A. C. Huston, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a new trial in an action for damages for failure on the part of defendant to deliver to plaintiff water for the irrigation of 42 acres of land in Yolo county for the season of 1906. There was a trial by jury, and plaintiff had verdict and judgment for $1,099, consisting of $599 actual damages and $500 exemplary damages. There was an appeal by defendant from the judgment on the judgment roll alone. On that appeal the judgment was affirmed by the District Court of Appeal of the Third appellate district, and an application for rehearing in this court was denied. See Lowe v. Yolo County, etc., Co., 8 Cal. App. 167, 96 Pac. 379.

There appears to be some difference between counsel as to the effect of the decision on the appeal from the judgment. The only questions involved on that appeal related to the sufficiency of the complaint and the right of the plaintiff, in view of those allegations, to exemplary damages. It was held that the complaint sufficiently stated a cause of action for damages against one who had appropriated waters for sale, rental, and distribution to the general public, and that the allegations of the complaint were in accord with the theory that defendant was such an appropriator, and governed by the provisions of the act to regulate and control the sale, rental, and distribution of appropriated waters in this state, approved March 12, 1885, St. 1885, p. 95. It was further held that section 3294 of the Civil Code, providing for the recovery of punitive or exemplary damages in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, is applicable in an action for damages for failure on the part of such an appropriator to furnish water when demanded in accord with the provisions of said act, and that the allegations of the complaint in this respect were sufficient to bring the case within the provisions of such section. These were the only questions decided on such appeal, as we read the opinion of the District Court of Appeal.

1. We shall accept the admission of learned counsel for defendant, contained in their

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

closing brief, that defendant "never seriously contended that it did not exercise a public use, or that it was not amenable to the act of 1885." So far as this plaintiff is concerned, defendant would appear to be estopped to claim otherwise, in view of the condemnation proceedings on its behalf against plaintiff, whereby, upon the theory that it was exercising such a use for the benefit of a specified district including plaintiff's land, it obtained a decree of condemnation of a strip of said land of plaintiff for the very ditch from which he seeks to be served with water.

Section 10 of said act of 1885 requires every such appropriator for sale, rental, or distribution, "upon demand therefor, and tender in money, of such established rates, * * * to sell, rent, or distribute such water to such inhabitants at the established rates to the extent of the actual supply of such appropriated waters, * * * for such purposes," and provides that, if such appropriator, "having water for such use," refuses for five days to comply with the demand "to the extent of his or its reasonable ability so to do," he or it shall be liable in damages to the extent of the actual injury sustained by the party making such demand.

Defendant's real claim now is that it was not obligated to comply with plaintiff's demand for water if all the water available was needed for the purpose of supplying prior users, in other words, that plaintiff could be entitled to water from this ditch only in the contingency that there was water enough to supply both him and all others whom defendant had previously been and was then serving with water for the irrigation of their lands. Although by two of its instructions the trial court apparently adopted this theory of defendant, instructing the jury substantially that the law gives to the first user of water a preferred right as against those subsequently demanding water, and that the defendant was under no obligation to deliver water to plaintiff unless it had sufficient to supply all previous takers and also an excess which was available for plaintiff's use, it sustained objections to all evidence offered by defendant for the purpose of showing that there were prior users of the water for irrigation purposes, who applied for the water for the year 1906.

This contention is rendered immaterial by the uncontradicted evidence in the case. It was shown that at the time plaintiff demanded the water from the defendant, and for a sufficient time thereafter to have satisfied that demand, sufficient water to irrigate plaintiff's land was flowing in the defendant's ditch at plaintiff's intake therefrom to have fully irrigated plaintiff's lands, and that this water was not used by other customers of defendant, but was allowed by the defendant to run into Putah creek at the lower end of its ditch, and thus go to waste. There is no substantial evidence in contradiction of these facts. There was never any pretense that all those claiming to have preferential rights were not supplied with the water to which they were entitled. The offers of evidence made in this behalf included the offer to show not only that they had made application for the water, but also that they had received it. Notwithstanding such use by all such parties, the evidence shows without conflict, as we read the record, that there was still sufficient water running to waste to have satisfied the demands of plaintiff. To this surplus, after the demands of the prior users had been satisfied, plaintiff was certainly entitled. The refusal to admit the evidence offered was, therefore, harmless error, if error at all.

2. We are satisfied that the judgment in the condemnation proceeding brought by defendant against plaintiff was admissible in evidence, and that its effect was to estop defendant from denying that, so far as plaintiff was concerned, it was exercising purely a public use for the benefit of the landowners along the line of the ditch constructed in part over plaintiff's land. It was only upon the theory that it was exercising a public use that defendant could maintain the action and recover such judgment, and the particular public use for which the right of way for the ditch was sought was described in the complaint in such action as being one for the supplying of the farming neighborhood of Winters, which includes plaintiff's land, with water for irrigation purposes. Issue was joined upon both these matters, and those issues were litigated and determined in that case. In his complaint in this action, plaintiff alleged this estoppel by judgment. In view of the estoppel created by this judgment, if the court erred in refusing to admit in evidence defendant's articles of incorporation, the error was without prejudice.

3. We find no error in the rulings of the court in the admission of evidence relative to the amount of actual damage suffered by plaintiff by reason of the refusal to furnish water, nor any force in the claim that the evidence was insufficient to sustain the conclusion of the jury that the amount of this actual damage was $599. According to plaintiff's evidence the facts were as follows: He had seeded his 42-acre tract to alfalfa, and at the time he needed and demanded water—July 6, 1906—had just cut his first crop therefrom. The first crop ran about one ton to the acre. The cost of putting the land in alfalfa was $10 per acre. This is what plaintiff meant by saying that the "stand of clover" with the first crop thus cut was worth $10 per acre, as is shown by his cross-examination. It would have produced two more crops of hay during the season of 1906 if properly irrigated. Hay was worth a minimum of $5 per ton, cut and in the field. It would not cost to exceed $1 an acre for each cutting, and $25 for each watering of the whole land. By reason of the failure to

obtain water, no crop was obtained during the year 1906, except the crop that was cut prior to the demand. Three-fourths of the alfalfa died for want of water, and the evidence was such as to warrant the conclusion that a reseeding of the whole piece would be necessary to put it in the condition it was in at the time water was refused. There was a conflict of evidence as to some of these matters, especially as to the probable yield of the alfalfa stand per acre, and also as to the cost of reseeding the land, but we must here look at the evidence in the light most favorable to plaintiff. Upon these facts the jury would have been warranted in concluding that the cost of reseeding the 42 acres would be $420, and that the net profits of the alfalfa stand for the season of 1906, exclusive of the first crop, would have been $286, of all of which plaintiff was deprived by the failure of defendant to furnish water as demanded. This would make an aggregate of $706, actual damages, and the verdict was for $599 actual damages. We are of the opinion that these elements constitute the proper measure of damages in a case of this character. Land prepared for alfalfa will produce several crops each year for several years, without further care except in the way of irrigation. At the time of the refusal to furnish water this land had just been so prepared, and with the requisite water would have produced crops for several years to come. Its capacity in this regard was wholly destroyed by reason of defendant's wrongful act. The case is practically that of the destruction of a meadow. In Bradley v. Iowa Central Ry. Co., 111 Iowa, 562, 82 N. W. 996, the question of the proper measure of damages in such a case was discussed, and the court held that the measure of damages is the cost of reseeding and the rental value until restored, finding a clear distinction between such case and that of the destruction of growing trees. As was substantially said, the purpose of the law where one has been injured by the tort of another is to reimburse the sufferer for his loss, and the cost of restoration together with the value of the use of the meadow during the time lost can be accurately ascertained in the case of a meadow, and shows the amount of loss occasioned by the wrongful act as clearly and correctly as any method of which we can conceive. The cost of restoration, together with the value of the use of the meadow during the time lost, in this case the value of the profits plaintiff would have made from the crop during the season of 1906, in our opinion constitute the damage he must be held to have suffered. See, also, 4 Sutherland on Damages (4th Ed.) p. 3001. Clearly such a rule as to the measure of damage does not result in awarding double damages. All of the evidence introduced by plaintiff as to the amount of damage was directed to these two elements, and was properly admitted on the issue of damages.

4. As we have said, the decision on the appeal from the judgment establishes that section 3294 of the Civil Code, relative to exemplary damages, is applicable in a case of this character. It is urged that the evidence was insufficient to warrant the recovery of such damages in this case. It is not disputed, of course, that a corporation may be held guilty of malice or oppression by reason of acts of those whom it has placed in charge of its affairs and who "constitute, to all purposes of dealing with others, the corporation." See Maynard v. F. F. Ins. Co., 34 Cal. 54, 91 Am. Dec. 672. The claim of defendant in this behalf is necessarily based on the further claim that certain evidence given of declarations made to plaintiff by both the general manager and the president of defendant must be disregarded, for that evidence, taken in connection with the absolute refusal and failure to furnish any water, amply warrants a conclusion of malice and oppression. Plaintiff had prepared his field, and was making his preparations to receive the water therefor. He had spoken to defendant's general manager several times about the water, and had been given no reason to doubt that it would be ready for him when needed. He was about to put a side gate in the ditch for the purpose of receiving the water, when defendant's general manager told him not to put it in; that the board of directors had notified him to notify plaintiff that they would not give him any water for that particular piece of land. Plaintiff asked Mr. Gregory, the manager, for the reason, and Gregory replied that plaintiff knew the reason, and, when asked if he thought that was right, said: "I don't know anything about it; I was notified to notify you you couldn't have any water." Plaintiff then asked the president of the corporation why water would not be furnished, and was informed by him that some of the directors were bitter towards him on account of "that lawsuit," and that the directors had decided not to give him any water until he had paid back the money paid him under the condemnation decree as damages. Within two or three days thereafter, viz., on July 6, 1906, he went with his attorney to the office of the defendant company, and presented to the person in charge thereof, one L. H. Stephens, the accountant of defendant, a written demand for water for irrigation of the land. He then made a tender of $100 for the water, and offered to pay such other sums as might be necessary. No objection was made to the sufficiency of either written demand or tender. They were simply ignored and no water was ever furnished. It must be assumed that the fact of demand and tender were made known to the directors of defendant. The evidence of the general manager and the president in regard to the reasons assigned for the refusal of water did not present a materially different situation. The testimony of the president and general manager

introduced by defendant showed that it was claimed that plaintiff was occupying a portion of the defendant's right of way with his own ditch, and that they told plaintiff that they would give him no water while he had that ditch there. The president further testified that he told plaintiff that it would be right and proper for him to pay back to the company the cost he had put them to in the matter of procuring the right of way. There was not prior to this action any pretense that defendant did not have sufficient water to supply plaintiff, and the defendant failed to furnish the water when subsequently formally demanded without giving any reasons for such refusal. It is obvious that defendant had no right whatever to insist upon a compliance by plaintiff with either of the conditions stated as a condition precedent to furnishing him with water, and must have known that it had no such right. If he was trespassing upon the right of way, appropriate proceedings would lie therefor, and the money that he had been awarded in the condemnation proceedings was his own, awarded him by judicial decree. As said before, there was in all this clearly sufficient support for the conclusion that the defendant was guilty of malice and oppression.

It is urged, however, that the declarations of the general manager and president to plaintiff were not admissible. We think that there can be no question that the statements of these officers as to the reason for refusing water, made in connection with such refusal, were admissible for the purpose of showing the motive of the corporation. As has often been said, and as is necessarily obvious, a corporation can speak only through the acts and conduct of those whom the persons composing it have put in charge of its business. Such officers of the corporation as the president and general manager, when dealing with members of the public in matters pertaining to the ordinary business of the corporation, and acting within the apparent scope of their authority, must necessarily be presumed, prima facie at least, to be acting in accord with the desire of the board of directors, who as said in Maynard v. F. F. Ins. Co., supra, are deemed to be the mind and soul of the corporation entity, and whose motives and intentions are to be imputed to the corporation itself. Boiled down, the statement attributed by plaintiff to the president was simply that the defendant would not furnish plaintiff with water unless he paid back to defendant an amount that he had received from it as damages for the right of way, those managing the corporation believing that it was inequitable and unfair for him to retain it. Here was simply a statement by the official head of defendant to an applicant for water as to the condition upon which it would be furnished to him by defendant. It is only fair to assume that it was authorized by the defendant. See 4 Thompson on Corp. § 4656; Bullock v. Consumers', etc., Co., 31 Pac. 367, 370; 1 Clark & Marshall, Pri. Corp. § 239. The statement attributed to the general manager was no more than an absolute refusal by the officer in charge of the business of defendant to furnish water, professedly made by authority of the directors. It may be that the portion of the statement attributed to the president, to the effect that "Uncle Larry and Uncle Joe are very bitter towards you on account of that lawsuit" was objectionable, but the motion to strike out was directed to the whole statement, which included unobjectionable matter, and the motion was therefore properly denied. There was no serious pretense on the trial that either the president or general manager was not acting in accord with the wish of the board of directors. It must be assumed that the formal written application of plaintiff for water, which had been left at the office of the company with the person in charge thereof, was brought to the attention of the board of directors, and that they were made fully aware by the president of his refusal to furnish water except upon the condition stated. See Balfour v. Fresno Canal, etc., Co., 123 Cal. 397, 55 Pac. 1062.

5. Numerous other points for reversal are made by counsel for defendant. Many of them are substantially disposed of by what we have already said, and it will be unnecessary to enumerate them here. Others are not so disposed of, and we will briefly refer to the most important of them.

We cannot doubt that the leaving of the written demand for water at the office of the defendant corporation during office hours, with the person in charge thereof, was a sufficient compliance with the requirements of section 10 of the act of 1885 as to demand. There was never prior to this action any claim that the demand was in any way uncertain or insufficient, or that the tender of money for water was in any way insufficient. The avowed position of the defendant expressed through both its general manager and president was that it would not furnish plaintiff with any water, even if he paid the amount legally chargeable therefor. The written notice subsequently presented described with certainty land that had been "planted in alfalfa," and for the irrigation of which water was thereby demanded. In it, plaintiff further offered to pay, in addition to the $100 tendered, such further and other sums as might be necessary. As said before, this demand and tender were simply ignored, without further objection or reason of any nature ever being given. We are satisfied that defendant cannot now be heard to object to the sufficiency of either demand or tender.

We do not read the record as indicating that defendant offered or attempted to show that its ditch was not completed to an extent sufficient to enable it to furnish water therefrom. There is, therefore, nothing in its contention that it should have been allowed to show this.

Under the circumstances of this case, the court did not err in refusing to instruct the jury that, before the defendant was required to deliver water to a customer, such customer must make all necessary provision for receiving it, including a suitable method of diverting water from the main canal. Defendant's refusal to furnish was not based on any such ground. It was established without conflict that plaintiff was about to put in his side gate for the diversion of the water when he was notified by defendant's general manager that he need not put it in, for the defendant would not furnish him with water.

We find no error in the modification by the court of defendant's requested instruction 10. The fact that plaintiff's ditch for the taking of water from defendant's ditch may have been in part on defendant's right of way certainly constituted no defense to this action if it was there with the consent of defendant, or if defendant's refusal to furnish water was not based on that ground. The instruction, as modified, left these questions with the jury, and was certainly as favorable to defendant as the law warranted.

We have been unable to find in the evidence contained in the record any foundation for defendant's requested instruction 12.

There is no other point made that, in our opinion, requires notice.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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NICHOLL v. KOSTER, Auditor. (S. F. 5,326.)

(Supreme Court of California. March 28, 1910.)

1. STATUTES (§ 94*)—"MUNICIPAL AFFAIRS"—POLICE POWER—GENERAL LAWS.

Act March 8, 1909 (St. 1909, c. 133), providing for the care and custody of children who are likely to develop criminal tendencies, and giving additional powers to the superior courts in respect thereof, provides for an exercise of the police powers of the state through the judicial department, and its subject-matter is not embraced within "municipal affairs" as used in Const. art. 11, § 6, providing that charters of cities and towns except in municipal affairs shall be subject to and controlled by general laws, though the functions of the particular extension of the system may be exercised exclusively within incorporated cities having a freeholders' charter.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 94.*

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

2. COURTS (§ 125*)—JURISDICTION—POWER OF LEGISLATURE.

Const. art. 6, § 1, provides that the judicial power of the state is vested in various courts, including the superior court and such other inferior courts as the Legislature may establish in any city or town or city and county. Section 5 provides that the superior court shall have jurisdiction of all such special cases and proceedings as are not otherwise provided for. *Held*, that the Legislature has sole authority over the jurisdiction and powers of the superior and inferior courts of the state, with the exception of the police courts of cities which under Const. art. 11, § 8½, may be established by freeholders' charters of cities; and hence the freeholders' charter of San Francisco does not control Act March 8, 1909 (St. 1909, c. 133), providing for the custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, and giving additional jurisdiction to the superior court in respect thereof, prescribing the necessary procedure, and providing the means of exercising and enforcing that jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 125.*]

3. MUNICIPAL CORPORATIONS (§ 79*)—SPECIAL CHARTERS—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 6, providing that municipal charters prevail over general laws in municipal affairs, relates only to cities and towns and not to San Francisco, which is a consolidated city and county, partaking of the nature of both, except in so far as that subdivision of the state possesses and exercises municipal functions and constitutes a city as distinguished from a county; the power of the Legislature to enact general laws for the government of counties, including San Francisco, remaining unaffected by the section.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 79.*]

4. COURTS (§ 42*)—JURISDICTION—POWER OF LEGISLATURE.

Const. art. 11, § 8½, provides that, where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed by it, under section 8, providing for freeholders' charters, to provide for the manner in which, the time at which, and the terms for which, the several county officers shall be elected or appointed, for their compensation, and the number and compensation of their deputies. *Held*, that the freeholders' charter of the consolidated city and county of San Francisco, not providing for compensation of probation officers of the juvenile court and their assistants, provided for by Act March 8, 1909 (St. 1909, c. 133), who are a part of the machinery of the judicial system of the state, and officers of the superior court provided to enable the court to effectually exercise the special jurisdiction given by the act, the city and county are bound by the provisions of that general act, making such officers' compensation payable from the county treasury.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 42.*]

5. COUNTIES (§ 61*) — OFFICERS — POWER OF LEGISLATURE.

Even if the probation officers and assistants be considered deputy sheriffs, yet, under Const. art. 11, § 5, conferring upon the Legislature plenary power to prescribe the duties of sheriffs and other county officers and to create other county offices and provide for the appointment of persons thereto as public convenience may require, in addition to the other officers specifically named therein, and in view of section 8½, which does not provide that the duties of the county officers may be fixed by the charter of the consolidated city and county, the Legislature could create a new county office for performance of the duties of the probation officers, which are different from those usually imposed on sheriffs, and provide for the appointment of persons to perform the duties thereof who would be county officers, and, in the absence of any provision in the charter creating such an office or providing compensation therefor, could require such officers' compensation to be paid out of the county treasury.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 17.*]

6. CONSTITUTIONAL LAW (§ 74*) — DISTRIBUTION OF GOVERNMENTAL FUNCTIONS—CONSTRUCTION OF CONSTITUTION.

Const. art. 3, providing that no person charged with the exercise of powers properly belonging to the executive, judicial, or legislative department shall exercise any functions appertaining to either of the others, except as expressly permitted by the Constitution, refers to the respective departments of the state government and not to local, county, and municipal governments which the Legislature might establish; and a superior judge, though he be classed as a person charged with the exercise of powers belonging to the judicial department of the state, in appointing probation officers, as expressly provided by Act March 8, 1909 (St. 1909, c. 133), which officers are not officers of the state government, but minor officers of the local county government, does not exercise functions intended to be described in the Constitution as appertaining to the executive department of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. § 74.*]

7. COURTS (§ 55*)—JURISDICTION—INCIDENTAL POWERS.

The appointment of persons to discharge acts necessary to be done to enable a court to transact its judicial work in an orderly and expeditious manner, or necessary or even merely convenient to the exercise of its jurisdiction, has always been recognized as a power incidental to the judicial office; and if the Legislature or the Constitution should fail to provide such persons, the court, invested with jurisdiction, would have power to appoint such assistants as might be required.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 55.*]

In Bank. Mandamus by William H. Nicholl against John A. Koster, Auditor of the City and County of San Francisco. Writ granted.

Garret W. McEnerney and J. R. Pringle, for petitioner. Francis V. Keesling, for respondent auditor. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., for respondent city and county of San Francisco.

SHAW, J. This is an original action in this court in mandamus, to compel the defendant, as auditor of the city and county of San Francisco, to approve and allow the demand of the plaintiff for $125, alleged to be due and payable to him out of the treasury of said city and county, for his salary for the month of April, 1909, as assistant probation officer, under the act approved March 8, 1909. St. 1909, p. 213. This act provides for the care, custody, and maintenance of dependent and delinquent children, defines such children, gives to the superior court of the county jurisdiction to determine whether or not a child is "delinquent or dependent" as defined therein, and to commit such children to a detention home, or to the custody of some reputable person, establishes the office of "probation officer" in every county, and of "assistant probation officers" in some counties, nine being allowed in San Francisco, authorizes the judge of the superior court exercising such jurisdiction to appoint such officers, and fixes the salary of an assistant probation officer in San Francisco at $125 per month, declaring that the same shall "be paid out of the county treasury of the county for which they are appointed, respectively, in the same manner as the salaries of county officers."

The defendant claims that the provision making the salaries of the probation officers and their assistants payable out of the county treasury is invalid when applied to the consolidated city and county of San Francisco. This claim is based on two propositions: First. That the compensation of the officers of the city and county is a municipal affair, which, by section 6, art. 11, of the Constitution, is governed exclusively by the charter of the city and county, and that the charter has provided fully for such compensation; wherefore the act is not operative upon that point with respect to probation officers in San Francisco. Second, that under the last clause of subdivision 4, § 8½, art. 11, of the Constitution, a special city charter may provide for the election, appointment, and compensation of all officers and deputies, and that, as the charter has made such provision, the general law cannot apply to San Francisco. It is also claimed that the part of the act giving power to the judge of the superior court to appoint the probation officers is void, as giving executive power to a member of the judicial department of the state.

The main purpose of the act is to provide for the care and custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, in order to have them trained to good habits and correct principles. To accomplish this it gives additional jurisdiction and power to the superior courts of the state and provides the officers necessary for the execution of that jurisdiction and power. It is an exercise of the police powers of the state, through the judicial department. It is a matter which concerns the whole state as much as any other extension of the judicial system. These have been held to be matters of state policy and not "municipal affairs," within the meaning of that term in the Constitution, although the functions of the particular extension of the system may be exercised exclusively within incorporated cities having a freeholders' charter. Graham v. Fresno, 151 Cal. 470, 91 Pac. 147; Fleming v. Hance, 153 Cal. 165, 94 Pac. 620; Robert v. Police Court, 148 Cal. 136, 82 Pac. 838; Jackson v. Baehr, 138 Cal. 270, 71

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pac. 167. Under section 1, art. 6, of the Constitution, the judicial power of the state is vested in the various courts there named, and such other inferior courts as the Legislature may establish in any city or town or city and county. By section 5 of the same article, it is declared that the superior courts shall have jurisdiction of all such special cases and proceedings as are not otherwise provided for. The effect of the decisions last cited is that the Legislature has sole authority over the matter of the jurisdiction and powers of the superior and inferior courts of the state, with the single exception of the police courts of cities, which, under section 8½ of article 11, may be established by the freeholders' charter of such cities. It is perfectly obvious, therefore, that the San Francisco charter does not control the provisions of this general law, so far as the law gives additional jurisdiction to the superior court, prescribes the necessary procedure and provides the means of exercising and enforcing that jurisdiction.

The superior courts are established in each of the counties of the state. The consolidated city and county of San Francisco partakes of the nature of a city and a county. It has the powers and performs the functions of both. The section of the Constitution declaring that municipal charters prevail over general laws in municipal affairs relates solely to cities and towns. It has no application to San Francisco, except in so far as that subdivision of the state possesses and exercises municipal functions and constitutes a city, as distinguished from a county. With respect to the powers and functions of a county exercised by San Francisco, as in any other county of the state, that section has no concern. The power of the Legislature to enact general laws for the government of counties, as such, including San Francisco, remains unaffected and unimpaired by that section. It does not make the charter of San Francisco paramount to such laws as to county affairs. The only section of the Constitution which abridges the power of the Legislature in this respect over counties is section 8½, above mentioned. The last clause of that sections is as follows: "Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under said section eight of said article eleven, to provide for the manner in which, the times at which, and the terms for which the several county officers shall be elected or appointed, for their compensation, and for the number of deputies that each shall have, and for the compensation payable to each of such deputies."

In Fleming v. Hance, supra, the court, speaking with reference to legislative power to establish inferior courts, said: "It is thoroughly settled by the decisions of this court that the Legislature had the power, prior to the constitutional amendments in question, not only to establish police or other inferior courts in municipalities, but to provide for the payment of the salaries and office rent of the judges or justices of such courts out of the county treasury. Jenks v. Council, 58 Cal. 576; Bishop v. Council, 58 Cal. 572; Coggins v. City of Sacramento, 59 Cal. 599. It would seem to follow from the views above expressed that in cities governed by charters which have made no provisions for police courts, or other inferior courts exercising similar functions, the Legislature may still, notwithstanding the adoption of section 8½ and the amendment of section 6 of article 11 of the Constitution, provide that the city must pay the salaries of the police judges or city justices created by general law." The principle applied in this passage to inferior courts established by general laws, under section 1 of article 6 of the Constitution, is equally applicable to laws giving additional jurisdiction to superior courts, such as that here involved. The San Francisco municipal charter makes no provision for the compensation of probation officers and their assistants. They constitute a part of the machinery of the judicial system of the state, officers of the superior court provided to enable that court to effectually exercise the special jurisdiction given by the act, concerning which the charter does not speak. Conceding that, if their compensation was provided for in the charter, its provisions would prevail over the provisions of the act, both as to the amount and as to the manner of payment, the necessary conclusion, in the absence of such charter provisions, in view of this principle, is that the act is in force, and that the city and county is bound by its provisions relating to the compensation of the probation officers of the so-called "juvenile court."

The defendant contends that these officers are nothing more nor less than deputy sheriffs, and that as the charter provides for the number and compensation of such deputies, and for an increase in their number when necessary, the attempt of the Legislature to add to their number by the device of calling the additional deputies probation officers is unavailing and without effect. But section 5 of article 11 confers upon the Legislature plenary power to prescribe the duties of sheriffs and other county officers. Section 8½ does not say that the duties of the county officers may be fixed by the charter of a consolidated city and county. That power still remains with the Legislature. The duties to be performed by these probation officers are in some respects not unlike those prescribed for sheriffs by the previous laws on the subject. He was required to "obey all lawful orders and directions of all courts held within his county." Pol. Code, § 4157; St. 1907, p. 402, § 4157. Perhaps the juvenile court jurisdiction of the superior court could have been carried on within the city and county of San Francisco by requiring the sheriff and his deputies to execute its orders and processes in that behalf. But these duties are of a character not before imposed upon sheriffs. The probation officer is required to inquire into the antecedents, character, family, history, environments, and cause of delinquency of every child brought before the court, to be present in court and represent the interests of such child upon the hearing as to its being a delinquent, to give the court such information and assistance upon that hearing as the court may require, to take charge of the child before and after the hearing if so ordered, and, in some circumstances, he is required to act in a capacity similar to that of a guardian of such child. Section 5 of article 11 gives the Legislature power to create such other county offices and provide for the appointment of persons thereto, as public convenience may require, in addition to the officers specifically named therein. For the performance of these new duties, of a character different from those usually imposed on sheriffs, the Legislature undoubtedly had the power, under this constitutional provision, to create a new county office, and provide for the appointment of persons to perform the duties thereof who would be county officers. And as the city charter neither creates such an office, prescribes the duties thereof, nor provides any compensation for the persons who perform the same, there is nothing in its provisions which can in any way affect the validity and force of the declaration of the act that such compensation must be paid out of the county treasury. The treasury of the city and county of San Francisco is, for that purpose, a county treasury.

The remaining objection is that the appointment of these probation officers is an act of the executive department of the state, and that the judge of the superior court, being an officer of the judicial department of the state, cannot be vested with power to exercise functions belonging to the executive department. Article 3 of the Constitution provides that "no person charged with the exercise of powers properly belonging to one of those departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." In People v. Provines, 34 Cal. 525, this court decided that this provision of the former Constitution, which is in the identical language above given, referred to the respective departments of the state government, and not to the local county and municipal governments which the Legislature might establish. The superior court is one of the courts of the state, and the judge of that court may perhaps be classed as a person charged with the exercise of powers belonging to the judicial department of the state. But the probation officers in question are not officers of the state government. They are minor officers of the local county government. The appointment of such officers is not necessarily a part of the duties or functions of the executive department of the state government, according to the system outlined in the Constitution. Perhaps the Legislature, after creating such county offices, could authorize the state executive to appoint persons to fill them, but it is no part of the constitutional scheme of government that such appointments should be made by state officials. The judge of the superior court, when he appoints these probation officers, does not exercise functions intended to be described in the Constitution as those appertaining to the executive department of the state. It is apparent that the act does not conflict with this provision of the Constitution.

Furthermore, the appointment of persons to discharge duties of this character, acts necessary to be done to enable a court to transact its judicial work in an orderly and expeditious manner, or necessary or even merely convenient to the exercise of its jurisdiction, has always been recognized as a power incidental to the judicial office. The Legislature may indeed provide for the appointment of such assistants of the court by the executive department, or by election of the people, and thus relieve the court of the burden of choosing such persons. But if the Legislature or the Constitution should fail to provide such persons, a court invested with jurisdiction would have all the powers necessary to its convenient exercise, and could appoint such assistants as might be required. And doubtless the Legislature can authorize the court to appoint such assistants. Instances are not wanting. The Supreme Court is authorized to appoint bailiffs, secretaries, phonographic reporters, a libarian, and janitors. Code Civ. Proc. § 265; Pol. Code, §§ 769, 2314; Code Civ. Proc. § 47. The district courts of appeal are authorized to appoint a stenographer and a bailiff. Pol. Code, § 758. These powers are not given to the courts by the Constitution. They have never been considered a part of the functions of the executive department of the state. The judges of the superior courts appoint receivers, referees, phonographic reporters, and guardians, each of whom may be said to be assistants of the court, necessary to the exercise of its jurisdiction. The functions of these probation officers are in some respects similar to those of guardians, in others like those of a bailiff or sheriff, and in others not unlike those of an attorney. The appointment of persons to discharge such duties is clearly not a necessary part of the functions of the executive department of the state government.

Indeed, it may be said that the selection of officers is not, per se, abstractly speaking, an exclusive function of the executive department. It may be done by the people by election. The executive department has power to appoint the executive officers pertaining thereto, if no provision for their election is made, and in that case such appointment will be a part of the duties of that department. But if assistants are required for the judicial or legislative departments, and no provision is made for their election, there is nothing in the Constitution that can properly be construed to require that the appointment of such assistants must be committed to the executive department. There is much force in the concurring opinion of Justice Sawyer in People v. Provines, supra, page 541 of 34 Cal., that the appointment of an officer is not strictly or essentially either a legislative, executive, or judicial act, within the meaning of article 3 of the Constitution.

For the reasons here given, we are of the opinion that the appointment of the probation officers in the city and county of San Francisco was lawfully delegated to the judge of the superior court, and that the salary provided by the act is lawfully payable out of the treasury of the city and county.

Let the writ issue as prayed for.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

(157 Cal. 515)

UNITED REAL ESTATE & TRUST CO. v. BARNES, Superintendent of Streets.

(L. A. 2,457.)

(Supreme Court of California. March 30, 1910.)

Appeal and Error (§ 781*)—Questions Reviewable—Moot Questions.

An appeal from a judgment dismissing a suit to enjoin the sale of land for a delinquent assessment taken after payment under protest to avoid a sale will not be dismissed as presenting a moot question, the questions whether on the reversal of the judgment the superior court may under its equity powers order a refund of the money paid under protest, and as to the liability of the sureties on the undertaking on the issuance of the temporary injunction, involve the merits.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 781.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the United Real Estate & Trust Company against T. L. Barnes, as Superintendent of Streets of the City of San Diego. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal denied.

Wadham & Pritchard, for appellant. Ward & Wells, for respondent.

BEATTY, C. J. Plaintiff sought to enjoin the defendant from selling its lot in San Diego to satisfy a delinquent assessment for opening a street through an assessment district created by resolution of the city council. The ground of the action was the alleged fraud of the council in adjusting the boundaries of the district, and fraud in the assessment. A temporary injunction was issued some time in 1908. In February, 1909, defendant's demurrer to the second amended complaint was sustained, and, plaintiff declining to amend further, the action was dismissed. Upon the dismissal of the action the defendant again offered the lot for sale, to prevent which plaintiff paid, under protest, the amount of the assessment, penalties, and costs amounting to over $1,100, and on April 2d took this appeal from the judgment. The motion to dismiss is based upon the ground that the payment of the assessment, etc., put an end to the controversy and leaves only a moot case. It is not, however, by any means clear that it is a moot case, for evidently the claim of the plaintiff to recover the money paid under protest involves the same questions that are involved in this appeal; and it claims that in this action, if the judgment should be reversed, the superior court, as a court of equity, could and should order the defendant to refund the money paid under protest as a condition of being allowed to answer to the merits. This is a serious question—new in this state—which has not been adequately presented in the briefs filed on this motion, and it is too much involved in the merits of the case to be decided on a motion to dismiss the appeal.

There is a question, also, as to the right of appellant to have the judgment of this court on the merits of his case, in view of the liability of his sureties on the undertaking required upon the issuance of the temporary injunction—a question also new in this state—and upon which we prefer to reserve our opinion until the question above stated has been disposed of.

Motion denied.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(157 Cal. 494

EDGAR v. McNAIR. (L. A. 2,267.)

(Supreme Court of California. March 30, 1910.)

1. Public Lands (§ 37*) — Certificate of Desert Location—Title.

Where, in an action for land claimed under a certificate of entry as a desert location, described as the south half of section 33 of a designated township and range, the evidence showed that the description in the certificate was based on the description in a private survey, and that the land in controversy was under the government survey in sections 34 and 35, the certificate showed no title, for the description in the certificate must mean the south half of section 33 as finally located by an official survey of the federal government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 81; Dec. Dig. § 37.*]

2. Public Lands (§ 37*)—Desert Location—Possession—Evidence.

Where there was no evidence that a claimant to a desert location had possession of it when the adverse claimant entered on the land in September, 1907, or that the claimant was in possession at any time within one year, before the adverse claimant entered, and it did not appear that any one was ever on the land on behalf of the claimant, except in January, 1906, when some men and teams were employed a little more than a day and a half at work on a small part of the land, there was nothing to support a claim of possession by the claimant previous to the entry of the adverse claimant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 81; Dec. Dig. § 37.*]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. H. Edgar against James McNair. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed and remanded.

M. W. Conkling, for appellant. F. C. Farr and R. D. McPherrin (D. S. Ewing, of counsel), for respondent.

PER CURIAM. Plaintiff sued for possession of property in Imperial county described in the complaint as "the south half of section 33, township 15 south, range 15 east, S. B. M." The complaint alleged his quiet, peaceable, and exclusive possession of the land for more than one year; defendant's wrongful entry and taking possession of the property on September 20, 1907; plaintiff's written demand for restoration of the premises, and defendant's refusal to comply with it; and plaintiff's damage in the sum of $150. The answer denies plaintiff's peaceable or exclusive, or other, possession, or that while plaintiff was occupying, or in possession of it, defendant entered upon said land or any part thereof, or took or held possession of it, or any part of it. Judgment was in favor of plaintiff, and this appeal is from that judgment, and from the order denying a motion for a new trial.

Plaintiff introduced in evidence a receipt showing that he had made a payment of $80 to the land office on August 21, 1905, for desert land, using the same description as that employed in the complaint. He testified that soon after receiving his certificate of entry from the land office, he caused a small amount of clearing and leveling to be done upon the property, and made arrangements with his brother, a contractor, to prepare the entire tract for irrigation; that in November, 1906, he bought 320 shares of water stock in Imperial Water Company No. 1, and had it applied to this tract. It was in evidence that locating water stock upon a tract of land claimed by a settler under the desert land act was the usual method of complying with the requirement that $1 per acre each year should be expended for the reclamation of the property.

Defendant's claim was based upon a purchase of the asserted interest of one Hollingsworth, who testified at the trial that he entered upon the land in October, 1904, did a small amount of work, and in August of the following year performed labor worth $85. Mr. Hollingsworth also stated that he made application to the land office for a desert location on the property, using the section number employed by the Bothwell survey, but that his application was rejected on the ground that the land was covered by a filing of one McKinney. From this decision he took an appeal, which was still pending when he testified.

There is much learning displayed by counsel for both litigants in discussing the effect of the various surveys in Imperial Valley and the status of claimants asserting rights to property described according to their lines. The Bothwell survey and that called the "Imperial" were private ones. Mr. Edgar used the former in getting the proper description, as he supposed, of his land. While it was asserted at the trial that the United States land office recognized the Bothwell survey, there is nothing to indicate that Edgar explained to the registrar how he got his description. The land is described as the S. ½ of section 33, township 15 S., range 15 E., S. B. M. This, of course, must mean the south half of that section as finally located by the approved official survey of the United States. One of the witnesses for defendant testified with reference to the property in dispute: "The land in question by Imperial Land Company survey would be the N. W. ¼ of section 36, and the N. E. ¼ of 35. By the Henderson survey it would be the E. ½ of the N. E. ¼ of 34 and the N. W. ¼ of 35 and the W. ½ of the N. E. ¼ of 35; that is, practically. I mean by the Henderson survey the township survey recently made by United States Deputy Surveyor A. A. Henderson, the most recently approved government survey." It will thus be seen that by the Henderson survey—the only official admeasurement of that land—the property in dispute is part of sections 34 and 35. The respondent's certificate, therefore, purports to give him title to land of which he has never had or claimed possession—i. e., the land which the Henderson survey would describe as the south half of section 33—but the land which is the subject of this litigation is placed by the official and conclusive survey, that of Henderson, in parts of sections 34 and 35. Edgar, therefore, gains nothing as to this land by his certificate, and has shown no title. He is forced to rely wholly on an asserted previous possession. The evidence is not sufficient to support a finding that Edgar had such possession of the land, or that he held it when McNair entered upon the property. Nor is it shown that he was in possession at any time within one year before McNair entered. W. A. Edgar, respondent's brother, did some work upon a small part of the land in controversy in January, 1906. Some men and four teams were employed a little more than a day and a half at that work. It does not appear that any one was ever on the land at any other time on Edgar's behalf. Such a showing was insufficient to support a claim of a possession previous to that of appellant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order are reversed, and the cause remanded.

BEATTY, C. J., does not participate in the foregoing.

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157 Cal. 442

HORSESHOE PIER AMUSEMENT CO. v. SIBLEY et al. (L. A. 2,490.)

(Supreme Court of California. March 28, 1910.)

1. CORPORATIONS (§ 76*)—STOCK—SUBSCRIPTIONS—VALIDITY.

A person could agree to pay in certain installments a subscription to a trustee for stock in a corporation to be subsequently formed, after a specified amount had been subscribed for such purpose, upon demand therefor, payment not depending upon the creation of the corporation, and would be liable thereon, regardless of any obligation due to the relation of stockholder, and hence the fact that such person's name was not included in the articles of incorporation would be no defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 215; Dec. Dig. § 76.*]

2. PARTIES (§ 6*)—PLAINTIFF—REAL PARTY IN INTEREST.

Where a person contracted with a trustee to buy stock in a proposed corporation, the agreement being solely for the benefit of such corporation, the promise was in legal effect to pay to the corporation when organized, and, though the corporation was not named in the contract, no formal assignment thereof from the trustee to the corporation was necessary to enable the corporation to sue thereon; it being the real party in interest and entitled to sue under the express provisions of Code Civ. Proc. § 367, though the trustee, being a trustee of an express trust, might also sue under the express provisions of section 369.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6-8; Dec. Dig. § 6.*]

3. CORPORATIONS (§ 90*)—STOCK—SUBSCRIPTIONS—ACTIONS—DEFENSES.

In an action on a contract to buy $1,500 worth of corporate stock and pay therefor upon calls for 50 per cent. of the amount subscribed, it was no defense that the calls were for a less sum than 50 per cent., the subscriber not being prejudiced thereby; nor, where such subscriber had voluntarily paid all but $700 of the subscription, could she escape liability on the ground that such balance was less than 50 per cent. of the whole sum subscribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 386; Dec. Dig. § 90.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Horseshoe Pier Amusement Company against Luella Sibley and husband. From a judgment for plaintiff and an order denying a new trial, defendants appeal. On rehearing after a judgment of affirmance in the District Court of Appeal. Affirmed on opinion of the Court of Appeal.

Tanner, Taft & Odell, for appellants. Force Parker and Anderson & Anderson, for respondent.

MELVIN, J. The judgment and order of the lower court in this case was affirmed by the District Court of Appeal and this court granted a rehearing in order that we might further consider the effect upon the contract, which was the basis of the action, and upon the rights arising therefrom, of the organization of the plaintiff corporation without including the name of Luella Sibley in the list of subscribers. A further study of the matter has convinced us that while, under certain circumstances, such action might operate as an estoppel against the corporation, preventing it from pursuing its claim that the defendant was a stockholder, this is not a case for the application of the doctrine of estoppel announced in Monterey & Salinas Valley R. R. Co. v. Hildreth, 53 Cal. 123. In addition to that which is written upon this subject in the opinion of the District Court of Appeal, it might be added that Mrs. Sibley, who made certain payments under the contract to the corporation long after its organization, is herself perhaps estopped from asserting that she was not a subscriber to the capital stock. If the action were reversed and she were suing for the delivery of stock, the corporation which had accepted payments from her under her contract could not successfully defend upon the ground that her name did not appear upon the list of subscribers to the capital stock. Such payments and their acceptance evidence a mutual obligation binding upon both parties. Perhaps this phase of the matter could not be considered under the present form of the pleading; but, if a new trial were ordered, doubtless the court would permit such proper amendments as would justify a ruling upon the result of her voluntary payments to a corporation from which she had demanded no stock. We are satisfied, however, with the opinion of the District Court of Appeal, which we hereby adopt:

"Defendants appeal from a judgment and an order of court denying their motion for a new trial. George Sibley is made a party defendant by reason of the fact that he is the husband of Luella Sibley, also known as Mrs. George Sibley.

"The action is founded upon a certain agreement alleged to have been signed by defendant, as follows: 'I hereby subscribe $1,500 to be used in the construction and fitting out of a Pleasure Pier running from or near the foot of Pier avenue to or near the foot of Marine street, in the cities of Ocean Park and Santa Monica, Cal., and amusement buildings and structures connected therewith; and I hereby agree to pay to the Ocean

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Park Bank, trustee, or its assigns, upon demand, in two payments of 50 per cent. each, at any time after the sum of $40,000 (including my subscriptions) has been subscribed for said purpose, the second payment, however, not to be called for until at least 60 days after demand made for the first. It is expressly understood that this is a subscription for stock in a corporation to be hereafter formed to build, maintain, and operate said pier, buildings, and structures; and that I am to receive stock in said corporation when formed in the proportion that my said subscription bears to the total capitalization of such corporation. Mrs. Geo. Sibley.'

"The court found: That defendant Mrs. George Sibley executed and delivered this agreement to the Ocean Park Bank, as trustee, for the use and benefit of plaintiff, which was thereafter incorporated and created pursuant to and in consideration of said agreement and a number of similar agreements theretofore executed and likewise delivered. That plaintiff is the corporation referred to in said agreement as the corporation to be thereafter formed to build, maintain, and operate the pleasure pier and structures contemplated in said agreement. That in accordance with the terms of said agreement plaintiff did construct and fit out said pleasure pier and is now the owner and in the actual possession, control, and operation thereof; that more than $40,000 had been subscribed for the purpose contemplated in said agreement; that calls were made for the amount of said subscriptions as follows: In November, 1905, 20 per cent.; February, 1906, 30 per cent.; May, 1906, 25 per cent.; June, 1906, 25 per cent. That defendant paid $800 on account of the subscription made in said agreement, and, although demand therefor was made, refused to pay the remainder thereof, amounting to $700. That at the time of making the demand for said $700, the balance of defendant's subscription, plaintiff tendered to her the amount of capital stock in said corporation which her subscription bore to the total capitalization thereof. That no representations other than contained in said agreement were made to said defendant for the purpose of inducing her to sign the same.

"At the trial it was stipulated that the name of defendant Sibley did not appear in the articles of incorporation of said company as one of the stockholders thereof, nor in any of the papers or proceedings relating to the organization of the company, or subsequent increase of the capital stock thereof. Notwithstanding this fact, the court found that by virtue of said agreement defendant Sibley was a subscriber to the capital stock of the corporation.

"Appellant's chief contention is that this finding is not supported by the evidence, and that by reason of such stipulation plaintiff is estopped from claiming defendant to be a subscriber to the capital stock, for the reason that her name did not appear as a stockholder in the articles of incorporation. In support of such claim appellant cites the case of M. & S. V. R. R. Co. v. Hildreth, 53 Cal. 123. In that case the action was by a corporation to recover assessments levied upon stock alleged to have been owned by the party sued. The only point involved therein was the defendant's obligation to pay the assessments levied upon the stock, the ownership of which he disclaimed. In the case at bar, however, the obligation of defendant Sibley is not founded upon her ownership of stock in plaintiff corporation, nor upon any assessment levied thereon in accordance with the provisions of section 332 of the Civil Code; but such obligation rests solely and alone upon the written agreement and promise to pay the sum subscribed to be used in the construction of the pleasure pier and amusement buildings and structures connected therewith. Clearly, the contract is a valid one. Under the terms thereof, the payment of the amount subscribed did not depend upon the creation of the corporation; but she agreed to pay the same to the trustee named at any time after $40,000 had been subscribed for such purpose, upon demand therefor, in installments of 50 per cent. each, the second installment being payable not less than 60 days after the first payment. While she was entitled to the stock, delivery of which was tendered her, the question of her membership therein is wholly foreign to the controversy; plaintiff's right to recover, as we have seen, resting upon an express promise to pay, not upon an obligation due to the relation of stockholder. West v. Crawford, 80 Cal. 19, 21 Pac. 1123; San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349. 'A stockholder may expressly agree to pay the amount of his subscription immediately, or at stated times, and thus relieve the corporation of the duty of making calls. He will be liable to pay upon such contract according to its terms.' Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; California Southern Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99.

"Appellant also insists that, in the absence of an assignment of the agreement by the trustee to whom the subscription was made payable, plaintiff cannot maintain suit to enforce payment. In view of the findings heretofore referred to, and the further finding that said agreement 'was made solely for the benefit of plaintiff,' no formal assignment was necessary. That plaintiff was not named in the agreement is immaterial, for, notwithstanding such fact, it clearly appears that the subscription was made for its benefit and in contemplation of its creation. 'In legal effect, the promise of defendant was to pay to the plaintiff corporation when organized.' Marysville, etc., Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215. Plaintiff was the real party in interest, and therefore could maintain the action. Code Civ. Proc. § 367; Western Development Co. v. Emery, 61 Cal. 611. Its right in this respect is unaffected by the fact that the Ocean Park Bank, as trustee of an express trust, might also, by virtue of the provisions of section 369, Code Civ. Proc., have maintained a like suit.

"There is no merit in the contention that the calls or demands as made were for a less sum than 50 per cent. of the amount subscribed. Defendant could not be prejudiced by such fact. Moreover, she, having voluntarily paid all of her subscription except a balance of $700, is in no position to insist that she be released from her obligation upon the ground that such balance is less than 50 per cent. of the whole sum subscribed.

"A number of objections are urged to the rulings of the court in admitting testimony; but they are largely based upon appellant's theory that the contract was nonenforceable by reason of the fact that defendant's name was omitted from the articles of incorporation, and are fully answered in discussing that point.

"There was no abuse of discretion on the part of the court in reserving its decision upon defendant's motion for a nonsuit. It was properly denied.

"A careful examination of all the points to which our attention has been called in appellant's brief discloses no prejudicial error, and, as said by this court in Los Angeles National Bank v. Vance, 98 Pac. 58, 'upon every principle of right and justice, as well as upon authority,' the judgment and order should be, and are, affirmed."

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

157 Cal. 481

CRAIG v. SUPERIOR COURT OF SAN JOAQUIN COUNTY et al. (Sac. 1,741.)

(Supreme Court of California. March 29, 1910. Rehearing Denied April 27, 1910.)

1. MUNICIPAL CORPORATIONS (§ 155*)—OFFICERS—REMOVAL—JURISDICTION.

Under Const. art. 20, § 16, relating to the terms of office of any officer or commissioner, which was amended on November 6, 1906, by adding the proviso that, in case of any officer or employé of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the term of office or dismissal of such officer shall control, where the provisions of a freeholders' charter provide for the removal of municipal officers by the municipal authorities, the superior court has no jurisdiction to remove such officers under Pen. Code, § 758, and the following sections, providing for the removal of civil officers, otherwise than by impeachment, for certain misdemeanors.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 342–345; Dec. Dig. § 155.*]

2. MUNICIPAL CORPORATIONS (§ 185*)—OFFICERS—POLICE DEPARTMENT—REMOVAL—AUTHORITY.

Const. art. 11, § 8½, provides that freeholders' charters may provide for the regulation and government of boards of police commissioners and the municipal police force. Stockton City Charter (St. 1905, p. 851), § 131, places the police and fire department under a board of three commissioners elected by the city council; section 135 (page 851) provides that the officers and members of such departments shall be appointed by the board, and prohibits removals except for cause established after due investigation and trial as therein provided. Section 136 (St. 1889, p. 610) authorizes the board to hear all charges against any officer or member and to take such action thereon as is most conducive to the efficiency of the departments, and section 143 (St. 1905, p. 852) makes any member or employé guilty of any legal offense, inefficiency, etc., liable to reprimand, suspension, or dismissal. Charter, § 32, defines the duties of the mayor and requires him to lay before the council or city or district attorney any misconduct or neglect of official duty which he may discover. *Held*, that the charter provisions contemplated that the police and fire commissioners should have exclusive authority to dismiss members of the police and fire departments pursuant to such provisions, so that the superior court had no jurisdiction of proceedings to remove a policeman of the city of Stockton under Pen. Code, § 758, and the following sections, providing for the removal of civil officers for certain misdemeanors in office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 497; Dec. Dig. § 185.*]

In Bank. Application for writ of prohibition, prayed to be directed against the Superior Court of San Joaquin County and Hon. W. B. Nutter, Judge thereof. Writ issued.

Clary & Louttit, for petitioner. Geo. F. McNoble and Max Grimm, for respondents.

ANGELLOTTI, J. Plaintiff was at the time of the institution of this proceeding captain of police and a policeman of the city of Stockton. The object of the proceeding was to obtain a writ of prohibition restraining the superior court of San Joaquin county from trying him upon an accusation presented to said court by the grand jury of San Joaquin county under the provisions of section 758 et seq. of the Penal Code, providing for the removal of civil officers otherwise than by impeachment, charging him with certain misdemeanors in office. The sections referred to provide for an accusation in writing made to the superior court by the grand jury against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, notice to the accused, a trial by jury, and, in the event of conviction, a judgment "that the defendant be removed from office." The main claim of plaintiff and the only one that it will be necessary to consider is that, by reason of certain provisions of the Stockton charter, the exclusive jurisdiction in the matter of the removal from office of officers, members, and employés of the police and fire departments of the city of Stockton is with the board of police and fire commissioners of that city, and that the superior court is therefore without jurisdiction in the matter of this accusation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the case of Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75, a similar contention was made on behalf of the chief of police of the city of Sacramento, and it was held that the provisions of the Sacramento charter were not such as to show an intention to confer exclusive jurisdiction on the city trustees, the official body vested in that city with the control of the police department; the court saying: "There is nowhere in the charter any provision which in terms confers exclusive jurisdiction upon the board of trustees to proceed against and remove municipal officers, nor is there apparent in any of the charter provisions an intention that its provisions should supersede the provisions of the general law as found in the sections of the Penal Code relative to the removal of delinquent officials from office."

Subsequent to the decision in the Coffey Case, viz., on November 6, 1906, section 16 of article 20 of the state Constitution, relating to terms of office, was amended by adding the following proviso: "Provided, however, that in the case of any officer or employé of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employé shall control." This amendment was in line with what was declared in Dinan v. Superior Court, 6 Cal. App. 221, 91 Pac. 808, to be "the policy of the state, and the tendency of the late decisions and constitutional amendments to broaden the scope of municipal corporations governed by charters as to their own affairs, to allow them to govern themselves, and to prescribe their own rules and regulations as to affairs which are purely municipal." There can be no serious question that the object of this constitutional provision was to make it clear that provisions of a freeholders' charter should control in the matter of the dismissal from office of any officer or employé of a municipality, and it was very properly recognized in the opinion of the learned District Court of Appeal in this proceeding that such provisions "would not control" if such an officer or employé can be removed by the superior court under the sections of the Penal Code heretofore referred to, where the charter provisions contemplate that the whole matter of removals shall be in the hands of the appropriate municipal authority. The question, then, is whether the charter provisions of the city of Stockton do so contemplate.

It is to be borne in mind that section 8½ of article 11 of the Constitution provides that it shall be competent to provide in freeholders' charters, "(3) for the manner in which, the times at which, and the terms for which the members of the boards of police commissioners shall be elected or appointed; and for the constitution, regulation, compensation, and government of such boards and of the municipal police force." By the charter of Stockton, the police and fire departments are placed under the management of a board of three commissioners, elected by the city council. Section 131, Charter; St. 1905, p. 851. Section 135 of the charter provides: "The officers, members and employés of the police and fire departments shall be appointed by the board, but no appointment or removal shall be made for political purposes, nor shall any removal be made except for cause established to the satisfaction of the board after due investigation and trial, as herein provided." St. 1905, p. 851. By section 136 of the charter (St. 1889, p. 610) the board is invested with power to hear and determine all complaints of misconduct, inefficiency, "or other charges" against any officer, member, or employé, and "to take such action thereon as shall be most conducive to the maintenance, discipline and efficiency of said departments," and section 143 (St. 1905, p. 852) provides that any officer, member or employé "guilty of any legal offense, inefficiency," etc., "shall be liable to be punished by reprimand, forfeit of pay for a specified time, suspension or dismissal from the department of which he may be an officer, member or employé."

It appears to us that these provisions very clearly show the intention that the matter of employment, retention, and dismissal of officers, members, and employés of the police and fire departments of the city of Stockton shall be in the hands of the police and fire commissioners of that city, their control thereof to be exercised in accord with the provisions of the charter, free of any interference at the hands of any other authority as long as their acts are in accord with the charter provisions. Not only are they given the management of those departments and expressly invested with power to hear and determine all complaints for any cause, and to take such action as, in their judgment, shall be most conducive to "the maintenance, discipline and efficiency of said departments," including not only the removal of the offender (which is the only penalty under the Penal Code provision), but also the imposition of a lesser penalty, such as suspension, forfeit of pay, or reprimand, if they deem it conducive to the best interests of the department to which the offender belongs, but it is further expressly explicitly provided that no "removal" of any officer, member, or employé shall be made "except for cause established to the satisfaction of the board, after due investigation and trial." It would be difficult to express more clearly than is done by these various provisions that the commissioners shall be the sole judges in the matter of complaints against any officer, member, or employé of these departments, involving simply the question whether he should be removed from his office or employment. Of course, as was said by the District Court of Appeal, in

Dinan v. Superior Court, supra, if any such officer or employé should commit an offense against the laws of the state, "he would be subject to trial under such laws," and to punishment thereunder; but the provisions of the Penal Code here involved "deal only with the removal from office for misconduct in office"—a matter which, under our Constitution, so far as officers and members of the police department of the municipality are concerned, may properly be regulated by the provisions of a freeholders' charter of such municipality.

The provisions of the Sacramento charter involved in Coffey v. Superior Court, supra, were essentialy different from those of the Stockton charter that we have referred to. The general intent to invest exclusive control in the municipal authorities was nowhere apparent, and the charter was entirely destitute of any provision to the effect that officers or members of the police department should not be removed except for cause "established to the satisfaction of the board." Under these circumstances a section of the Sacramento charter relative to the duties of the mayor, requiring him, among other things, to lay before the "board of trustees, city attorney, or district attorney" any official defalcation, willful neglect of duty, or official misconduct of an officer which he may discover, "in order that the public interests may be protected and the person in default be proceeded against according to law," was given some weight in determining whether it was intended by the charter framers that the jurisdiction of the board of trustees in the matter of removal should be exclusive. A very similar provision is to be found in section 32 of the Stockton charter, defining various duties of the mayor, it being provided that such information shall be laid before "the council, city attorney, or district attorney," and much reliance is placed on this provision by counsel representing the defendants. But we think that, in view of the presence in that charter of the other provisions to which we have referred, provisions which substantially, in the language of the Coffey Case, "in terms confer exclusive jurisdiction upon" the board of police and fire commissioners in the matter of removals from the police and fire departments, this provision is not important in the consideration of the question before us. There is ample room for the application of this provision without applying it to the matter of removal of members of the police and fire departments, to which matter, in view of the other provisions, it apparently has no application.

The case before us, in its material facts, does not differ from the case of Dinan v. Superior Court, 6 Cal. App. 217, 91 Pac. 806, in which the superior court of the city and county of San Francisco was restrained from trying a similar accusation against the chief of police of that city and county, on the ground that the charter thereof provided the exclusive method in such cases. There is no substantial difference between the provisions of such charter and the charter of Stockton in regard to such matters. The San Francisco charter gave the same ample powers to the police commissioners as does the Stockton charter to the police and fire board, and it was provided that "no member of the department shall be subject to dismissal for any cause, * * * except after a fair and impartial trial before the commissioners." This provision occupied the same relative position in the charter of San Francisco as does the provision against removal in the Stockton charter, being in that portion thereof devoted to the powers and duties of the commissioners invested with control of the police department. It means the same thing as does the Stockton provision. We entirely approve the views expressed by the District Court of Appeal in that case.

From what we have said, it follows that the superior court of San Joaquin county is without jurisdiction to entertain the accusation against petitioner.

Let a peremptory writ of prohibition issue as prayed.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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157 Cal. 487

BRIARE v. SUPERIOR COURT OF COUNTY OF SAN JOAQUIN et al. (Sac. 1,743.)

(Supreme Court of California. March 29, 1910.)

In Bank. Application for writ of prohibition, prayed to be directed against the Superior Court of the County of San Joaquin, and the Honorable Frank H. Smith, Judge thereof. Writ issued.

Ashley & Neumiller, for appellant. Geo. F. McNoble, Dist. Atty., for respondents.

PER CURIAM. This is an application for writ of prohibition. The questions involved are the same as those involved in Craig v. Superior Court et al. (Sac. No. 1,741, this day decided) 108 Pac. 310. Upon the authority of that case, the writ must issue.

Let a peremptory writ of prohibition issue as prayed.

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157 Cal. 497

PROVIDENCE JEWELRY CO. v. NAGEL. (L. A. 2,448.)

(Supreme Court of California. March 30, 1910.)

1. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR — RULINGS AS TO EVIDENCE.

The admissibility of evidence under special averments in the answer will not be considered on appeal, where the evidence objected to was admissible under the general issue pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. SALES (§ 52*)—SALE OR CONSIGNMENT FOR SALE—EVIDENCE.

Evidence *held* to justify the finding that the transaction between the parties was a consignment of goods for sale, and not a sale of the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 137; Dec. Dig. § 52.*]

3. EVIDENCE (§ 434*)—PAROL EVIDENCE—FRAUD.

Where defendant claims that the contract under which plaintiff claims he sold goods to defendant was procured by fraud, evidence is admissible to show the circumstances under which the contract was procured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2014; Dec. Dig. § 434.*]

Sloss, J., dissenting.

In Bank. Appeal from Superior Court. Orange County; Z. B. West, Judge.

Action by the Providence Jewelry Company, a corporation, against A. Nagel. Defendant had judgment, and plaintiff appeals. Affirmed.

F. C. Spencer, for appellant. Tipton & Cailor, for respondent.

PER CURIAM. The district court of appeal for the second district having failed to agree on a decision in this case it was certified to this court for determination. The following opinion written by Justice Allen of that court and concurred in by Justice Taggart, is approved and adopted as the opinion of this court:

"Appeal by plaintiff upon a bill of exceptions from a judgment rendered in favor of defendant. The action was one for the price and value of merchandise of the market value of $379.30 alleged to have been sold and delivered by plaintiff to defendant. The answer denies the sale or the acceptance of the goods upon any promise or agreement to pay the said sum of money or any price or at all.

"We forbear any discussion of questions raised as to the sufficiency of the evidence to support certain averments in an answer denominated a separate and distinct answer, for the reason that all of the testimony adduced upon the trial, the admissibility or the effect of which is questioned by the specifications, was admissible under the general issue raised by the denial. Wendling, etc., Co. v. Glenwood, etc., Co., 153 Cal. 411 [95 Pac. 1029]. Upon the trial of the action, the court found that the allegations in the plaintiff's complaint which averred the sale and delivery of the goods under a contract of purchase were untrue. Appellant specifies as error the incorrectness of this finding. The record discloses that upon the trial plaintiff offered in evidence an order received by plaintiff for the shipment of the goods mentioned. The essential portions of this order were as follows:

" 'Following is a list of goods for our $379.30 order:

" 'On condition that the purchaser complies with all the terms of this order at the time and in the manner stated hereon, promptly meets any obligations entered into with the Providence Jewelry Company, uses ordinary diligence in the sale of these goods, will sell nothing at a less profit than is usually charged on jewelry, and will make out and send to the Providence Jewelry Company, by mail quarterly, a report showing the goods on hand, at which time he will take advantage of the exchange privilege herein set forth, the Providence Jewelry Company guarantees that the gross profitts from the sale of the goods purchased herein shall be fifty per cent. of the amount of this order, and if the profits do not amount to fifty per cent. as above provided, the Providence Jewelry Company will buy back and pay the original invoice price for all goods remaining on hand unsold, or will pay by Chicago or New York draft a sufficient amount to make up the deficiency, at the expiration of this agreement. Terms of payment: Six per cent. discount for cash in fifteen days, or one-fourth of the amount due in six months, one-fourth in eight months, one-fourth in ten months, one-fourth in twelve months, without interest. The above terms of credit will only be allowed if acceptances to our order are given within fifteen days from date of invoice. Otherwise terms are net cash 30 days. Same terms shall apply on all re-orders for these goods.' Here follows an itemized statement of the goods, with the catalogue price, occupying several pages of manuscript, followed by the following:

" 'The Providence Jewelry Co. will replace free of charge any article not wearing satisfactorily. Exchange privilege. Any goods contained in this order may be exchanged for different styles, patterns or other articles purchased in this order, any time within three years and after compliance with terms of settlement. The Providence Jewelry Co. will send purchaser of this order 500 advertising cards, 500 commutation cards and 100 silver spoons, wild-rose pattern, extra plate, for advertising purposes to be distributed as follows: Purchaser shall furnish names of 100 persons, to each of whom the Providence Jewelry Company will mail three advertising cards and an order on purchaser for one spoon; each order when properly filled out with the name and address of three persons, to each of whom the holder of the order has delivered an advertising card, shall be good for one spoon at purchaser's store. Additional spoons will be given by purchaser with every $10 purchase of merchandise at his store. Purchaser agrees to account for spoons by sending all receipted orders to the Providence Jewelry Co. Date Feb. 1, 1907.

" 'Providence Jewelry Co., Rock Island, Ill.

" 'Gentlemen: On your approval of this order deliver to us at your earliest convenience

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. O. B. transportation companies, either at distributing point or at factory point, the above described goods, and no others, on the terms and conditions herein set forth, and no others, all of which I have read and found complete and satisfactory.

"'[Signed] A. Nagel.

"'Providence Jewelry Co. will send their bond in the sum of $300 to the merchant before he commences selling their goods.'

"It further appears in evidence upon the part of plaintiff that under this order the goods were shipped to defendant, and the bond of $300 conditioned upon the faithful performance of the contract was forwarded by plaintiff on February 7th; that on February 21st Nagel notified the company that the jewelry had arrived; that he had sent the names of the families some days ago; that he was in a dilemma as to whether he had made a mistake, and, 'if so, I am in for it.' Thereafter plaintiff wrote defendant a letter the effect of which was to notify him that plaintiff would insist upon the contract as one of sale. It further appears that the acceptances mentioned in the order were forwarded to Nagel, who, in reply, notified the plaintiff that he refused to sign the acceptances.

"There was evidence offered upon the part of defendant tending to show that this written order offered in evidence by plaintiff was signed under the following circumstances: That the representative of plaintiff called at defendant's place of business and proffered to put in a stock of jewelry in a case about four feet long; that he would be around every three months and check up the goods that had been sold by defendant and replace them with new goods; that he would send a case so that when the defendant got ready to turn the jewelry over, in case he did not want to handle the jewelry, they could pay him back the freight; that he was induced to sign the order because the representative told him he had nothing to lose in this proposition, that plaintiff carried the stock; that the representative had no samples of the goods, nothing but a catalogue; that this representative made the selection of all the goods included in the order and inserted the list in the order after it was signed and delivered; that, when defendant received the goods, he did not open the package, but shipped it shortly thereafter by express to the plaintiff, who refused to receive it from the express company, in whose hands it still remains subject to plaintiff's order. This he did for the reason that he could see from the correspondence that they claimed it was a sale instead of a commission proposition; that when they sent him the four acceptances he then discovered that it was an attempt to effect a sale; that he also returned the guaranty bond. Another witness in behalf of defendant, who was present, testified that the representative of plaintiff told the defendant that, if he did not want to keep the business up, he could return the goods; that the case in which the goods were held and the goods all would belong to plaintiff and that Nagel was to pay only for just what he sold; that the representative was to come around every three months collecting and everything that was tarnished he would replace with new goods; that the representative picked out the goods, and said, if they did not sell well, they would make a change, because they wanted the goods sold; that on these representations he handed the paper introduced by plaintiff as the order, but then incomplete, to Nagel, and told him to sign it so that they would ship the goods, and they would put them in and it would be practically the same as on commission; that Nagel signed the paper and handed it back to him, 'and I don't think he had time to read it. He just wrote his name across the back and handed it to him.'

"We are of opinion that it cannot be said that there was no testimony to justify the findings of the court, that this transaction did not amount to a sale. The written order upon its face would indicate that an absolute sale was not intended; in fact, it is so adroitly worded that the true intent can scarcely be gathered from the terms of the instrument. It is such a paper as might well trap the unwary, and, when its peculiar terms are considered in connection with the testimony offered by the defendant that it was executed under a direct representation and statement that the title to the goods did not pass and that they were to be received by defendant and sold upon commission, there is sufficient to warrant the finding of the court.

"The objection interposed by plaintiff to oral testimony in relation to the circumstances under which the order was signed were not well taken. As said in Maxson v. Llewelyn, 122 Cal. 199 [54 Pac. 734]. The receipt of such testimony is not to vary or contradict the writing, 'but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it, that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.' The testimony of the defendant's witnesses which was accepted by the court as true clearly indicates that the minds of the parties did not meet, that there was in fact no contract between them as appears in the written order, and that the same was executed under such circumstances as would estop plaintiff from claiming any benefit thereunder. It seems clear that a fraud was practiced upon defendant by this representative of plaintiff, and that his signature to the order was procured by misrepresentation and fraud sufficient to vitiate the instrument. The defendant had a right to rely upon the representations of plaintiff's agent that the written instrument presented for signature was but an order to send the goods for sale on commission, and plaintiff, in an action between the original parties, is not in a position to say that, having practiced this fraud, defendant must still be bound because he did not distrust plaintiff and signed without an independent examination. We do not think the rule that the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party should be carried to the extent of holding that, under the circumstances of this case, defendant should be bound by a written instrument at variance with the terms of the actual agreement, and which he was induced to sign by misrepresentation upon the part of plaintiff. Los Angeles, etc., Co. v. New Liverpool Salt Co., 150 Cal. 27 [87 Pac. 1029]. We are not prepared to say that the evidence showing fraud in this case was not clear and convincing. The trial court appears to have given it that effect and with its judgment we are content.

"Judgment affirmed."

SLOSS, J., dissents. BEATTY, C. J., does not participate in the foregoing.

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157 Cal. 472

Ex parte ROBERTS. (Cr. 1,576.)

(Supreme Court of California. March 29, 1910.)

1. CRIMINAL LAW (§ 13*)—STATUTORY PROVISIONS—CONSTRUCTION.

Where a statute begins, "all persons," etc., and proceeds to state several apparently independent offenses and sets off each clause defining such offenses by appropriate punctuation, ending with a provision imposing a punishment for its violation, the language relating exclusively to each offense is not affected by that describing the other offenses; each being construed as if it stood alone, and was read in connection with the general words applying to all the offenses created.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.*]

2. GAMING (§ 72½,* New, vol. 8, Key No. Series) — OFFENSES — RECEIVING MONEY AS STAKEHOLDER—STATUTORY PROVISIONS.

Pen. Code, § 337a, makes every person who receives, registers, records, or forwards any money wagered by or for any other person or sells pools upon the result of any contest of skill, speed, etc., of man or beast or upon any chance or contingency, or who, being the owner, lessee, or occupant of any building, etc., knowingly permits the same to be used for any of those purposes or therein employs any device for recording wagers, etc., or becomes a custodian for gain, hire, or reward of any money wagered upon such result, punishable by imprisonment. *Held*, that the first clause created a separate offense and forbade any person from receiving money wagered by or for another upon any contingent event.

3. GAMING (§ 83*) — PROSECUTIONS — COMPLAINT—CONSTRUCTION.

A complaint charging that accused without consideration or reward became the custodian of $10, then and there wagered by two others with each other upon the result of a horse race, only charged an offense under the first clause of the statute, and not under the last clause punishing one who as owner, etc., permits any room to be used for the purposes stated in the first clause.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 219; Dec. Dig. § 83.*]

4. GAMING (§ 63*)—STATUTES — REPEAL — INCONSISTENT CLAUSE.

Since the first clause of the statute requires that the person receiving the money must have received it as custodian for the parties to the wager in order to constitute an offense, irrespective of whether the stakeholder owns or leases a place for such business or receives a reward, while the second clause in effect permits the receipt of wagered money, if not received for gain in some of the places named therein, the latter clause is inconsistent with part of the first clause forbidding the receiving of wagered money as a stakeholder under any circumstances, so as to make it inoperative, under the rule that, where a later clause in a statute is irreconcilably inconsistent with a preceding clause, the later clause repeals the former as far as inconsistent therewith.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 120; Dec. Dig. § 63.*]

In Bank. In the matter of the application of W. W. Roberts for a writ of habeas corpus. Writ granted, and petitioner ordered released from custody.

Carroll Cook and Henry Ach, for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin, Deputy Atty. Gen., for respondent.

SHAW, J. The petitioner was arrested upon a complaint which it is claimed alleges a violation of section 337a of the Penal Code. He contends that it does not charge any public offense whatever, and upon that contention he has sued out a writ of habeas corpus. It is admitted that no crime is charged against him, unless it be under the aforesaid section.

The charge in substance is that, without consideration, gain, hire, or reward, at some place in San Francisco not described, he became the custodian and depositary of $10 in money, then and there bet and wagered by two other persons with each other, upon the result of a horse race then about to take place. Although comprising but a single sentence, section 337a of the Penal Code creates many distinct offenses. It begins by the phrase "every person," and each subsequent clause is connected therewith by appropriate punctuation. It is written in the disjunctive throughout, and the several offenses therein described are apparently as distinct and independent of each other as if they had been enacted in separate sections. In general, when such form of expression is used, the effect of the language pertaining exclusively to each offense described is not affected or modified by the words used solely in describing the other offenses, but the description of each is to be construed as if it stood alone, and were read in connection with the general words applying to all. The section contains two clauses which it is necessary to compare and construe, in order to determine the sufficiency of the charge. Separated from the other parts of the section and placed in paragraphs in the order in which they occur, they are as follows: "Every person * * * who receives, registers, records or forwards, or purports or pretends to receive, register, record, or forward, in any manner whatsoever, any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered by or for any other person, or sells pools upon any such result; * * * or who, being the owner, lessee, or occupant of any room, shed, tenement, tent, booth or building, float or vessel, or part thereof, or of any grounds within this state, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for gain, hire or reward of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result: * * * is punishable by imprisonment in a county jail or state prison for a period not less than thirty days and not exceeding one year." The words "such result" in these clauses refers to a previous clause reading as follows: "Upon the result of any trial or contest of skill, speed, or power of endurance, of man or beast or between men or beasts, or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever." The language of the first clause in order, relating to the receiving of money or things bet or wagered, is not in itself ambiguous or uncertain in meaning. As plainly as words can declare, it forbids every person from receiving money bet or wagered by or for any other person upon the result of a horse race, or upon any contingent or unknown event. It may require some stretch of credulity to believe that the Legislature could have enacted a penal law making an act which may be so trivial a felony, but, when a reading of the act discloses that it has been enacted, there can be no misunderstanding of its meaning or effect, if it stands alone and without qualification.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The complaint plainly shows that it was not intended to charge a violation of the second clause, but exindustria, to exclude that clause from consideration. It does not aver that the petitioner was the owner, occupant, or lessee of any place of the kind specified in that clause, or at all, and it states that he became a custodian and depositary of the money "not for gain, hire or reward," thus eliminating the conditions essential to the commission of a crime under the second clause. If it describes an offense at all, it is an offense defined in the first clause. In effect, one who receives money of another becomes the custodian thereof, and conversely, one who becomes a custodian of money receives it. If the rule that the exact language of the statute need not be followed in charging an offense and that words of like import will suffice, particularly in a complaint for a preliminary examination, is applied, the complaint in substance charges that the petitioner received the money alleged to have been wagered. If this be so, the complaint charges an offense under the first clause, if that clause is not modified, qualified, or partially repealed by the second clause. Whether or not it is so affected is the only question to be decided.

To constitute a criminal acceptance of such money under the first clause, it is necessary that it be received for the use of the parties to the bet or wager, and not as the due or right of the person receiving it. He must take it as their property, and not as his own. If he receives it in payment of a debt or as a gift, he commits no offense, and the fact that it was the identical money or thing which had been wagered by the party or parties from whom he received it is immaterial. In that case he would be no party to the bet or wager which the law intends to denounce as criminal. In order to constitute a crime under the first clause, therefore, the person receiving the money must do so as custodian or depositary for the parties to the bet or wager and must act as such for some period of time, however brief. If that clause alone is considered, it would be immaterial that he does not keep, lease, or own a place for such business or that he receives it neither for gain, hire, or reward. Under the second clause, it is necessary that both of these elements shall exist to constitute the crime there defined. The second clause in effect excepts and permits all receiving which is not for gain, hire, or reward and which is not done in some one of the places mentioned by one who uses or occupies such place for that purpose. It is therefore to that extent inconsistent with that part of the first clause which forbids the receiving of such money for the use of the parties to the bet or wager anywhere, or under any circumstances. (We speak now of one who receives the money, and not of one who merely owns or leases such a place and permits its use by others for such purposes.) The rule applicable to a statute in which a later clause is found to be irreconcilably inconsistent with a preceding clause is that the clause later in position operates as a repeal of the former clause, so far as it is inconsistent. "The part of a statute later in position in the same act or section is deemed later in time, and prevails over repugnant parts occurring before, though enacted to take effect at the same time. This rule is applicable where no reasonable construction will harmonize the parts." 1 Lewis' Suth. Stat. Const. § 280. See, also, Emeric v. Alvarado, 64 Cal. 609, 2 Pac. 418; Pol. Code, § 4484; Harrington v. Rochester, 10 Wend. (N. Y.) 551; Branagan v. Dulaney, 8

Colo. 412, 8 Pac. 699; Powers v. Barney, 5 Blatchf. 203, No. 11,361; Ex parte Thomas, 113 Ala. 1, 21 South. 370; Hand v. Stapleton, 135 Ala. 162, 167, 33 South. 689; Van Horn v. State, 46 Neb. 77, 64 N. W. 365; Omaha, etc., Co. v. Kragscow, 47 Neb. 611, 66 N. W. 658. Applying this rule, it is clear that the provision of the first clause, so far as it relates to the mere receiving of money or property bet or wagered, is practically inoperative, and that the only conditions under which the receiving alone will be criminal are those mentioned in the second clause. As the complaint against the petitioner expressly negatives the existence of some of these conditions, and fails to aver the others, and does not charge that he either registered, recorded, or forwarded the money received, as specified in the first clause, it fails to charge an offense under either clause of the section. The petitioner is entitled to his discharge.

What we have said concerning the inconsistency between the two clauses applies only to the part of the first clause relating to the "receiving" of money or things bet or wagered. It has no necessary bearing upon so much of the first clause as relates to a person who "records, registers, or forwards" such money or things. Those acts are different from merely receiving and involve other elements, intents, and results.

It is ordered that the petitioner be released from custody under the warrant, and that his bail upon the issuance of the writ herein be exonerated.

We concur: ANGELLOTTI, J.; SLOSS, J.

HENSHAW, J. I concur in the judgment for the following reasons:

Section 337a of our Penal Code is in all essentials (saving that of the penalty prescribed) an exact re-enactment of section 351 of the Penal Code of the state of New York. It is a familiar rule that, when one state enacts a statute taken from the books of a sister state, the construction which the courts of the latter state have put upon the statute is of great value and of high persuasive force in its interpretation. If a reading of this statute did not clearly disclose, as I think it does, that its principal, if not its sole, object is to prevent bookmaking and pool selling, the construction which the courts of New York have put upon it would resolve all possible doubt. The courts of New York were called upon to consider this law in the light of a provision of their Constitution of 1894, which provided (article 1, § 9): "Nor shall any lottery, or the sale of lottery tickets, pool selling, bookmaking, or any other kind of gambling hereafter be authorized or allowed within this state, and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." No such provision is found in the Constitution of California, and, as this state adopts the common law where the statutes are silent, it follows, as at common law, that the mere laying of a bet or wager upon an indifferent subject is not illegal. "The distinction has always been observed," says Wharton, Criminal Law, par. 2, p. 446, "between betting or gambling and maintaining a gambling house or a place to which people resort to gamble. While at common law wagers on indifferent subjects were legal and might be enforced, a gambling house or a resort for gamblers was a public nuisance, for which its keeper might be indicted." And the Court of Appeals of New York, upon this subject has said (People v. Stedeker, 175 N. Y. 57, 67 N. E. 132): "The same distinction has obtained in this state, where ordinary betting has never been made a crime, * * * while the keeping of a gambling house, selling lottery tickets, and the profession of a common gambler have been subject to severe punishment." This opinion, it is pointed out in People ex rel. Collins v. McLaughlin, 128 App. Div. 599, 113 N. Y. Supp. 188, was rendered in 1903, eight years after the enactment of section 351 of the New York Penal Code in practically its present form. In the last-cited case the defendant was charged with a violation of the section in having "received" $5 at the race course of the Brooklyn Jockey Club as the result of a bet which he had made upon a horse race; the bet having been made and accepted orally with one John Rall. The court declared in terms that section 351 of the Penal Code was intended to prevent bookmaking and pool selling; that is, the business of taking and recording bets and wagers and acts which are incidental to that business, and does not make it a crime to receive a sum of money as the result of a bet upon a horse race which was made and accepted orally. We may pause here to say that it would certainly be a singular law which would make it no crime to lay such a wager and for the winner to receive the money, and yet would make it a crime if one became a stakeholder of such wager without gain, hire, or reward. The Court of Appeals of New York in People ex rel. Lichtenstein v. Langan, 196 N. Y. 260, 89 N. E. 921, construing this law, reaffirmed the declaration in People v. Stedeker, supra, saying that "in this state an ordinary bet has never been made a crime, while the keeping of a gambling house has been subject to severe punishment. The laying of odds standing alone does not, therefore, constitute a crime. If a man should offer to bet the ladies of his party a pair of gloves to a box of candy, it would be the laying of odds and publishing the same. To hold him to be a bookmaker would, in my judgment, be a departure from the rule which gives to the terms of the statute their ordinary and accepted meaning, and would be a construction which was not within the contemplation of the Legislature. The vice of bookmaking chiefly consists in soliciting and in the inducing the public to take chances in the carefully figured and planned scheme of the bookmaker, and this, in order to be profitable to him, requires the writing out of the list of the odds laid on some paper or material so that they could be seen by those who were solicited to invest."

With the light thus thrown upon the meaning, the purpose, the scope, and intent of the statute, the question immediately under consideration is easily answered: Is a man who without consideration to him paid, or to be paid, and not for gain, hire, or reward, becomes the custodian and depositary of a sum of money already wagered between two citizens, guilty of a felony? The very language of the law is against such a construction. And, bearing in mind that at common law the laying of a wager upon such an event was not a crime, the mere depositary of the money or things wagered himself could not be guilty of a crime. The language of section 337a in effect declares that "the custodian or depositary for gain, hire or reward is alone guilty." In other words, the law is directed against one who for gain, hire, or reward has become such a depositary, who thus is engaged in a business violating the spirit of the law aimed against pool selling, bookmaking, and professional gambling. Elsewhere the section under consideration makes one guilty of a felony "who receives, registers, records or forwards, or purports or pretends to receive, register, record or forward in any manner whatsoever any money, thing, or consideration of value bet or wagered, or offered for the purpose of being bet or wagered by or for any other person, or sells pools upon any such result." A reading of this language, with its context, makes it apparent that the "receiving" there under consideration does not make the mere reception as a stakeholder a crime, but it is a receiving in aid of the condemned purposes of bookmaking and pool selling, a receiving which is a part of the scheme of registering, recording and forwarding the money bet, in aid of the actual bookmaker or pool seller. Not only is this quite apparent from the context, but it is the precise construction which has been put upon the language in New York, where the attempt was made to convict one who had received $5 as the result of a wager. In People ex rel. Collins v. McLaughlin, 128 App. Div. 599, 113 N. Y. Supp. 188, a historical review is had of the legislation in New York upon this subject, and the reasons for the enactment of this especial provision are given. In brief, it appears that bookmaking and pool selling upon race tracks in the state of New York were not illegal, though it was a felony to sell pools or make books elsewhere than at an authorized race track. The poolroom people outside of the race tracks "thereupon devised a scheme by which they claimed to be merely forwarders of the money deposited by betters with them. They pretended to receive the same as common carriers to send to the race tracks where it could be bet. This is clearly shown by the opinions in People v. Wynn [12 N. Y. Supp. 379], decided in December, 1890, affirmed on opinion below, 128 N. Y. 599 [28 N. E. 251], and People v. Fisher [17 N. Y. Supp. 162], decided in December, 1891." It was to meet this condition that the language which we have been considering was adopted in New York. Thus one who becomes a depositary of a thing wagered for the purpose of recording and forwarding the wager, and so aids the business of bookmaking and pool selling, or one who becomes a depositary of things wagered for hire, gain, and reward, and thus becomes a professional aid to gambling, are one, and both under the ban of the law. But as the law nowhere denounces as criminal the mere laying of a wager, so it would be preposterous to say that it denounced as a criminal one who became the depositary of such wager, not by way of aiding the poolselling business, and not for hire or reward, but as a mere matter of accommodation to the better.

LORIGAN, J. I concur.

(157 Cal. 432)

SCHWARTING v. CARPENTER.

(L. A. 2,175.)

(Supreme Court of California. March 28, 1910.)

1. LANDLORD AND TENANT (§ 157*)—LEASE—IMPROVEMENTS—TIME.

Under Civ. Code, § 1657, providing that, where no time is specified for the performance of an act, a reasonable time is allowed, where a lease requiring the lessor to make improvements is silent as to time, they must be made within a reasonable time.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 157.*]

2. TRIAL (§ 395*)—FINDINGS—SUFFICIENCY.

A general finding that "no allegation contained in the amended complaint or in the answer thereto is true, save and except as hereinbefore found," is too vague and indefinite for any purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927–934; Dec. Dig. § 395.*]

3. HIGHWAYS (§ 44*)—"LOCATION."

The word "location," as used in Pol. Code, § 2689, relating to the establishment of highways, refers to proceedings designed to fix the line of the highway at a time prior to its actual construction and opening.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 44.*

For other definitions, see Words and Phrases, vol. 5, pp. 4219–4222; vol. 8, p. 7709.]

4. TRIAL (§ 396*) — FINDINGS — RESPONSIVENESS TO ISSUES—"LOCATED."

In an action to rescind a lease for failure of defendant lessor to make certain improvements before the commencement of the term, the answer alleged the pendency of proceedings to open and establish a road, and averred that the location of the improvements was to be fixed after the road had been definitely located through the land, and convenient to the road when it was opened and ready for travel. *Held* that, while the term "located" as applied to a road is of uncertain significance, and may refer to the fixing of the line which the road is to occupy or to the actual construction of the road, it was meant as used in the answer to describe the act of the public officials in determining the place which the road was to occupy, and hence a finding that the improvements were to be placed after the road was located "and built" was beyond the issues.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4217–4219.]

5. Appeal and Error (§ 1054*).

Error in the overruling of an objection to evidence is prejudicial where it leads directly to the making of an erroneous finding, on which the court bases its conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Victor H. Schwarting against Emory W. Carpenter. Judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

S. V. Wright and T. A. Norton, for appellant. W. H. Spencer, for respondent.

SLOSS, J. Action on the part of lessee to rescind a written lease, and recover moneys paid in advance on account of rental reserved therein. Judgment went for defendant, and the appeal is from an order of the court denying plaintiff's motion for a new trial.

By the terms of the lease, dated September 1, 1906, the premises, consisting of 340 acres of land, were demised for a period of five years, commencing on October 1, 1906. The lessor, defendant herein, covenanted that he would erect on the land a house of not less than five rooms, together with a barn, and furnish the materials for making other minor improvements; plaintiff agreeing to furnish the labor of one man in the performance of the work. The lease was silent as to the time when these improvements were to be made. On October 13, 1906, nothing having been done toward making the improvements, plaintiff served upon defendant a notice of his intention to rescind said contract of lease, and demanded the repayment of the amount which he had upon the execution of the lease paid to defendant on account of rental of the premises.

The grounds for rescission stated in said notice and in the complaint were the failure on the part of defendant to make the improvements called for in the lease, and that defendant had failed and omitted to deliver possession of the premises on October 1, 1906. The only questions requiring discussion here are those relating to the first ground. If there was no default by the lessor with respect to the improvements, the court's findings, sufficiently supported by the evidence, showed a good excuse for the failure to deliver possession at the beginning of the term.

As has been said, the lease was silent on this subject, and contained no express stipulation concerning the time when the improvements were to be made. In the absence of any other agreement, the lessor would have been obliged to perform the stipulated acts within a reasonable time. Civ. Code, § 1657. The complaint alleges an understanding that the improvements should be made prior to the commencement of the term, and further avers that with reasonable diligence the defendant could have completed said improvements before the commencement of said term. The answer denies all the allegations of the complaint. In addition, it alleges that on September 1, 1906, the county of San Luis Obispo was taking legal steps to open and establish a county road from Oceano to Pismo, passing through the lands described in the lease; that the plaintiff and the defendant agreed that the location of the improvements to be placed on the land by defendant would be fixed and determined "after said road had been definitely located through said land, and convenient to such road when the same was opened and ready for travel; that said road, and the line and route thereof through said land, was not definitely located until October 25, 1906." The finding was that the parties agreed "that the improvements * * * should be placed thereon as soon as the defendant could do so after a county road from Oceano to Pismo was located and built through said land; that said road through said land was not built through said land until on or after October 25, 1906." This was the only finding on the question of the time agreed upon for the erection of improvements. There was no specific finding on plaintiff's averments that such improvements were to be erected before the commencement of the term, and that with reasonable diligence the defendant could have completed them by that time. The general finding that "no allegation contained in the amended complaint or in the answer thereto is true, save and except as hereinbefore found," is "too vague and indefinite for any purpose." Perkins v. West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118.

The judgment was evidently based upon the special finding regarding the agreed time for the making of the improvements. As to this the appellant contends, and we think rightly, that the finding is beyond the issues. The allegation of the answer is that the improvements were to be placed after the proposed road had been definitely located. The term "located," as applied to a road, is of uncertain significance. It may refer to the fixing of the line which the road is to occupy (Foster v. Park Com'rs, 133 Mass. 321; Turner v. Road Company, 33 Ind. 317); or to the actual construction of the road upon the ground (Moule v. Road Co., 6 How. Prac. [N. Y.] 37; Railroad Co. v. Jones, 2 Cold. [Tenn.] 574; Westfield Borough v. Tioga Co., 150 Pa. 152, 24 Atl. 700). Whether one or the other meaning is to be given depends upon the context. The word "location" appears in section 2689 of the Political Code, a part of the chapter relating to the establishment of highways. As there used, it plainly refers to proceedings designed to fix the line of the highway at a time prior to its actual construction and opening. The answer in this case undertook to describe proceedings under this very chapter. But, apart from this consideration, we think there can be no doubt that the word "located," as used in the answer, was meant to describe the act of the public officials in determining the place which the road was to occupy. The pleading alleges the pendency of proceedings by the county to open and establish a road. It states that the location of the improvements was to be fixed after the said road had been definitely located through said land, and convenient to the road when the same was opened and ready for travel. The addition of the adverb "definitely" is significant. It would have been useless if the word "located" had meant actually constructed. Again, the pleader himself distinguishes between the terms "located" and "opened and ready for travel." The only fair interpretation of defendant's answer is that he alleged an agreement whereby the erection of the improvements was to be deferred until the line of the proposed road should be definitely established and known, so that the improvements should be convenient to such road when the latter should be actually built.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The finding of the court was, however, that the parties agreed that the improvements should be erected as soon as the county road was located and built through said land, and that the road was not built until October 25, 1906. The effect of this finding was to excuse the delay of the defendant upon a ground not asserted in the answer. Whether the presence of a finding beyond the issues is ground for new trial need not be decided. The point is presented by the record in another way. The plaintiff objected to evidence of the time when the road was actually constructed, basing his objections specifically on the ground that the answer alleged that the improvements were to be erected "as soon as the county road should be located, not as soon as it should be built or constructed." The objection was overruled. This was error, and the error was clearly prejudicial, since it led directly to the making of a finding upon which the court obviously based its conclusion.

Numerous other points are made by the appellant, but we think the foregoing discussion disposes of the only matters of importance which seem likely to arise upon a new trial.

The order is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

157 Cal. 437

JENSEN v. DORR. (L. A. 2,441.)

(Supreme Court of California. March 28, 1910.)

1. Maritime Liens (§ 73*)—Attachment.

The attachment provided for by Code Civ. Proc. § 813 et seq., affording a special statutory procedure for the enforcement of liens upon vessels, and authorizing a writ of attachment, is entirely distinct from the ordinary attachment described in section 537, subd. 1 of which precludes an attachment against a resident defendant, where the debt is secured by a lien, unless the security has become valueless; the attachment under section 817, which provides that plaintiff may have the vessel attached as security for the satisfaction of any judgment that may be recovered, presupposing the existence of a lien, and being issuable only where there is such lien and for the purpose of aiding in its enforcement.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 113, 114; Dec. Dig. § 73.*]

2. Maritime Liens (§ 73*) — Attachment — Necessity for Affidavit.

As Code Civ. Proc. § 813 et seq., do not mention an affidavit for an attachment to enforce a maritime lien, none is required.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 115; Dec. Dig. § 73.*]

3. Maritime Liens (§ 73*)—Attachment—Effect of Filing Affidavit.

No affidavit being required in such proceedings, the attachment could not be vitiated by plaintiffs' having filed a useless and superfluous affidavit, nor by the fact that such affidavit contained a misstatement regarding an immaterial matter.

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. § 73.*]

4. Maritime Liens (§ 73*)—Enforcement by Attachment — Improper Direction of Writ.

Code Civ. Proc. § 819, provides that on an attachment in foreclosing a lien upon a vessel the writ must be directed to the sheriff of the county to which the vessel lies, and require him to attach such vessel with its tackle, etc., and keep the same, etc., it being a special writ, giving authority to seize specific property only; and in such a proceeding a writ following the terms of the general attachment law (Code Civ. Proc. § 540), directing the sheriff to attach and safely keep all the property of defendant within his county, or so much thereof as may be sufficient to satisfy plaintiff's demand, is insufficient.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 115; Dec. Dig. § 73.*]

5. Maritime Liens (§ 73*)—Enforcement by Attachment — Improper Direction of Writ.

Under Code Civ. Proc. § 823, providing that attachments on vessels may on motion be discharged in the same manner as attachments in other cases, and sections 556, 558, providing that a writ of attachment must be discharged if upon motion it appears that the writ was improperly or irregularly issued, a writ for a maritime attachment directed as provided by the general attachment law must be discharged, regardless of whether the sheriff did in fact levy on any property other than the vessel.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. § 73.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Lawrence Jensen against Fred Dorr. From an order denying defendant's motion to dissolve an attachment, he appeals. Reversed.

Wilbur Bassett, for appellant. Patterson Sprigg, for respondent.

SLOSS, J. Appeal by defendant from an order of the superior court of San Diego county denying his motion to dissolve an attachment. The complaint in the action was in 19 counts, each of which set up a cause of action for services or material furnished and used in the construction of the yacht "Yankee Girl," owned by the defendant, Dorr. The total sum demanded was $4,001.76, for which plaintiff claimed a lien upon said vessel, under the terms of section 813 of the Code of Civil Procedure. Upon the filing of the complaint, the plaintiff filed an affidavit, in the form prescribed by section 538 of the said Code, averring, among other things, that the payment of the contract in suit "has not been secured by any mortgage or lien upon real or personal property or any pledge upon personal property." At the same time an undertaking on attachment in the sum of $500 was filed. Thereupon, a writ of attachment, in the form prescribed by section 540, was issued out of said court to the sheriff of Los Angeles county, and said sheriff made return that he had attached the yacht "Yankee Girl," with its tackle, apparel, and furniture. Thereafter the defendant moved the court to dissolve and discharge the attachment upon the grounds: (1) That the attachment was improperly issued in that the contracts sued upon are alleged in the complaint to be secured by a lien upon personal property; (2) that the attachment was irregularly issued in that the affidavit is false in the statement that the amount sought to be recovered had not been secured by any lien upon personal property; and, (3) that the writ was irregularly issued in that it did not direct the sheriff to attach the vessel "Yankee Girl," with its tackle, apparel, and furniture, as provided in section 819 of the Code of Civil Procedure. The motion, as already stated, was denied, and the defendant appeals.

Under subdivision 1 of section 537 of the Code of Civil Procedure, an attachment can issue in an action against a resident defendant only where the debt is unsecured by lien, mortgage, or pledge, or where the security has become valueless. The requisite fact must appear by affidavit. Section 538. The first and second grounds of the motion to dissolve are based upon the proposition that the plaintiff's demand was, by virtue of section 813 of the Code of Civil Procedure, secured by a lien upon the vessel; such lien being antecedent to and independent of any seizure. The Great West v. Oberndorf, 57 Ill. 168; Bennett v. Beadle, 142 Cal. 239, 75 Pac. 843. From this the appellant draws the inferences that an attachment could not issue upon such secured debt, and that, in any event, the attachment was irregularly issued because based upon an affidavit which falsely stated that the debt was not secured. These positions are not well taken. The attachment provided for in the chapter of the Code relating to actions against steamers, vessels, and boats (Code Civ. Proc. § 813 et seq.) is entirely distinct from the ordinary attachment described in section 537 of the Code of Civil Procedure. The section which gives a lien upon vessels in certain cases is followed by other sections providing for the manner of enforcing such lien. The action is to be brought against certain defendants, if known (section 814); the form of the complaint and the manner of service of summons (sections 815, 816) are prescribed; and it is then provided that the plaintiff may have the vessel attached as security for the satisfaction of any judgment that may be recovered (section 817). The writ in a given form (section 819) is to be issued by the clerk upon receiving an undertaking (section 818). There are further provisions as to the execution of the writ (section 820) and the release of attached property by undertaking (section 822). Here is a special statutory procedure designed to permit the enforcement of liens upon vessels, and authorizing a writ of attachment to facilitate that end. Obviously, the provisions of subdivision 1 of section 537, precluding an attachment in an action against a resident defendant where the debt is secured by a lien, unless the security has, without the act of the plaintiff, become valueless, can have no application to such proceedings against vessels or their owners. The attachment under section 817 presupposes the existence of a lien. It can issue only where there is such lien, and for the purpose of aiding in its enforcement. For the same reason, the ordinary affidavit on attachment, showing a debt unsecured by lien, is entirely inappropriate to the case of an action to foreclose a lien upon a vessel. Since the sections covering such actions make no mention of an affidavit, we must conclude that none is required. If this be so, the plaintiff's writ cannot be vitiated by his having filed a useless and superfluous affidavit, nor by the fact that such affidavit contained a misstatement regarding an immaterial matter. Thorn v. Alvord, 32 Misc. Rep. 456, 66 N. Y. Supp. 587.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But the very reasons which lead us to hold that the first and second grounds of defendant's motion are without merit force the conclusion that the third ground was well taken, and should have been sustained. As respondent must concede, the general attachment law did not authorize an attachment in this case, and the issuance of the writ can be supported only as a proceeding under the statutory provisions regarding claims against vessels. It was essential, therefore, that the steps taken should have been in substantial compliance with the terms of these provisions. Proceedings for attachment, whether in ordinary cases or in actions to enforce liens against vessels, are created by statute, and must, in each of such classes of cases, follow the terms of the law governing that class. Edwards v. Cooper, 28 Ark. 466.

Where the attachment is sought in aid of an action to foreclose a lien upon a vessel, the Code requirement is that the writ "must be directed to the sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel, or boat, with its tackle, apparel, and furniture, and keep the same in his custody until discharged in due course of law." Code Civ. Proc. § 819. It is a special writ which gives authority to seize specific property only. The writ here issued, however, followed the terms of the general attachment law (Code Civ. Proc. § 540), and directed the sheriff "to attach and safely keep all the property of said defendant Dorr * * * within your said county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand. * * *" This was essentially different from the writ to which plaintiff was entitled under the vessels statute. In place of process authorizing a seizure of the yacht "Yankee Girl" alone, the sheriff was armed with a writ empowering him to seize any property of the defendant, and this in a case in which, under the averments of the complaint, a general attachment could not issue.

It is of no consequence that the sheriff did not in fact levy on any property other than the vessel. Under section 823, attachments on vessels may, on motion, be discharged in the same manner, and on like terms and conditions, as attachments in other cases. Sections 556 and 558, thus imported into the procedure for enforcing liens against vessels, provide that a writ of attachment must be discharged, if upon motion, made before or after levy, it appears that the writ was improperly or irregularly issued. "Under these sections it is immaterial whether much or little or any property of a defendant has been actually levied upon, but the court must, upon proper application therefor, discharge the writ of attachment thus wrongfully issued." Kennedy v. Cal. Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Sparks v. Bell, 137 Cal. 414, 70 Pac. 281.

By a proviso recently added to section 558 (St. 1909, p. 253), a motion to discharge for irregularity may now be met by proper amendment of the affidavit, undertaking, or writ. But this enactment was not in force when the motion in the present case was made, and, besides, it does not appear that plaintiff made any attempt to correct the defective writ.

The order is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

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157 Cal. 425

In re DANFORD. (Cr. 1553.)

(Supreme Court of California. March 28, 1910.)

1. ATTORNEY AND CLIENT (§ 36*) — DISBARMENT OF ATTORNEY—GROUNDS.

That misconduct charged against an attorney may also render him liable to punishment under the criminal laws does not necessarily deprive the court of power to hear disbarment proceedings against him; Code Civ. Proc. § 287, subd. 2, authorizing removal of an attorney for any violation of the oath taken by him or of his duties as such attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 49; Dec. Dig. § 36.*]

2. ATTORNEY AND CLIENT (§ 51*) — DISBARMENT OF ATTORNEY—PROCEEDINGS BY PRIVATE INDIVIDUAL.

The rule that an application for disbarment preferred by a private individual, who has a remedy for his alleged grievance by ordinary civil or criminal process, will not be considered, does not apply to the superior court, where the accusation has the sanction of a bar association, and is prosecuted by attorneys directed by that body to act in the matter.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 67; Dec. Dig. § 51.*]

3. ATTORNEY AND CLIENT (§ 44*)—OFFICE OF ATTORNEY—VIOLATION OF DUTY.

An attorney who exacted money from his client upon the false representation that he was authorized to practice in a United States court, and would conduct her case therein, violates his oath and duties as an attorney, as prescribed by Code Civ. Proc. § 282.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55–62; Dec. Dig. § 44.*]

4. ATTORNEY AND CLIENT (§ 123*)—NATURE OF RELATION.

The relation between attorney and client is a fiduciary one of the very highest character, and binds the attorney to most conscientious fidelity, and precludes him from obtaining any personal advantage by abusing the confidence reposed in him by his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239–249; Dec. Dig. § 123.*]

5. APPEAL AND ERROR (§ 1011*) — REVIEW — CONFLICTING EVIDENCE.

Where the evidence is conflicting, the facts are to be determined by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. TRIAL (§ 393*)—NECESSITY FOR WRITTEN FINDINGS.

Written findings were not required at common law, and are necessary only where the statute so provides.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 920–923; Dec. Dig. § 393.*]

7. ATTORNEY AND CLIENT (§ 54*)—PROCEEDINGS FOR DISBARMENT—NATURE—NECESSITY FOR FINDINGS.

Disbarment proceedings are peculiar to themselves and governed exclusively by the Code sections specifically covering them, and as Code Civ. Proc. §§ 287–297, which outline a complete scheme, covering the details of charge, process, plea, trial, and judgment, do not provide for findings, the court is not required to make them.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.*]

8. APPEAL AND ERROR (§ 708*)—TRANSFER OF CAUSE—NECESSITY FOR BILL OF EXCEPTIONS.

A motion to vacate the judgment is not a part of the judgment roll, and can be presented for review only when the papers used on the motion and the action of the court are authenticated by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 708.*]

9. JUDGES (§ 6*)—RIGHT TO OFFICE—COLLATERAL ATTACK.

That a judge presiding at a trial was an alien and therefore ineligible made him none the less a de facto officer, and his right to the office could be questioned only in proceedings regularly instituted for that purpose, and could not be attacked collaterally by motion to set aside his official acts.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 11, 12; Dec. Dig. § 6.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Proceedings for disbarment of William J. Danford. From a judgment of disbarment and an order denying a new trial, respondent appeals. Affirmed.

J. D. Reymert and Wm. J. Danford, for appellant. O'Melveny, Stevens & Millikin, for respondent.

SLOSS, J. Upon an accusation purporting to charge William J. Danford, an attorney at law, with a violation of his professional duties, a hearing was had in the superior court of Los Angeles county, and that court gave judgment depriving the accused of the right to practice as attorney or counselor in the courts of the state of California. This is an appeal by Danford from the judgment and from an order denying his motion for new trial.

The first point made is that the accusation fails to state facts justifying disbarment, and that therefore appellant's demurrer should have been sustained. The accuser, Catherine E. Smith, alleged, in effect, that on May 1, 1908, Danford was an attorney at law, entitled to practice before the superior court of Los Angeles county, and held himself out to the public as an attorney at law. Said Catherine E. Smith consulted him relative to her defense in a certain case then pending in the district court of the United States for the Southern district of California, entitled "The United States of America v. Mrs. C. E. Smith." It was alleged that Danford then and there falsely, fraudulently, and unlawfully represented and stated to said accuser that he could and was authorized to practice in the said district court of the United States, and could and was able to represent her as her attorney in said action in said court. At the same time he requested her to pay him the sum of $500 for services to be rendered by him as her attorney in defending said action in said court, and she paid said sum, believing and relying upon his statements and representations. In fact, Danford was not authorized to or admitted to practice as an attorney at law in the United States district court, and could not represent or appear for Mrs. Smith as her attorney in said action or before said court, and, as is averred, his representations in this regard were false, were known by him to be false, and were made with the intention of misleading and deceiving the accuser, and inducing her to pay to the accused the said sum of $500. In June, 1908, it is alleged, Danford obtained from Mrs. Smith the further sum of $2,500, upon the representations, made with knowledge of their falsity, that he could and would represent her in said action, and that if she would pay him the said $2,500, he would cause said action against her in the district court to be "wiped out," discontinued, and disposed of.

It is argued that the complaint charges a public offense, and that an application for disbarment, in advance of the termination of a criminal prosecution for such offense, should not have been entertained. The fact that the misconduct charged against an attorney at law may also render him liable to indictment and punishment under the criminal law does not necessarily deprive the court of power to hear disbarment proceedings against him. Section 287 of the Code of Civil Procedure authorizes the suspension or removal of an attorney for various causes, including, "(1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence; (2) * * * any violation of the oath taken by him, or of his duties as such attorney and counselor." Where disbarment is sought upon the mere ground that the accused has been guilty of a public offense involving moral turpitude, but not necessarily connected with the practice of his profession, it has very properly been held that a case for disbarment is not made until there has been a conviction of the offense. In re Tilden, 87 Cal. xxi, 25 Pac. 687. In the Tilden Case the charge was that the accused had committed larceny, but it was not alleged that the act had been done in the discharge of any professional relation. There was no attempt to show a ground arising under any part of section 287 other than subdivision 1. Under that subdivision, a conviction was essential. But, as pointed out in later cases, an attorney may be disbarred for a violation of his professional duties, i. e., for any ground coming within the terms of subdivisions 2, 3, or 4 of section 287, notwithstanding the fact that the charge against him might also be made the basis of an indictment or information. Ex parte Tyler, 107 Cal. 78, 40 Pac. 33; In re Wharton, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72. See, also, In re Treadwell, 67 Cal. 358, 7 Pac. 724; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552. "If * * *" says this court in Ex parte Tyler, supra, "an attorney is charged with a violation of his professional obligations, either to his client or to the court, or with professional delinquency in matters pertaining peculiarly to the relations between him and his client, it is no defense to a proceeding for his suspension or disbarment that the same transactions may render him liable to a criminal prosecution." In re Delmas, 139 Cal. xix, 72 Pac. 402, is not to be taken as laying down a different rule. The refusal of the court to proceed in that case was based primarily upon the ground that the Supreme Court would not entertain an original proceeding for disbarment in the absence of a showing of good reasons for the failure to first resort to the superior court, which is vested with concurrent jurisdiction in this class of cases. The opinion declares, further, that an application for disbarment preferred by a private individual, who has a remedy for his alleged grievance by ordinary civil or criminal process, will not be considered. In re Stephens, 102 Cal. 264, 36 Pac. 586. We do not understand that this rule was intended to be applied to the superior courts, as well as to this court. At any rate, it was limited to cases in which the accusation was without the sanction of a bar association or of some responsible public officer. It appears here that the charge against Danford was authorized by the Los Angeles Bar Association, and was prosecuted by attorneys directed by that body to act in the matter.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We have no doubt that the facts alleged show a violation of appellant's oath and of his duties as an attorney. Code Civ. Proc. § 282. The relation between attorney and client is "a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—uberrima fides." Cox v. Delmas, 99 Cal. 104, 123, 33 Pac. 836. It is one which precludes the attorney from obtaining any personal advantage by abusing the confidence reposed in him by his client. In re Burris, 101 Cal. 624, 36 Pac. 101. The allegation here is that the accused, by means of a misrepresentation, induced his client to pay him a large sum for services which he was not, and knew that he was not, in a position to perform. This was a plain breach of the obligation of fidelity imposed upon him by the law and by the employment which he accepted.

The contention that the finding of guilt is contrary to the evidence cannot prevail. The testimony of the accuser and her witnesses supports every material allegation of the complaint. It is true that the testimony introduced by the appellant contradicted the accuser in various particulars, but the resulting conflict was as we have so often said, one to be determined in the trial court. It cannot be said that the representation that Danford was entitled to practice in a federal court was not material. Ordinarily, an attorney licensed to practice in all the courts of a state, as Danford has been, will, on motion and showing of good moral character, be admitted to the bar of the various inferior federal courts. The admission may, in a sense, be regarded as a merely formal matter. It was not so, however, in this instance for the record shows that, when a motion was made in the district court to have the appellant admitted to practice there, an objection to his admission was interposed, and action upon the motion was indefinitely deferred.

At the close of the trial, the accused requested the court to make written findings of fact and conclusions of law. This the court declined to do, and its refusal is assigned as error. We find no statutory provision requiring findings in a case of the character of the one before us. Written findings were not required under the common-law practice, and are necessary only where a statute so provides. Sections 632 and 633 of the Code of Civil Procedure, which declare that the decision must be in writing, and that the facts found and the conclusions of law must be separately stated, are included in title 8 of part 2 of said Code. Part 2 is entitled "Civil Actions." The requirement of findings, with some other details of procedure found in Part 2, applies only to civil actions and to those special proceedings—for example, matters of probate—(Code Civ. Proc. § 1713) to which such provisions are specially made applicable. Lyons v. Marcher, 119 Cal. 382, 51 Pac. 559. Proceedings on an accusation against an attorney are prescribed by sections 287 to 297 of the Code of Civil Procedure. These sections outline a complete scheme, covering the details of charge, process, plea, trial, and judgment. Section 295 authorizes an oral denial of the accusation, without oath. The procedure is in almost all respects dissimilar to that provided for civil actions, and, as it makes no mention of findings, there is no reason for holding that the Legislature intended to import the need of findings into it. This court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the Code sections specifically covering them. Thus, it has held that the statute of limitations applicable to civil or criminal applications is no bar (Ex parte Tyler, supra); that the accused is not entitled to a jury trial (In re Wharton, 114 Cal. 370, 46 Pac. 172, 55 Am. St. Rep. 72); and that the accuser has no right to an appeal (In re Thompson, 114 Cal. xvii, 45 Pac. 1034).

The transcript contains a copy of a purported notice of intention to move to vacate the judgment, on the ground that the judge presiding was not a citizen of the United States. This is followed by copies of affidavits and exhibits relied on by appellant to establish the ground of his motion. In like manner appear counteraffidavits and an order striking said notice of motion, with its accompanying affidavits and exhibits, from the file. The appellant assigns the refusal to vacate the judgment and the order striking out as error. His point cannot receive favorable attention for two reasons: (1) The motion to vacate the judgment is not a part of the judgment roll, and can be brought before this court for consideration only when the papers used on the motion and the action of the court are authenticated by a bill of exceptions. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904. In the record before us there is no authentication by means of such bill, or otherwise. (2) The motion was, on its face, without merit. The fact, if it had been a fact, that the judge presiding at the trial was an alien, and therefore ineligible, made him none the less a de facto officer. His right to hold the office could be questioned only in proceedings regularly instituted for that purpose. It could not be attacked collaterally by motion to set aside his official acts. People v. Sassovich, 29 Cal. 480; People v. Hecht, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96.

No other points are made by appellant.

The judgment and order are affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

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12 Cal. App. 671

LOEHR v. BOARD OF EDUCATION et al.

(Civ. 670.)

(Court of Appeal, First District, California. Feb. 23, 1910. Rehearing Denied by Supreme Court April 22, 1910.)

1. Schools and School Districts (§ 141*)—Teachers — Grades — Certificates—Limitation.

The law recognizes but three school grades, namely, primary, grammar, and high school; and certificates authorizing teachers to instruct in these grades qualify the teacher for service only in the grade or grades covered by the certificate, hence it is in the statutory sense that the court must regard the term "grade" when seeking a limitation upon the powers of the board of education to transfer and assign teachers.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 301–304; Dec. Dig. § 141.*]

2. Schools and School Districts (§ 141*)—Teachers—Appointment—Transfer — Assignment—Dismissal.

In the absence of a constitutional or statutory limitation, boards of education may exercise an unlimited discretion both in the employment and dismissal of teachers, and in their transfer and assignment.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 302; Dec. Dig. § 141.*]

3. Schools and School Districts (§ 141*)—Teachers — Consolidation of Classes — Discontinuance of Schools—Retirement of Teacher.

Pol. Code, § 1791, defines the general powers of city and county boards of examination. Section 1793 provides that holders of city or city and county certificates are eligible to teach in the cities or cities and counties in which the certificates were granted, in schools or classes of grades corresponding to the grades of their certificates, etc. *Held*, that teachers elected without definite tenure have the right to hold their position while competent and faithful, and are subject to dismissal only for insubordination, etc., though boards of education may consolidate classes and discontinue a school or class in the interest of economy or for other good cause, and in such event to determine what teacher shall be retired.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 302; Dec. Dig. § 141.*]

4. Schools and Schools Districts (§ 138½,* New, vol. 9, Key No. Series) — Teachers — Transfer.

Under Pol. Code, § 1793, the board of education has power to transfer a teacher from class to class or from school to school, providing the teacher shall be retained in some class in a school of the grade which the certificate qualifies him to teach in.

5. Schools and School Districts (§ 144*)—Teacher on Unassigned List—Right to Salary.

Where a teacher was without cause placed upon the unassigned list while away on a leave of absence, upon her return she was entitled to immediate assignment, and she could draw her salary until lawfully assigned to a position in the same class.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 308; Dec. Dig. § 144.*]

6. Schools and School Districts (§ 133*)—Teachers—Indefinite Employment—Statutes—Construction.

Under Pol. Code, § 1793, conferring the right of indefinite employment upon those who are the holders of city or city and county certificates, the right is conferred only as an incident to the holding of a city certificate as distinguished from a county, state, or special certificate.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 289; Dec. Dig. § 133.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Mandamus by Adeline M. Loehr against the Board of Education and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Percy V. Long and John T. Nourse, for appellants. C. M. Fickert and I. F. Chapman, for respondent.

KERRIGAN, J. This is an appeal by the defendants from a judgment of the superior court in favor of the plaintiff in a mandamus proceeding.

The trial court awarded plaintiff a peremptory writ, by which the board of education of the city and county of San Francisco was commanded to admit plaintiff to the position of teacher of a class designated as "A first grade" in a common public school of said city and county, and to approve, allow, and order to be paid her demand for $83 per month as compensation for services as teacher of such grade.

The case was submitted to the court upon an agreed statement of facts, from which it appears that plaintiff was the holder of a high school certificate, granted by an order of said board of education, which rendered her eligible to teach in any of the public schools of said city and county. In June, 1903, plaintiff was elected to the position of teacher in the primary grade, and placed upon the substitute list without any regular assignment. Thereafter she was assigned and transferred at various times to different schools and classes, all of the primary department, until June, 1906, when, her probation period having expired, she was by a resolution of the board of education elected a regular teacher in the department and placed upon the unassigned list until such time as her services would be required. In August, 1906, she was assigned as a teacher of a class of first grade and second grade pupils in the Sheridan Annex School at a salary of $83 per month. She remained there until June, 1907, when, at her request, she was granted a leave of absence until August 19, 1907. At the termination of this leave, she learned that she had been placed on the unassigned list of teachers. The reason of this action by the board of education is not indicated in the agreed statement of facts; and, unless for such moving cause as was held sufficient to sustain similar action in Bates v. Board of Education, 139 Cal. 145, 72 Pac. 907 (where, in the interest of economy the plaintiff's class had been consolidated with others), it would be held to constitute a violation of her rights as defined in Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042, and Fairchild v. Board of Education, 107 Cal. 92, 40 Pac. 26. The significance of this action of the board, however, is lost in what subsequently occurred, for it further appears from the agreed statement of facts that whatever may have been the cause of the placing of the plaintiff upon the unassigned list the board did again in November, 1907, assign her to the Marshal Primary School, to take charge of the B third grade, which position carried a salary of $76 a month. She refused to accept this assignment, and subsequently made a number of demands to be assigned to an A first grade class in the Sheridan Annex School, or to a class of similar rating in any other school paying a like salary, but such demands were not complied with. She has refused to accept assignment to a class having a different rating, or to a different grade, or to any class or grade carrying a different salary.

The questions presented by these facts call for a definition of the powers of the board of education in the transfer and assignment of teachers. That the board ought to have wide discretion in such matters would seem to be dictated by the necessity of maintaining the efficiency of the department. No doubt it often occurs that a teacher assigned to a particular class forming a part of a particular grade is shown by experience to be better suited to the instruction of a different class forming part of a different grade. In such event, it is reasonable to suppose that the Legislature intended that the board of education should be vested with discretion to make a reassignment of the teacher to such class; and, unless there is something in the statute plainly requiring a different construction, we should be reluctant to decide that boards of education do not possess this power. These considerations caused the court in Kennedy v. Board of Education, supra, at page 492 of 82 Cal., at page 1045 of 22 Pac., to express the reservation: "We do not wish to be understood as holding that the board of education has not the power to transfer a teacher from one school to another of the same grade. The statute does not guarantee to a teacher the right to teach in any particular school, but to continue as such teacher in a certain grade, and the transfer of teachers from one school to another may be necessary for the good of schools, and should not be prohibited." The term "grade" as used in that decision, we assume, was employed in the statutory sense. In the agreed statement of facts reference is made to the "A first primary grade," and the "B third grade," from which we infer that the public schools of the city and county of San Francisco have been so classified as to permit the application of such generic designations to all classes having the same course of instruction. Indeed, it is a matter of common knowledge that such a classification is made by the school authorities of the various counties and cities of the state. Pupils are said to belong to the first, second, third, or other grades, as the case may be, and to this fact some confusion of thought may be attributed. Such classification into grades is made by boards of education for the purpose of dividing the course of study or curriculum into convenient periods. There is nothing in the statute, however, which recognizes their existence. The law itself recognizes but three principal grades, namely, primary, grammar, and high school grades. Certificates authorizing teachers to instruct in these grades are issued accordingly as primary, grammar or high school certificates, and, as such, qualify the teacher for service only in the grade or grades covered by the certificate. It is in this statutory sense that we must regard the term "grade" when seeking a limitation upon the powers of the defendant to transfer and assign teachers, as it will not be pretended that the asserted right of the teacher to teach a particular class within a particular grade, in preference to another class within the same grade, can be upheld without express statutory authority. On the contrary, it has been uniformly held in this state that in the absence of a constitutional or statutory limitation, boards of education may exercise an unlimited discretion in the employment and dismissal of teachers, as well as in their transfer and assignment. Kennedy v. Board of Education, supra; Barthel v. Board of Education, 153 Cal. 376, 95 Pac. 892; Stockton v. Board of Education, 145 Cal. 246, 78 Pac. 730; Bradley v. Board of Education, 1 Cal. App. 212, 81 Pac. 1036; Harby v. Board of Education, 2 Cal. App. 418, 83 Pac. 1081. Therefore, unless there is some provision of the law denying the board of education the right in its discretion to transfer and assign teachers, it must be held in this case that the assignment of the plaintiff to the Marshall Primary School, to take charge of the "B third grade," was a valid transfer and assignment.

Plaintiff contends that there is such a limitation contained in section 1793 of the Political Code. That section has been held to confer upon teachers elected without definite tenure the right to hold the position while competent and faithful, and to be subject to dismissal only for insubordination or other causes specified in section 1791 of the same Code. To this statement of the rights of the teachers must be added the qualification expressed in the case of Bates v. Board of Education, 139 Cal. 145, 72 Pac. 907, that power resides in boards of education to consolidate classes and to discontinue a school or class in the interest of economy or for other good cause, and in such event to determine what teacher shall be retired. Section 1793 in part provides: "The holders of city, or city and county, certificates, are eligible to teach in the cities, or cities and counties, in which such certificates were granted, in schools or classes of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one, of this Code, duly ascertained and approved by the boards of education of such cities, or cities and counties." It will be observed that the section makes teachers eligible to teach only in "schools or classes of grades corresponding to the grades" of their certificates. There is nothing in this section, however, placing any limitation upon the power of the board of education to transfer a teacher from class to class, or from school to school. All that the statute seems to require is that the teacher shall be retained in some class in a school of the grade which the certificate qualifies him to teach in. However, it is sufficient for the purposes of this case to say that while plaintiff was transferred from one class to another, to which a slightly lower salary was attached, nevertheless she was not removed from the statutory grade to which she was elected, and, as we find nothing in the law preventing the board of education from making such transfer, it follows that the board acted within its powers, and that its action is valid. The Legislature certainly intended to leave such freedom of action in a board of education as would permit it in its discretion to make such assignment or transfer of a teacher as is complained of in this case. In Kennedy v. Board of Education, supra, the teacher was transferred from one school to another of lower grade, and the court observes: "She was removed fom the grade in which her certificate and the statute entitled her to teach."

As we have seen, the placing of the plaintiff without cause upon the unassigned list while away on a leave of absence was unauthorized by law. Upon her return she was entitled to immediate assignment, and the fact that she had been wrongfully placed on the unassigned list did not operate to deprive her of her right to draw the salary incident to the position from which she had been wrongfully removed. This right existed from the date of her return, August 19, 1907, until November 26, 1907, when she was, as we have held, lawfully assigned to a class in the primary grade. We hold, therefore, that she is lawfully entitled to a salary of $83 a month from August 19, 1907, to November 26, 1907, and the court below should have issued a writ of mandate, directing the defendants to approve, allow, and order to be paid such salary. But her refusal to accept the assignment and enter upon the discharge of the duties of a teacher in the "B third grade" in the Marshall Primary School at a salary of $76 a month was a refusal on her part to perform the services which she was legally required to perform, and she cannot legally refuse to perform such services and insist upon the payment of the salary incident thereto. "The public schools," as was pertinently observed in Bates v. Board of Education, supra, "were not created, nor are they supported, for the benefit of teachers therein, * * * but for the benefit of the pupils and the resulting benefit to their parents and the community at large."

Section 1793 confers the right of indefinite employment upon those who are "the holders of city or city and county certificates." And it has been repeatedly held, in accordance with the plain language of the section, that this right is conferred only as an incident to the holding of a city certificate as distinguished from a county, state or special certificate. Stockton v. Bd. of Education, 145 Cal. 246, 78 Pac. 730; Barthel v. Bd. of Education, 153 Cal. 376, 95 Pac. 892; Bradley v. Bd. of Education, 1 Cal. App. 212, 81 Pac. 1036. Defendants contend in this case that the holder of a high school certificate is not the holder of a city certificate within the contemplation of the section quoted, but the views we have expressed render the determination of this point unnecessary at this time.

The judgment is reversed, with directions to the trial court to enter judgment in accordance with the views herein expressed.

We concur: COOPER, P. J.; HALL, J.

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12 Cal. App. 639

JUSTIS et al. v. ATCHISON, T. & S. F. RY. CO. (Civ. 732.)

(Court of Appeal, Second District, California. Feb. 11, 1910. Rehearing Denied March 12, 1910; Denied by Supreme Court April 11, 1910.)

1. Carriers (§ 310*)—Injury to Passenger—Action For—Breach of Contract—Tort.

At common law a passenger injured could elect between the breach of the contract to deliver him in safety and the wrong which justified an action in tort.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 310.*]

2. Carriers (§ 253*)—Contract—Ticket—Receipt—Evidence.

Though a ticket purchased by a passenger, when considered alone, might be deemed merely a receipt, containing only part of the contract, it was evidence that there was a contract, that the fare was paid, and of the right to be carried according to its terms, even though it did not express all the terms of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1011–1018; Dec. Dig. § 253.*]

3. Contracts (§ 144*) — Interpretation — What Law Governs.

Where a contract between a citizen and a common carrier for transportation to another state was made in this state, its implied terms are to be supplied, and it is to be interpreted by the laws of this state, since the law of the domicile must prevail in the absence of express statutory provision.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724–727; Dec. Dig. § 144.*]

4. Property (§ 2*)—Right to Recover Damages.

Under Civ. Code, § 953, providing that a "thing in action" is a right to recover money or other personal property by a judicial proceeding, the right to recover damages from a common carrier for breach of a contract is "property."

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 2, pp. 1144–1148; vol. 8, p. 7602; vol. 6, pp. 5693–5728; vol. 8, pp. 7768–7770.]

5. Husband and Wife (§ 260*)—Right to Recover Damages—Community Property.

Under Civ. Code, § 164, providing that all property acquired after marriage is community property, the right to recover damages from a common carrier for breach of a contract when acquired after marriage by husband or wife, or both, is community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 912; Dec. Dig. § 260.*]

6. Husband and Wife (§ 270*)—Right to Recover Damages—Community Property—Parties.

The right of action for an injury to the wife and the money recovered therefrom being community property, the wife could not bring an action without making her husband a party, and she could not alone execute a release or satisfaction of the obligation, though the husband and wife could join in such an action.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 270.*]

7. Husband and Wife (§ 270*)—Right to Recover Damages—Form of Action—Election.

Neither could she alone elect the form of action in which the damages for the injury could be recovered.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 270.*]

8. Evidence (§ 80*)—Presumptions—Laws of Other States.

The laws of another state are presumed to be the same as the laws of the forum, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Minnie Justis and another against the Atchison, Topeka & Santa Fé Railway Company, a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. W. Camp and A. H. Van Cott, for appellant. C. F. McNutt and McNutt & Hannon, for respondents.

TAGGART, J. This is an action to recover damages for injuries received by the plaintiff Minnie Justis while riding as a passenger upon one of defendant's trains through the territory of Arizona; she having a ticket, issued by defendant's agent, entitling her to passage from Los Angeles, Cal., to Kansas City, Mo. Judgment was for plaintiffs in the sum of $1,975, and defendant appeals from the judgment.

The principal defense of appellant was based upon a written release and settlement of all damages arising from the injury, and a receipt therefor, signed by Mrs. Justis while on the train in the state of Kansas two days after the collision in which she was hurt. It is contended by appellant that, under the law of Arizona, and particularly under certain sections of the Revised Statutes of that territory which were read into the record and considered as evidence, without objection, the damages which could be recovered by plaintiffs, or either of them, on the cause of action stated, became and were the separate estate of the wife, and not the property of the community.

We are much inclined to the view of respondents' counsel that the discussion of the cause of action before us upon the theory that it is an ordinary action sounding in tort has "led us a chase in the wilder-ness." Section 2100 of the Civil Code of the state provides that "a carrier of persons for reward must use the utmost care and diligence for their safe carriage," etc. In applying this section to instructions given in cases relating to injury to passengers of common carriers, the rule relating to such cases clearly distinguishes them from ordinary actions in tort. Kline v. Santa Barbara, 150 Cal. 741, 90 Pac. 125; Valente v. Sierra Railway, 151 Cal. 534, 91 Pac. 481. Even at common law, the party injured might in such a case elect between the breach of the contract to deliver him in safety and the wrong which justified an action ex delicto. Sheldon v. Steamship Uncle Sam, 18 Cal. 527, 534, 79 Am. Dec. 193.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The complaint here states a cause of action against the defendant for a violation of the obligation assumed by it to carry Mrs. Justis in safety to her destination, as indicated by the ticket which its agent sold to her. While the ticket purchased by her, when considered alone, might be deemed merely a receipt, containing only a part of the contract made, yet it was evidence that there was a contract. It was evidence of the payment of her fare and of her right to be carried according to its terms, even though it did not express all the terms of the contract. Sloane v. Southern Cal. Ry. Co., 111 Cal. 685, 44 Pac. 320, 32 L. R. A. 193; Ames v. Southern Pacific Co., 141 Cal. 728, 732, 734, 75 Pac. 310, 99 Am. St. Rep. 98. The facts alleged in the complaint sufficiently state a cause of action based upon the contract created by the purchase of the ticket and the provisions of the Code. The findings are sufficient to sustain a judgment upon the same theory. We may then consider the cause of action as one based upon a contract. So regarded, the contract was made at Los Angeles, its implied terms are to be supplied from the laws of the state of California, and it is to be interpreted by the laws of this state.

The right to recover damages for such an injury by a judicial proceeding is property in this state (Civ. Code, § 953); and when acquired after marriage by husband or wife, or both, it is community property (section 164). McFadden v. Santa Ana, 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Neale v. Railway Co., 94 Cal. 425, 29 Pac. 954. The right of action for an injury to the wife and the money recovered therefrom being community property, the wife could not bring an action without making her husband a party, and could not, of course, alone, execute a release or satisfaction of the obligation. The husband and wife, however, may join in such an action. Williams v. Casebeer, 126 Cal. 82, 58 Pac. 380; Paine v. San Bernardino, 143 Cal. 658, 77 Pac. 659. As the wife alone could not release the obligation of defendant to the community for her injury, neither could she elect the form of action in which the damages for that injury could be recovered.

While the complaint and findings, in the absence of demurrer to the former, sustain the judgment upon the theory that the action is on the contract, the complaint supports and the evidence justifies the finding of the trial court that, "under the laws of Arizona, a cause of action for such personal injuries to the wife and the fruits thereof were community property," if the action be considered as based upon the tort instead of the contract. The same conclusion would be reached whether the Arizona law introduced is considered as "evidence," or as a law to be construed as such, notwithstanding it is required by the statute to be introduced in evidence in the same manner as the facts in the case. Code Civ. Proc. §§ 1900, 1901, 1902, 1903; Cummings v. O'Brien, 122 Cal. 204, 54 Pac. 742.

Of the sections of the Revised Statutes of Arizona contained in the record only sections 3104, 3106, and 3111 need be specially mentioned, as these are the ones chiefly relied upon to sustain appellant's view that the wife had authority to discharge the claim for damages. Section 3106 provides: "Hereafter married women of the age of eighteen years and upwards shall have the same legal rights as men of the age of twenty-one years and upwards, except the right of suffrage and of holding office, and *except the right to make contracts binding the common property of husband and wife*," etc. (The italics are ours.) Section 3104 is as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived, or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but the wife must join in all deeds and mortgages affecting real estate, except unpatented mining claims." The section which furnishes the basis for most of the arguments in the briefs is section 3111, which reads as follows: "The marital rights of persons married out of this territory, who may move to this territory, shall, in regard to property acquired in this territory, during the marriage, be regulated by the laws of this territory." Considered alone, the last section does not affect the material rights of the plaintiffs here, since they are not persons married out of the territory who have moved into it, but are residents of the state of California. Appellant contends, however, that by the application of the rule expressio unius, etc., to this section, the general rule declared in section 3106 would govern, and therefore the wife, by the law of Arizona, would have the same legal rights of contract in relation to injuries to herself that any man of 21 would have as to injuries received by him. We cannot accept this interpretation of the section. The general effect of the statutes of Arizona before us, other than section 3111, is to declare the law of that territory with respect to common property to be practically the same as that of this state, and the introduction in evidence of these statutes served merely to confirm the presumption which should have governed the decision of the superior court, in which the case was tried, if no such evidence had been introduced. In re Hancock's Estate, 106 Pac. 58. The effect of section 3111 was to bring within the operation of the laws of the territory relating to marital rights in property acquired in the territory the one class, to wit, persons married out of the territory who have moved into it. If the rule invoked by appellant were applied here, all persons not mentioned must be excluded and all other classes, including persons married in the territory, as well as those married elsewhere, who had not moved into the territory, would, as to property acquired by them in the territory, be excluded from the benefit of the laws of the territory affecting marital rights. It is apparent that the Legislature of the territory never intended such a result.

Respondents contend that the section is but the useless relict of a departed condition, a condition which existed at the ingrafting of community rights into the American system in all the Pacific Coast states and territories when that territory became a part of the United States, and which, having served its purpose, has, in all the other jurisdictions, been removed from the statute books by appropriate legislation. There is much to sustain this view, but we do not think we are driven to the necessity of accepting either the impossible and inconsistent construction of section 3111 by appellant, or to eliminate the section from consideration on the ground of decay, disuse, or laches, as urged by respondents. The reasonable interpretation of it would seem to be that it was intended to admit certain persons married out of the territory to the benefits of the community laws of the territory. Of those not affected by the express terms of the section, the resident, whose marriage occurred in the territory, under the laws of the territory, would be governed by its general laws. Persons married out of the territory and who have not moved into it would be governed, as to personal property acquired by them in the territory, by the well-established, almost universally acknowledged rule that the law of the domicile must prevail in the absence of express statutory provision. The law of California thereby became the law of Arizona as to these plaintiffs, and the finding of the trial court that the cause of action for the personal injuries to the wife was community property was a proper deduction from the law and evidence.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

157 Cal. 528

In re BELL'S ESTATE.

BELL v. NATIONAL BANK OF D. O. MILLS & CO. (S. F. 5,317.)

(Supreme Court of California. April 4, 1910.)

1. APPEAL AND ERROR (§ 994*) — REVIEW — CREDIBILITY OF WITNESSES.

The credibility of witnesses, though testifying by affidavit, is for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3904; Dec. Dig. § 994.*]

2. APPEAL AND ERROR (§ 323*)—SEPARATE APPEALS.

Whether or not creditors, opposing the application of a widow for a family allowance from the estate of her deceased husband, have an absolute right to appeal separately from the order of allowance, one of them may of necessity so appeal; the others refusing to join it in appealing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1798–1805; Dec. Dig. § 323.*]

3. COSTS (§ 256*) — COSTS ON APPEAL — ABSTRACTS.

There being no rule or statute authorizing an appellant, instead of filing a transcript, to make reference to one filed in another appeal, and separate independent appellants not being required to unite in the filing of a transcript, and the respondent having refused to unite in a stipulation, which appellants offered to make, that they should so unite, and that both appeals should be heard on one transcript, insisting that her rights might be thereby prejudiced, she cannot, after reversal on appeal, take the position that the filing of the two transcripts was unnecessary, and therefore that the cost of that filed last should not be taxed as costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968–971; Dec. Dig. § 256.*]

4. COSTS (§ 254*)—COSTS ON APPEAL—CERTIFYING ABSTRACT.

By provision of Supreme Court Rule 11 (78 Pac. ix), respondent is to be taxed with the cost of having the clerk certify the transcript; her attorney having refused to certify it as correct or to point out anything therein for correction.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 254.*]

5. EVIDENCE (§ 318*)—HEARSAY.

The affidavit of L. that B. returned, with his refusal to certify, a transcript to A., is not, on its face, hearsay, as L. might have been present when B. communicated his refusal to A.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1199; Dec. Dig. § 318.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the Estate of Thomas Bell, deceased. From an order, Teresa Bell appeals; the National Bank of D. O. Mills & Co. being the respondent. Affirmed.

See, also, 153 Cal. 331, 95 Pac. 372; 153 Cal. 345, 95 Pac. 378.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

T. Z. Blakeman, for appellant. James M. Allen, for respondent.

SLOSS, J. Appeal from an order denying a motion to tax costs on appeal.

Teresa Bell applied to the court in which the estate of Thomas Bell, her deceased husband, was pending, for an order of family allowance. Nineteen creditors appeared and opposed the application. An order granting the allowance was made. From this order the creditors appealed. Eighteen of them joined in a single notice of appeal. A separate notice was given by the nineteenth, the National Bank of D. O. Mills & Co. The appeals came up separately; that of the eighteen being numbered S. F. 4,582, and that of National Bank of D. O. Mills & Co., S. F. 4,583. In each case the order was by this court reversed. 153 Cal. 331, 95 Pac. 372; Id., 153 Cal. 345, 95 Pac. 378. In due time the successful appellant in No. 4,583 filed its memorandum of costs, claiming costs in the sum of $577, made up as follows: For printing transcript, $544.50; paid clerk of superior court for certifying to transcript, $22; paid clerk of Supreme Court for filing transcript, $10; fees of clerk of superior court on filing remittitur from Supreme Court, 50 cents. The respondent (appellant here) moved the court to tax the costs by striking out the items for printing and for certifying transcript on the ground that they were excessive and unnecessary.

The position of the appellant is that she had already paid the full cost of printing and certifying the transcript in 4,582; that this transcript, with the exception of the notice of appeal, is an exact duplicate of that filed by the appellant in 4,583; and that there was no occasion for filing two transcripts. The affidavits bearing on these questions present various points of conflict. It is, of course, plain that, in support of the order appealed from, we must assume that every such conflict was resolved by the trial court in favor of the respondent. The credibility of the witnesses, whether testifying orally or by affidavit, is for the trial court. Reading the record in the light of this elementary rule, we find that the trial court had before it evidence justifying it in believing this to be the state of facts: Of the 19 creditors who opposed Mrs. Bell's application for family allowance, 2, D. O. Mills and National Bank of D. O. Mills & Co., appeared and were represented by Mr. James M. Allen. The other 17, including one Louisa J. Thompson, were represented by Mr. J. F. Leicester. Mr. T. Z. Blakeman appeared as attorney for the petitioner, Mrs. Teresa Bell. The reason for the taking of a separate appeal by the National Bank of D. O. Mills & Co. was that Mr. Leicester, on behalf of Louisa J. Thompson, refused to join said National Bank in taking an appeal. Before the filing of a transcript on either appeal, Mr. Leicester, at the request of Mr. Allen, wrote a letter to Mr. Blakeman, requesting him to stipulate that both appeals might be heard on a single transcript. At that time the transcript on the appeal taken by Louisa J. Thompson and others (No. 4,582) had already been printed, and, by adding thereto a copy of the notice of appeal of the said National Bank, the same would have become a full and correct transcript for use on the appeal numbered 4,583. Mr. Blakeman replied by a letter stating that he would not stipulate as requested, as he might prejudice his rights by so doing. Mr. Leicester then wrote to Mr. Blakeman offering to stipulate in such manner and form as to protect any rights of Mrs. Bell to object to either of said appeals, and stating that any form of stipulation would be satisfactory to his firm if it would permit the hearing of both appeals on one transcript. To this Mr. Blakeman replied that he declined to sign any stipulation in the matter or to consent that said appeals might be heard on one transcript. Thereupon the National Bank of D. O. Mills & Co. prepared and filed its separate transcript.

This showing fully justified the court below in charging the cost of printing the additional transcript to the unsuccessful party. It is, of course, true, as claimed by appellant, that only such costs as are necessary should be allowed. Bank of Woodland v. Hiatt, 59 Cal. 580; Miller v. Highland, 91 Cal. 103, 27 Pac. 536. As a party aggrieved, the bank had a right to appeal from the order (Est. of Fretwell, 152 Cal. 573, 93 Pac. 283), and we see no ground for holding that it did not have the absolute right to appeal separately, if it so desired. Be that as it may, the taking of a separate appeal was made necessary here by the refusal of another party to join the National Bank in appealing. Under the rules of this court (Rule 2 [78 Pac. vii]), it became necessary for the appellant bank to file its transcript within a certain time after the filing of its notice of appeal. There is no rule or statute authorizing an appellant to dispense with the filing of a transcript by making reference to a transcript on file in another appeal. Nor do we find any case in which it has been held that the appeals of separate independent appellants should be embodied in a single transcript. This course appears to have been followed in Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; but the decision neither holds nor intimates that it is the duty of the different appellants to unite in the filing of a transcript. In Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187, the court was dealing with several appeals taken in one case by the same party. Indeed, it is difficult to see how one appellant can compel another to unite with him in the printing and filing of a transcript. In such case the necessity for filing a second transcript might be obviated by a stipulation of all the parties. Here the appellants in the two appeals offered to make such stipulation, but the respondent refused to join. It does not lie in her mouth, after such refusal, to complain that an additional transcript was printed and filed. If she had been willing to have the two appeals considered on a single record, her assent to the proposed stipulation would have accomplished the purpose. Her conduct was the direct cause of the printing and filing of two transcripts, and the resulting burden properly falls upon her. It is suggested that the National Bank might have obtained from this court an order that the two appeals be heard on a single transcript. There is no rule providing for such order. It is at least doubtful whether it would be made over the objection of a respondent insisting that the filing of separate transcripts is essential to the protection of his rights. At any rate, where such insistence has influenced the action of the appellant in filing his transcript, the respondent should not be permitted, after the disposition of the appeal, to shift his position and claim that the filing was unnecessary.

Appellant's contention that the charge for printing was excessive is based upon evidence to the effect that the transcript in 4,583 was printed from the same forms as those used for the transcript in 4,582, and that for that reason the proper cost of printing was much less than the amount charged. But, as against this, the printer's affidavit shows that the forms used in printing the one transcript had been distributed before the other was ordered. The trial court had the right to believe this statement and act upon it.

The charge of $22 for certifying the transcript is justified by the affidavit showing that Mr. Blakeman had refused to join in certifying (by stipulation) to its correctness. Rule 11 of this court (78 Pac. ix). There is no merit in the point that Mr. Leicester's affidavit to the effect that Mr. Blakeman had returned the transcript to Mr. Allen "with his refusal to certify" was hearsay and inferior evidence, and therefore not entitled to be considered as against an adverse showing. It does not appear to be hearsay. For aught that is shown, Mr. Leicester may have been present when Mr. Blakeman communicated his refusal to Mr. Allen. He testified positively to the fact, and we have no right to assume that he was undertaking to state matters not within his own knowledge.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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157 Cal. 534

In re GIRD'S ESTATE. (S. F. 5,399.)

(Supreme Court of California. April 4, 1910. Rehearing Denied May 4, 1910.)

1. BASTARDS (§ 13*)—LEGITIMATION—RECOGNITION.

Under Civ. Code, § 230, providing that "the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth," it is necessary, in order to sustain a decree for distribution of a decedent's estate to illegitimate children, that the jury find that decedent was their father, that during minority he publicly acknowledged each as his own child, and received it into his family as his own child, and otherwise treated each child as if it was his legitimate child, and the existence of a family is essential.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

2. APPEAL AND ERROR (§ 994*) — REVIEW — QUESTIONS OF FACT—CREDIBILITY OF WITNESS.

The effect of an attempted impeachment of a witness or of evidence affecting his credibility is a question not reviewable by the Supreme Court under Code Civ. Proc. § 1847, making "the jury the exclusive judges of his credibility."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3902; Dec. Dig. § 994.*]

3. BASTARDS (§ 5*)—ILLEGITIMACY—ADMISSIBILITY OF EVIDENCE.

Where nonaccess by a husband is shown to a reasonable certainty, the positive testimony of the wife that another is the father of her children is competent evidence of their paternity.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.*]

4. BASTARDS (§ 6*) — LEGITIMATION — EVIDENCE.

No different rule applies as to the sufficiency of evidence to support findings of legitimation of a bastard by the public acknowledgment of its paternity by the father and receiving it into his family than applies in other cases.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

5. BASTARDS (§ 13*)—LEGITIMATION—PUBLIC ACKNOWLEDGMENT.

The words "publicly acknowledging," as used in Civ. Code, § 230, providing for legitimation of a bastard by the father "publicly acknowledging" that he is the child's father, must be taken in their ordinary sense.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 6, p. 5772.]

6. BASTARDS (§ 6*)—LEGITIMATION—EVIDENCE OF RECOGNITION.

In a proceeding for distribution of a decedent's estate, evidence *held* to sustain the findings that decedent was the father of two illegitimate children, and that he publicly acknowledged them as his own, and received them into his family.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

7. BASTARDS (§ 13*)—LEGITIMATION—RECEIVING INTO FAMILY.

"Family," as used in Civ. Code, § 230, providing for the legitimation of a bastard by "receiving it * * * with the consent of his wife, if he is married, into his family," means no more than that the father must have a home, a settled place of habitation of which he is the head, into which he must receive the child, with the consent of his wife, if he be married; and brothers and sisters, who never live with him, are no part of his family.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 3, pp. 2673–2691; vol. 8, p. 7661.]

8. TRIAL (§ 106*)—ARGUMENT OF COUNSEL.

Parties are not entitled as a matter of right to be heard by as many separate attorneys as they see fit to present, and a party who is allowed full opportunity to present argument by one counsel cannot complain that the court excluded argument by another who had testified in the case, and who knew before the trial that he would be a witness, and was warned by the court before testifying that under a rule of the court he would not be permitted to argue the case if he testified, and no reflection was cast on his evidence by refusing to allow him to argue the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 267; Dec. Dig. § 106.*]

9. BASTARDS (§ 5*) — WITNESSES (§ 344*) — PROOF OF PARENTAGE—IMPEACHMENT—EVIDENCE OF IMMORALITY.

In a proceeding for distribution of a decedent's estate claimed by two illegitimate children, the mother who was the wife of another man, and who had testified to her relations with decedent, was asked on cross-examination how many men she had had sexual intercourse with since her husband left her, and who they were. *Held*, that an objection was properly sustained on the ground that it was too general, as it should have been limited to the time at or about the time of conception, and it was not proper in order to impeach the witness, as questions on cross-examination to show general immorality or specific acts of immorality are not allowable, the impeachment of witnesses being limited to the mode prescribed by the Code of Civil Procedure.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 7, 8; Dec. Dig. § 5;* Witnesses, Cent. Dig. § 1125; Dec. Dig. § 344.*]

10. BASTARDS (§ 6*)—PROOF OF PARENTAGE.

In a proceeding for distribution of a decedent's estate claimed by two illegitimate children, the evidence showed that the mother had lived with decedent for a number of years both before and after the birth of her children. *Held*, that testimony that the witness had seen decedent and the mother having sexual intercourse after the birth of the younger child was admissible as tending to show the relations between decedent and the mother, and as bearing on the probability of decedent's being the father of the children.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

11. WITNESSES (§ 383*)—IMPEACHMENT—INCONSISTENT STATEMENTS—COLLATERAL MATTERS.

Where a witness testifies to declarations made by decedent, and on cross-examination states that he never kept a memorandum of all the things decedent told him, and did not remember telling R. and C. that he had done so, it is not error to refuse to admit evidence by R. and C. to show that he had stated that he had kept such a memorandum, the matter attempted to be brought out being collateral to the issue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

12. BASTARDS (§ 5*)—ILLEGITIMACY—DECLARATIONS BY MOTHER.

In a proceeding for distribution of a decedent's estate claimed by two illegitimate children, the mother testified that decedent was the father of the children. *Held*, that evidence of a declaration by the mother to a physician shortly before the birth of one of the children that she was pregnant by another man, and that she desired to be rid of the child by an operation, was properly excluded, as the mother was not a party to this proceeding, and her declarations were not binding on the children on the question of their paternity.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.*]

13. WITNESSES (§ 388*)—IMPEACHMENT—CONTRADICTORY STATEMENTS—FOUNDATION—NECESSITY.

In order to impeach a witness by proof of inconsistent statements, a foundation must be laid in the examination of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233; Dec. Dig. § 388.*]

14. TRIAL (§§ 187, 240*) — INSTRUCTIONS — CREDIBILITY OF WITNESS—ARGUMENTATIVE INSTRUCTIONS.

In a proceeding to distribute a decedent's estate claimed by illegitimate children, the mother testified that decedent was their father. *Held*, that an instruction that, "of the women who are mothers of nameless children, there are few indeed who would hesitate at fraud, or to whom perjury would be a crime," was properly refused, as being argument and on the weight of testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 419, 561; Dec. Dig. §§ 187, 240.*]

15. BASTARDS (§ 13*) — LEGITIMATION — INSTRUCTIONS.

An instruction in a proceeding for distribution of a decedent's estate in which it was sought to show legitimation of illegitimate children of decedent under Civ. Code, § 230, is properly refused, which informs the jury that to hold that there had been an adoption under that statute would require "liberality of construction destructive of language of the statute itself."

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

16. BASTARDS (§ 13*) — LEGITIMATION — ACKNOWLEDGMENT OF PATERNITY.

Under Civ. Code, § 230, providing for the legitimation of illegitimate children by the father receiving them into his family, the children may be received into the father's family without the father acknowledging his paternity to every relative, friend, and acquaintance who visits his house after their birth.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

17. APPEAL AND ERROR (§ 1057*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence to establish a point established without conflict by other evidence is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

18. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Sustaining objections to questions on cross-examination, asked for the purpose of showing bias, is harmless, where the witness' testimony fully covers the subject-matter of the questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. § 1058.*]

19. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where a witness has testified that another witness has made statements to him as to the paternity of her illegitimate child, refusal to allow him to testify that a letter written by the mother contained the same statements was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. § 1058.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

20. EXECUTORS AND ADMINISTRATORS (§ 316*)—DISTRIBUTION OF ESTATE—RESERVATION OF ASSETS.

Where application is made by heirs of a decedent for distribution of his estate, under Code Civ. Proc. § 1658 et seq., relating to "partial distribution prior to final settlement," there having been no presentation of the administrator's final accounts, and the court finds that the estate "is but little indebted, and may be distributed * * * without loss to the creditors," it is error to order a distribution of all the estate, although the bond required by each petitioner under Code Civ. Proc. § 1661, has been given, such distribution being proper under Code Civ. Proc. § 1665, only on final settlement, but enough should be reserved to pay decedent's debts and the expenses of administration and the inheritance tax without recourse to the bonds, but if land belonging to the estate is mortgaged and is ample security for the debt, such debt may be disregarded, as under Code Civ. Proc. § 1661, the land mortgaged is subject to the mortgage after distribution.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1315–1318; Dec. Dig. § 316.*]

Department 1. Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

In the matter of the estate of Henry Gird, deceased. From a decree distributing all the property of the estate, and from an order denying a motion for a new trial, the administrator of the estate and decedent's two brothers and a sister appeal. Decree of distribution reversed, with directions to make a decree of partial distribution, and the order denying a new trial affirmed.

J. W. Rose and J. A. Barham, for appellants. C. H. Pond and R. L. Thompson, for respondents.

ANGELLOTTI, J. This is an appeal from a decree distributing all of the property of the estate of deceased to William Stephen Bennett and Nellie Florence Bennett, and from an order denying a motion for a new trial made by the administrator of said estate and two brothers and a sister of deceased. The application for distribution was one made under section 1658, Code Civ. Proc., by said distributees, claiming to be adopted children of deceased under the provisions of section 230, Civ. Code. This claim being opposed, the application was heard by the court and an advisory jury, and the latter found in response to questions submitted to them that deceased was the father of said petitioners, that he publicly acknowledged each during its minority as his own child, that he received each during its minority into his family as his own child, and that he otherwise treated each child during its minority as if it was his legitimate child. The trial court adopted these findings of the jury.

It is earnestly contended that the evidence is not sufficient to sustain these findings. All of them are essential to the affirmance of the decree, section 230, Civ. Code, providing that: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Different views have been entertained by justices of this court whether the existence of a family into which the child can be received is essential to an adoption under this section, but that question has been finally determined in the affirmative by this court in Estate of De Laveaga, 142 Cal. 158, 169, 75 Pac. 790.

Material facts of the case concerning which there is no dispute are as follows: Deceased was born July 29, 1837, and died intestate April 4, 1907, leaving an estate valued at about $21,000. He left two brothers and a sister, the brothers residing in Los Angeles county, and the sister residing in the state of Illinois. In 1853 or 1854 he settled in Alexander Valley, Sonoma county, on what was thereafter known as the "Gird Ranch," and this continued to be his home until the time of his death. He was never married. No person claiming relationship to him ever resided there with him other than the petitioners here. About the year 1865 or 1866 Mr. and Mrs. Fletcher, husband and wife, came to this ranch, bringing with them a half Indian girl about three years old, called Alice. For a time Fletcher worked for the deceased on the ranch, but left the neighborhood within two or three years and never returned. Mrs. Fletcher and Alice remained on the ranch, Mrs. Fletcher doing the general housework, and Alice helping as she grew older until at the time of her marriage she was doing a great part of the housework and much farm work outside. During all of this time deceased, Mrs. Fletcher and Alice lived in the same house and ate at the same table, Mrs. Fletcher and Alice sleeping in one room and deceased in another. Deceased was a highly educated man, and took an interest in teaching Alice to read and write. He always treated her kindly and much as any one would treat a child in his household. She finally married one Owen Bennett and lived with him as his wife for a short time, when they separated and she resumed her life on the Gird ranch with Mrs. Fletcher and deceased, but the marriage between Bennett and herself was not dissolved until after the death of deceased. The manner of living was the same as before her marriage, she continuing to occupy a sleeping room with Mrs. Fletcher, and deceased occupying another room. She worked about the ranch as before. She was never paid any wages. On May 22, 1885, she gave birth to William Stephen Bennett, one of the petitioners. Deceased sent for and paid the doctor. The boy was kept on the place and there grew to manhood, being treated practically as any boy raised on a farm. As he grew older he worked on the ranch and attended the public school. Deceased always manifested a kindly interest in him, and assisted him in his education. He always went by the name of Bennett, and was registered at school under that name. He was never paid any wages for his work. In the year 1895, Mrs. Bennett gave birth to the other petitioner, Nellie Bennett, who thenceforth was one of the household. This child was always known as Nellie Bennett. Deceased always treated her kindly. The evidence very clearly establishes that Mrs. Bennett's husband was not the father of Nellie. It must also be taken as establishing that he was not the father of Stephen. The only evidence as to the year of the marriage was to the effect that it occurred in the year 1880, and there was no evidence to contradict that given to the effect that Bennett and Alice separated not later than the year 1881, and never thereafter cohabited or even saw one another until long after the birth of Nellie, except on one occasion when Alice saw him at a distance, saving and excepting evidence to the effect that Alice had on several occasions admitted to others that Stephen was Bennett's child. The evidence was clearly of such a nature that we cannot say that the jury and court were not warranted in concluding that Stephen was not Bennett's child.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The only evidence that deceased was the father of these children was that given by Alice, and that afforded by the circumstances under which all the parties lived, certain alleged admissions of deceased, and his general treatment of Alice and the children. This evidence was of such a nature that an appellate court cannot hold, however much it may doubt the correctness of the conclusion of the trial court, that the conclusion of the trial court on the question of paternity is without sufficient support in the evidence. Alice testified positively that she commenced to have sexual relations with deceased in the year 1884, and that he was the father of both Stephen and Nellie. There was evidence given of statements and conduct on her part that was inconsistent with her testimony, but the effect of this attempted impeachment was purely a question for the trial court. Nonaccess by the husband being clearly shown, or at least being shown to a reasonable certainty, the positive testimony of Alice as to the paternity of her children was competent evidence, and, under the law, sufficient basis for a finding by the jury on the question of paternity. It may reasonably be argued that corroboration of her evidence is to be found in the fact that these children were apparently accepted by deceased without demur or objection as a part of his household, and were treated and brought up as his own children would have been, and that he, Alice, and the children all continued to live as members of one family ordinarily live. In addition to this, two witnesses testified positively that just after the birth of Nellie deceased declared in their presence, another person also being present, when some question was suggested as to the paternity of Nellie, that Stephen and Nellie were his children, and one of these witnesses testified that he heard deceased say many times that Stephen was his son, and Stephen testified that deceased told him that he was his son. Learned counsel for appellant is in error in his claim that a different rule may be applied by this court in cases of this character in determining the sufficiency of evidence to sustain the findings from that applicable in other cases. What was said by Justice Fox in the Matter of Jessup, 81 Cal. 423, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, quoted in counsel's brief, was said solely with reference to the proper construction of a statute from the standpoint of policy, and, while it might constitute good material for argument to the trial court or jury on the question of the weight to be given by them to certain evidence, cannot be taken as laying down any rule of law. Estate of Sandford, 4 Cal. 12, involved no other question than whether an alleged written acknowledgment sufficiently complied with the terms of a statute. In Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82, only three of the justices concurred in any expression of opinion that might serve as a basis for the contention that an appellate court would ever review the finding of a trial court in regard to a matter where there is substantial evidence to support the finding, and we do not construe anything in the opinion signed by these three justices as intimating any such doctrine. By section 1844, Code Civ. Proc., it is provided: "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." But, says counsel, there are eight separate reasons why Alice Bennett was not "entitled to full credit," such as swearing to her own adultery, admissions, and inconsistent acts. In reply, we can only point to section 1847, Code Civ. Proc., which, after declaring the manner in which a witness may be impeached, declares "and the jury are the exclusive judges of his credibility." Both the trial judge and jury concluded that she was a witness entitled to full credit, and their conclusion on that question is not open to review by us. See Fowden v. Pacific, etc., Co., 149 Cal. 151, 161, 86 Pac. 178.

We do not deem it open to serious question that the evidence is sufficient to support the conclusion on the part of the trial court that deceased treated both Stephen and Nellie as if they were his legitimate children, and will not unnecessarily prolong this opinion by discussing the evidence in regard thereto. "The criterion referred to in the statute is the treatment usually accorded to legitimate children." Estate of Heaton, 139 Cal. 237, 73 Pac. 186.

A more serious question exists as to whether the evidence sufficiently shows that deceased publicly acknowledged Stephen and Nellie as his children to sustain the findings of the trial court to that effect. The language of section 230, Civ. Code, is simply "by publicly acknowledging it as his own." There is no provision as to what shall constitute "a public acknowledgment," and the words of the statute must be taken in their ordinary sense. Blythe v. Ayres, 96 Cal. 532, 577, 31 Pac. 915, 19 L. R. A. 40; Townsend v. Meneley, 37 Ind. App. 127, 74 N. E. 274, 76 N. E. 321. In Crane v. State, 94 Tenn. 86, 28 S. W. 317, a prosecution for bigamy, the statute provided that the testimony of a bystander who witnessed the ceremony and "the public acknowledgment of the party charged shall be competent evidence." The court said: "Criticism is directed to the term 'public acknowledgment of the party charged,' and it is insisted that this means some acknowledgment before a court or other public tribunal. We do not so construe the law, but any acknowledgment of the fact of marriage, by confession or conduct, in the presence of one or more individuals, would answer the requirement of the statute. It need not be in the shape of a public avowal, made in the courts, or in the market place, or from a housetop, but can be made as well by acts and conduct recognizing the marriage, as by oral statements to third persons." In Blythe v. Ayres, supra, it was said in the main opinion, signed by three of the justices, that "this acknowledgment was also public, for, as we have seen, the thought of concealment of the paternity of the child never entered his mind." In the light of what is said in the various authorities as to the meaning of such terms as "public acknowledgment," we are of the opinion that there was sufficient evidence to support the conclusion of the trial court. The circumstances surrounding the birth of these children, and the conditions existing in the household of deceased before and after their birth, coupled with his treatment of them, and his interest in them, were of such a nature, in the absence of any statement to the contrary by him, as to constitute evidence of a general acknowledgment of paternity to the community. In the face of circumstances which might well be accepted as calling for explanation as to the true situation if he was not the father of these children, he never expressly denied that he was such or made to any living person, so far as the evidence shows, any explanation why these children were accepted by him as a part of his household. Of course, he was under no obligation to make any explanation to any one, but in the absence thereof he could not complain if the community accepted, as they might very reasonably do, that he was the father of these children. In addition to the evidence of this character there was the evidence of his declarations to three persons on the only occasion when the question of the paternity of these children appears to have been raised in his presence, to the effect that they were his children, and also the evidence of a witness to the effect that he had heard deceased on many occasions say that Stephen was his son. It may be proper to say again, as we said in regard to the witness Alice Bennett, that the question of the amount of credit to be given to these witnesses was one solely for the trial court. That the children always went by the name of Bennett and that deceased on two separate occasions introduced Stephen as Mr. Bennett or Mr. Steve Bennett, once to his attorney and once to a stranger, do not destroy the effect of the evidence given in support of the children's claim. Nor is the fact that he did not say anything about the matter to his brother when he visited his home shortly before his death of such importance, under the circumstances, as to forbid the conclusion of public acknowledgment. The many reputable witnesses called by appellants to show absence of express acknowledgment to them or in their presence amounted to no more than that they had never heard any such acknowledgment made by deceased, but as to practically all of such witnesses there was nothing to indicate that there was in the circumstances anything to call for an acknowledgment to them. While the case, both on the question of paternity, and that of public acknowledgment, may not be a very strong one in favor of claimants, we are constrained to hold that it was sufficiently strong to support the findings of fact of the trial court thereon, and that being so those findings are conclusive on us, however we might decide the matter had we the right to review findings of fact made on conflicting evidence.

It is claimed that the evidence is insufficient to support the conclusion that he received these children "into his family." If his household in Sonoma county is to be regarded as "his family," within the meaning of section 230, Civ. Code, it cannot be questioned, of course, that the evidence was sufficient. In Estate of Bennett, 134 Cal. 323, 66 Pac. 371, this court said: "The meaning which is to be given to the word (family) is to be determined by the context, and also from a consideration of the subject-matter to which it relates. Every case must depend upon its particular circumstances. Mr. Jarman says (Jarman on Wills, p. 941) 'family' is not a technical word, and is of flexible meaning. Anderson's Law Dictionary defines the word: 'In its modern comprehensive meaning, a collective body of persons living together in one house.' It is sometimes used to include parents with their children, whether dwelling together or not. The word has also a broader and secondary meaning, which includes all the offspring or descendants of a common progenitor, but is not to receive this construction unless such intention is manifested from the context." Webster defines it as: "The collection of persons forming a domestic household, including parents, children, servants, and sometimes lodgers." By the Century Dictionary it is declared to be: "The collective body of persons who form one household under one head and one domestic government, including parents, children, and servants." In their concurring opinion in Blythe v. Ayres, 96 Cal. 592, 31 Pac. 927, 19 L. R. A. 40, Justices McFarland and De Haven said: "Either a widower or a bachelor, as we all know, may have a family, viz., 'a collective body of persons living together under one head or manager.'" In Garner v. Judd, 136 Cal. 394, 68 Pac. 1026, this court, in bank, said, speaking through Chief Justice Beatty: "We have no doubt that when a man has a home where he lives, with a woman whom he holds out to the world as his wife, he has a family within the meaning of section 230, Civ. Code, into which he must receive an illegitimate child in order to legitimate it under that section." In Estate of De Laveaga, 142 Cal. 169, 75 Pac. 790, this court was careful to limit its language as to the necessity of the existence of a family into which the child can be received as one of the cardinal conditions prescribed for an adoption under section 230, Civ. Code, by saying "having a family, or at least a home in which he can receive him" is such a condition. The words of section 230, "receiving it * * * into his family," imply a receiving into a place of which he is the head—of which he has control. As used in this section the word "family," in our opinion, means no more at most than that the father must have a "home," a settled place of habitation of which he is the head, into which he must receive the child, such receiving to be with the consent of his wife if he be married. The brothers and sisters of deceased, who never lived with him in California, constituted no part of his "family" within the meaning of that section.

It is claimed that the trial court committed many errors in the trial of this case.

On objection of respondents, the trial court precluded J. W. Rose, Esq., one of appellants' two attorneys, from arguing the case to the jury or the court. The reason for this action on the part of the trial court was that Mr. Rose was an important witness for appellants and testified on their behalf, and there was a rule of the court purporting to preclude counsel who gave evidence in a case from participating in the argument thereof. The evidence given by Mr. Rose related to matters of such a nature that it must have been known before the commencement of the trial that he would necessarily be a witness, and at the time he was called as a witness he was warned by the court that he would be precluded from arguing the case if he testified. The reason for the refusal was stated by the court in the presence of the jury to be that the rule precluded one who was a witness from arguing a case. The suggestion that the court by this refusal cast any reflection on Mr. Rose or his evidence is unwarranted. We do not deem it necessary to discuss the question of the validity of the rule of the superior court of Sonoma county invoked by respondents. We can well see that the facts of a case might be such as to make its application such an unwarranted deprivation of a party's rights as to constitute an abuse of discretion. In this case appellants were not deprived of the right to argue this case by counsel of their own selection. The record shows that J. A. Barham, Esq., was one of the attorneys of record for appellants, participating throughout all the proceedings in this case, and practically conducting the trial on the part of the appellants. It further shows that the cause was argued to the jury by respective counsel. Counsel were fully advised by the court at the time Mr. Rose was called as a witness that he would thereby render himself ineligible to argue the case as counsel, and we are warranted in assuming that Judge Barham made his preparation for argument accordingly. Without intending to reflect in the slightest degree upon the ability of Mr. Rose in the matter of argument to a jury, we have no hesitation in saying that it would be absurd to hold that any prejudice may have accrued to appellants by reason of the refusal of the court to allow any additional argument to that of Judge Barham, especially when they were fully advised a sufficient time before argument that such would be the ruling of the court. Appellants were not deprived of any statutory right. Parties are not entitled as a matter of right to be heard by as many separate attorneys as they see fit to present. The trial court may exercise a reasonable supervision of such matters, and under ordinary circumstances, if a party is allowed full opportunity to present argument by one counsel, he cannot complain of any deprivation of his rights in this behalf. Certainly no statute prescribes that he shall be entitled to present separate arguments by different counsel.

Alice Bennett was asked on cross-examination: "Since Mr. Bennett left how many men have you had sexual intercourse with, and who are they?" An objection to this question was sustained, the court holding that the question was too general as to time and should be confined to the "time or around the time of gestation." A subsequent question of the same nature directed to "at or about the time immediately before the conception of Nellie" was then asked, and the witness answered that deceased was the only one. Error is alleged in sustaining the objection to the former of these questions. The authorities are practically in accord to the effect that evidence tending to show unchaste conduct of the alleged mother with other men is allowable only in so far as it has a bearing upon the question of the paternity of the child—in so far as it tends to show that another is or may be the father of the child, and hence that it must be directed to a time at or about the time the child was begotten. See 3 Am. & Eng. Ency. of Law (2d Ed.) 822; 5 Cyc. 661; State v. Lavin, 80 Iowa, 555, 46 N. W. 553. The question here, one directed solely to mere acts of sexual intercourse, was not so confined, but, on the contrary, embraced a period of over 20 years. The only other basis on which it could be claimed to be a proper question was that of impeachment of the witness. But it is thoroughly settled that "questions on cross-examination, tending to show the general immorality of the witness, or specific acts of immorality, should never be allowed in any case for the mere purpose of discrediting or impeaching the witness. * * * The Code of Civil Procedure prescribes the method of impeaching witnesses, and they can be impeached in no other way than therein provided." People v. Harlan, 133 Cal. 16, 20, 65 Pac. 9, 10. See, also, Sharon v. Sharon, 79 Cal. 673, 22 Pac. 26, 131. The ruling of the trial court sustaining the objection was correct.

Complaint is made that the court should have stricken out certain evidence given by witness Sanders. The evidence was given on direct examination without objection, and was practically that he had come upon deceased and Alice while they were engaged in an act of sexual intercourse. On cross-examination it was developed that the witness was uncertain whether the incident occurred shortly before or shortly after the birth of Nellie, the younger child. The motion to strike out was based on the ground that the witness said it was after the birth of Nellie. Assuming this to be so, we nevertheless are of the opinion that the evidence was proper as tending to show the extent of the intimacy between Alice and the alleged father of her children, and to corroborate the testimony of Alice as to the nature of the relations existing between them as members of the same household before and after the birth of Nellie. In People v. Jamieson, 124 Mich. 164, 82 N. W. 835, a bastardy case, it was held that "acts of intercourse and undue familiarity both before and after the alleged act resulting in conception are admissible, as bearing upon the probability of the intercourse at the time stated in the complaint." See, also, 5 Cyc. 662, declaring that evidence of the intimate relations existing between the mother and alleged father is admissible, and that evidence of previous or subsequent intercourse is competent to show the probability of the particular act having occurred.

The trial court did not err in sustaining objections to questions asked witnesses Ralph Rose and Arthur Cochrane for the purpose of showing that witness Sanders, who had testified to declarations on the part of deceased, stated shortly before the trial that he kept a memorandum of all the things that deceased told him during his stay at the Gird ranch. On his cross-examination by appellants, Sanders had testified that he never kept such a memorandum, and that he did not remember telling Rose and Cochrane that he had done so. This was clearly a collateral matter elicited on cross-examination. In Faulkner v. Rondoni, 104 Cal. 148, 37 Pac. 886, it was said, quoting from People v. Devine, 44 Cal. 448: "A recognized rule, or rather qualification of the rule, governing the impeachment of the credit of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relevant to the issue being tried"—citing many authorities. See 1 Greenl. on Ev. §§ 449, 461 "e," "f." As to such a collateral matter, the answer of Sanders could not be contradicted by appellants, but was conclusive on them.

It was sought by appellants to show certain declarations by Alice to a physician, Dr. Coffman, some few months before the birth of Nellie, to the effect that she was "in the family way" by one Smith, and that she desired to be rid of the child by an operation. This proposed evidence was properly excluded by the trial court. Alice was not a party to this proceeding, but only a witness on behalf of her children. Evidence of these declarations by her to the physician would have been pure hearsay, in no way binding on her children as evidence on the question of paternity. Being contrary to her evidence given on that question, the declarations, waiving other objections thereto, would have been admissible by way of impeachment of Alice as a witness, but a complete answer to appellants' claim in this regard is that no foundation was laid for any such impeachment on the examination of Alice.

There was no error in refusing to give appellants' requested instruction 1, commencing "I instruct you that, of the women who are mothers of nameless children, there are few indeed who would hesitate at fraud, or to whom perjury would seem a crime," etc. It was not only open to the objection of being in part pure argument in favor of appellants' side of the case, and an instruction on the weight to be accorded the testimony of certain witnesses, but it also in terms informed the jury that to hold that there had been an adoption under section 230, Civ. Code, would require "liberality of construction destructive of language, of the statute itself." There was no prejudicial error in modifying appellants' requested instruction 3. Appellants' requested instructions 4 and 5 were properly refused. They were to the effect that deceased did not receive the children into his family unless he acknowledged his paternity to every relative, friend, and acquaintance who visited his house after their birth. This certainly is not the law.

It was established without conflict that there were always several hired men working on the Gird ranch. Exclusion of other evidence going simply to that extent was, therefore, not prejudicial error.

If any of the rulings sustaining objections to questions asked Sanders on his cross-examination for the purpose of showing bias on his part were erroneous, the effect of the errors was obviated by the testimony given by the witness, in which he fully covered the subject-matter of such questions.

The refusal of the trial court to allow the witness Hopper to testify as to the contents of a letter said by him to have been given to him by Alice to be given to Smith was not prejudicially erroneous. The theory of appellants was that the letter contained statements by Alice showing that Smith was the father of Nellie. But Hopper fully testified as to statements then and at other times to the same effect made by Alice to him. Additional evidence by him showing similar statements by her in a lost writing could not have added to the effect of his evidence already given.

What we have said disposes of all points made in appellants' briefs that require notice, except the claim that the trial court erred in distributing all the residue of the estate to the petitioners. It must be held that there is merit in this claim. The application of petitioners was one under section 1658 et seq., Code Civ. Proc., the sections relating to "partial distribution prior to final settlement," there having been no presentation of the accounts of the administrator—a prerequisite to final distribution. By the decree all the property of deceased, both real and personal, and specifically all cash, money in bank, and every other article of personal property, is distributed to the petitioners, share and share alike, and the bond for $2,000, required by the court of each petitioner under section 1661, Code Civ. Proc., having already been given, the decree orders the administrator to forthwith deliver to the petitioners all of the property distributed. While the trial court might have been warranted in finding that all debts of the deceased except the mortgage debt had been paid, it did not so find. It did find to the contrary that "the estate * * * is but little indebted, and may be distribu[illegible] as prayed for without loss to the creditors of said estate," evidently proceeding upon the theory that the creditors would be protected by the bonds ordered. It is manifest that our law does not contemplate the distribution of all the property of an estate under partial distribution proceedings or prior to the settlement of the final account of the executor or administrator. Such a distribution can be had only upon the final settlement of the accounts of the executor or administrator, or thereafter. Section 1665, Code Civ. Proc. The court in probate must necessarily retain until such time what may reasonably be anticipated as necessary to pay debts and expenses of administration. "Creditors are not to be deprived of their lien upon the assets of the estate, and given a bond in lieu thereof. The court should see that sufficient assets are left, after partial distribution, to pay them, without recourse to the bond. The requirement of a bond is only additional security to provide against unforeseen liabilities, and against errors in judgment." In re Painter, 115 Cal. 635, 641, 47 Pac. 700. This is as applicable to expenses of administration as it is to debts of the deceased. The court here should have distributed to the petitioners a portion only of the residue of the property, reserving what it deemed a sufficient portion to pay any unpaid claims (including any probable deficiency on the mortgage claim, if any), and also to pay such expenses of administration as had been incurred and remained unpaid, and also such expenses of administration as might reasonably be incurred prior to settlement of the final account. If the land mortgaged constituted ample security for the mortgage debt, such debt could be disregarded so far as partial distribution was concerned, the land mortgaged being subject to the mortgage after distribution as before. Section 1661, Code Civ. Proc.; Estate of Mitchell, 121 Cal. 394, 53 Pac. 810. Nothing has been said on this appeal as to the inheritance tax due under the act of 1905, which, of course, is also payable out of the property remaining for distribution.

The decree of distribution appealed from is reversed and the matter remanded, with directions to the lower court to make a decree of partial distribution to the petitioners upon the findings and decision filed July 27, 1909, distributing to said petitioners all the property of decedent except such portion thereof as it may deem advisable to retain until final settlement of the accounts of the administrator for the purpose of paying debts and expenses of administration, upon the giving of such bond by the distributees under section 1661, Code Civ. Proc., as the court may deem proper, and subject to the payment by the distributees of the amounts due as inheritance tax under the act of March 20, 1905 (St. 1905, p. 341). The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

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157 Cal. 583

COONEY v. GLYNN. (S. F. 5,173.)

(Supreme Court of California. April 7, 1910. Rehearing Denied May 6, 1910.)

1. TRUSTS (§ 96*)—CONSTRUCTIVE TRUST.

Where a mother conveyed land to her son on his oral promise to hold the same for the benefit of a daughter, and without any other consideration for the conveyance, a trust arises by operation of law in favor of the daughter.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148; Dec. Dig. § 96.*]

2. Trusts (§ 109*) — Constructive Trust — Evidence—Grounds—Preventing Devise.

In an action by a sister against her brother to establish a trust in her favor in land alleged to have been conveyed by their mother to defendant for plaintiff's benefit, evidence is admissible that four days before the deed was made the mother had executed a will devising the land to plaintiff, and that on defendant's suggestion, and his oral promise to hold the land for plaintiff, the deed was made and the will destroyed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 159; Dec. Dig. § 109.*]

3. Trusts (§ 365*)—Enforcement—Laches.

Where land was conveyed by a mother to her son on his oral promise to hold the same for the benefit of his sister, and he complied with the terms of such trust for many years by paying to the beneficiary the rents and profits, an action to enforce the trust brought in less than a year after his repudiation is not barred by laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568–573; Dec. Dig. § 365.*]

4. Trusts (§ 109*)—Constructive Trust—Evidence.

Though a constructive trust in land cannot be established by oral promises of the grantee made after the execution of the deed, evidence of the subsequent declarations of the grantee as to what he agreed to do at the time the deed was made is admissible to show what occurred at the time of the transaction.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 159; Dec. Dig. § 109.*]

5. Appeal and Error (§ 997*) — Review — Questions of Fact—Appeal from Nonsuit.

On appeal from a judgment of nonsuit, the evidence is considered most favorable to plaintiff, and the judgment will be reversed if there is enough evidence to make out the cause alleged, though there may be contradictory evidence which, if given effect and allowed to prevail, would defeat plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. § 997.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Virginia C. Cooney, administratrix of Margaret J. Cooney, deceased, against Thomas J. Glynn. Defendant had judgment, and plaintiff appeals. Reversed.

Bishop & Hoefler and Bishop, Hoefler, Cook & Harwood (Alfred J. Harwood, of counsel), for appellant. Sullivan & Sullivan and Theodore J. Roche, for respondent.

SHAW, J. This is an appeal by the plaintiff from a judgment entered in favor of the defendant upon motion for a nonsuit at the close of plaintiff's evidence. The action was begun by the deceased, Margaret J. Cooney, in her lifetime. The present plaintiff was substituted during the pendency thereof upon the death of Margaret J. Cooney.

The complaint states a case to enforce a constructive trust in real estate. In substance it shows the following facts: Bridget Gallagher was the mother of Margaret J. Cooney, the original plaintiff, and of Thomas J. Glynn, the defendant. In the year 1891 she resided at the house of the defendant, Glynn, living with him as a member of the family. She was then about 76 years of age. The relations between them had been confidential and intimate for many years before that time. He had been accustomed to transact business for her and she relied upon him and trusted him implicitly with respect thereto. On the 23d of March, 1891, Mrs. Gallagher executed a will wherein she devised the premises in controversy to her daughter, Margaret J. Cooney. A few days thereafter the defendant suggested to Mrs. Gallagher that it would be more advantageous to cancel the will and convey the property to him, and he promised that if she would do so he would hold the same in trust for the use of Margaret J. Cooney. Thereupon, Mrs. Gallagher, assenting thereto, destroyed the will, and, relying upon his promise to hold the property in trust for his sister, executed to him a deed purporting to be a gift of the property to him. There was no other consideration for the conveyance. It was made upon the express understanding that he would hold the property in trust for his sister, and pay or apply the rents thereof to her use and benefit, and convey the same to her upon demand. Thereupon he went into possession of the property, collected the rents and profits, and applied them in part to the use and benefit of Margaret J. Cooney until December, 1904, at which time he began to apply the whole thereof to his own use, and refused to convey the premises to her. She thereupon demanded a conveyance to herself, which he refused to make.

The evidence was sufficient to establish the material allegations of the complaint. With regard to the trust, it was shown that during the year 1890 Mrs. Gallagher began to reside with Glynn as a member of his family; that she was the mother of Glynn and Mrs. Cooney; that she had executed a will on the 23d of March, 1891; that on the 27th of March in that year she executed the deed in controversy; and that the deed was made in pursuance of an understanding between Glynn and Mrs. Gallagher that he would hold the property in trust for his sister, Mrs. Cooney, and that he would receive the income therefrom, and pay it to his sister or for her use. One of the reasons for making this arrangement was a fear that, if it was put in Mrs. Cooney's control, her husband would induce her to sell the property and that it would thereupon be dissipated. It also appeared that the lot immediately adjoining the property in controversy was owned by Glynn, that there was a belief that the two would sell to better advantage if sold together than if sold separately, and, also, that if a building were to be erected it could be done more advantageously by erecting a single building upon all the lots and dividing the income therefrom according to the respective interests, and that it was expected that at some time this could be done, or that a sale would be made, and that Glynn could manage the matter better if he held the title to both. Glynn took possession of the premises, and from that time until 1904 proceeded to collect the rents therefrom. Thereafter, to Mrs. Cooney's children, he repeatedly admitted that he was holding the same in trust for the benefit of his sister. In each instance he assured them that it was all right, that he was holding the property for their mother, and that he had so adjusted his affairs that if anything happened to him it would be hers upon his death. He applied the rents to her satisfaction, and, for the most part, to her use or to the use of her family. There is evidence to support the conclusion that, until the year 1904, he never denied his trust obligation, but always, upon inquiry, avowed his intention to fulfill it and to convey the property to Mrs. Cooney at the proper time.

Upon these facts it seems perfectly clear that the case made was that of a constructive trust in favor of Mrs. Cooney, and that the nonsuit was improperly granted. It has been established by a number of decisions in this state that where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other, upon a parol promise by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises. If made in good faith, and if it is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated. Brison v. Brison, 75 Cal. 525, 529, 17 Pac. 689, 7 Am. St. Rep. 189; Id., 90 Cal. 323, 334, 27 Pac. 186; Jones v. Jones, 140 Cal. 590, 74 Pac. 143; Broder v. Conklin, 77 Cal. 330, 338, 19 Pac. 513; Alaniz v. Casenave, 91 Cal. 41, 46, 27 Pac. 521; Nordholt v. Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; Feeney v. Howard, 79 Cal. 525, 529, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Odell v. Moss, 130 Cal. 356, 62 Pac. 555; Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171; Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108.

The entire question is discussed at great length in Brison v. Brison, supra, and it is unnecessary to elaborate upon it here. The other cases cited illustrate numerous phases of the question in which it was attempted to distinguish the Brison Case. It is here attempted to distinguish it because in that case the plaintiff was the grantor, and the constructive trust, as it was claimed, arose in his favor, whereas here the trust is not claimed on behalf of the grantor of the deed, but on behalf of Mrs. Cooney, a daughter of the grantor, and it is said that a trust cannot be thus created in favor of a third person. The case of Hayne v. Hermann, supra, was of the same character. In that case the land was conveyed by plaintiff's father to his wife, the defendant, who was plaintiff's mother, upon the express understanding that she would hold the property in trust for the grantor during his life, and after his death for the plaintiff and the defendant in equal proportions. After the death of Mr. Hermann, the daughter began the suit against her mother to enforce a trust as to the undivided one-half of the property. It was held that the case was not distinguishable in principle from that of Brison v. Brison, and that the trust arose by operation of law, and could be enforced by the third person as a beneficiary.

It was claimed by the plaintiff that four days prior to the execution of the deed in controversy Mrs. Gallagher had executed the will wherein she devised the property in controversy to Margaret J. Cooney, and that, at the suggestion of the defendant, the will was destroyed, and the deed executed to him instead thereof upon his promise to hold the property for the benefit of Mrs. Cooney. Upon the trial, the court rejected all evidence concerning the contents of the will and the execution thereof. This was clearly erroneous. It seems that the evidence was rejected upon the theory that, as the will was destroyed and had never been admitted to probate, it was absolutely void even as evidence, referring to the case of McDaniel v. Pattison, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805. It is true that it is there declared that as a dispositive instrument an unprobated will is without effect. But, under the circumstances appearing here, the fact of the execution of the will by Mrs. Gallagher, the devise of this property to Mrs. Cooney, its subsequent destruction at the instance of the defendant, and the execution of a deed in lieu thereof to the defendant in trust for Mrs. Cooney, would be material and competent evidence to establish the constructive trust alleged. The evidence should have been admitted.

It is claimed that the action is barred by the statute of limitations and by laches. It appears from the evidence, however, that the defendant at all times recognized his obligations to hold the property for Mrs. Cooney and to apply the income therefrom to her use or in accordance with her direction. It is also shown that he did so apply the rents and profits, or at least the greater part thereof, and that he at no time repudiated the trust until within less than a year prior to the beginning of the action. The case in this respect is similar to Butler v. Hyland, supra, Odell v. Moss, supra, and Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077. In Butler v. Hyland the property was conveyed by a third person to the aunt of plaintiff under circumstances which created a trust in favor of the plaintiff, a trust arising by operation of law. The terms of the trust were that her aunt should hold the property in trust for the plaintiff, and that was the purpose for which the conveyance was made. The plaintiff was a member of the family of her aunt. The rental value was small, and none of it was ever paid to plaintiff, but she knew her aunt was paying the taxes, assessments, and repairs. A period of nearly 20 years elapsed after the conveyance was made before the beginning of the action, and the plaintiff was of age for 16 years before the action was begun. It was held that where the promises which induced the conveyance are of a continuing nature, as in that case, and especially between members of one family, the doctrine of laches does not necessarily bar the action until there is a repudiation, or some act which would give notice to the beneficiary that the trustee no longer acknowledged any obligation to comply with the terms of the parol promise. The other cases are similar in character. The principle established by them is that, in cases of this character, neither the statute of limitations nor the equitable doctrine of laches begin to operate until the trustee begins to act in hostility to the continuing obligation imposed by the parol agreement or understanding.

The respondent makes the point that a constructive trust cannot be raised by any agreement made after the execution of the conveyance. This may be conceded to be correct, but the case shown by the evidence is not of that kind. The declarations of the defendant, which were made to the children of the deceased Mrs. Cooney a few days after the execution of the conveyance, were not declarations constituting a promise made at that time to hold the property in trust, but they were statements by him admitting that at the time the deed was executed he had made these promises. They constituted evidence therefore of what had occurred at the very time of the transaction, and were not subsequent promises made by him.

The evidence was not in all respects consistent. If the case had been submitted upon the merits, and thereupon the court below had made findings and given judgment for the defendant, it may be that there would be found enough in the evidence to support that judgment upon appeal to this court, in view of the limited power of the court to review the decisions of the trial courts in cases submitted to it upon the merits. But upon an appeal from a judgment of nonsuit, the rule regarding conflicting evidence is almost exactly the opposite of what it would be in considering the same evidence after a decision upon the merits. Upon a nonsuit the evidence is to be taken in the sense most favorable to the plaintiff, merely contradictory evidence against the plaintiff is to be rejected, and the plaintiff must prevail if there is enough evidence to make out the case alleged, although there may be contradictory evidence which, if given effect and allowed to prevail, would defeat plaintiff. We have not attempted to relate the evidence contradictory to the facts above stated. In any event the reversal is necessary because of the exclusion of the evidence concerning the will.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

157 Cal. 591

KIRK v. SANTA BARBARA ICE CO. et al.
(L. A. 2,410.)

(Supreme Court of California. April 8, 1910.)

1. MASTER AND SERVANT (§ 317*)—CONTRACTORS—INJURIES.

A licensee, operating under permission from a city to tear up a public street for the purposes of its business, is bound to restore the street, and to use due precautions to protect the public while the work is in progress, and cannot escape responsibility for injuries occurring from its failure to do so, on the theory that the restoration of the walk was under the control of an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1254; Dec. Dig. § 317.*]

2. APPEAL AND ERROR (§ 301*)—REVIEW—SCOPE—MOTION FOR NEW TRIAL.

Where prejudice of the jury was not assigned as a ground for a new trial in appellant's notice of intention to move, it could not be considered on appeal, under Code Civ. Proc. § 659, subd. 4, providing that when the motion for a new trial is made on the minutes of the court, for errors of law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors on which the party will rely.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 301.*]

3. APPEAL AND ERROR (§ 705*)—VERDICT—EXCESSIVENESS—REVIEW.

The alleged excessiveness of a verdict cannot be reviewed on appeal, where the transcript does not give the testimony with reference to plaintiff's injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2943; Dec. Dig. § 705.*]

4. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR.

Where there was no evidence showing that plaintiff was negligent, appellant could not complain of an instruction authorizing a finding against it, notwithstanding plaintiff was negligent, because it had not specially pleaded plaintiff's contributory negligence, while prohibiting a finding against appellant's codefendant, who had pleaded plaintiff's contributory negligence in case the jury found he was negligent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

5. PLEADING (§ 84*)—CONTRIBUTORY NEGLIGENCE—CODEFENDANTS.

Where, in an action for injuries against codefendants, one of them specially pleaded plaintiff's contributory negligence, and the other did not, it was proper to charge that plaintiff might recover, notwithstanding his contributory negligence against the one, though he could not against the other, and this, though plaintiff's complaint charged that he was injured by reason of defendants' negligence without fault on his part, on which issue was joined.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 170; Dec. Dig. § 84.*]

Department 2. Appeal from Superior Court, Santa Barbara County; W. L. James, Judge.

Action by Augustias A. Kirk against the Santa Barbara Ice Company and others. Judgment for plaintiff, and from an order denying the motion of defendant ice company for a new trial, it appeals. Affirmed.

Day & Day, for appellant. H. C. Booth and L. H. Roseberry, for respondent.

MELVIN, J. This is an appeal by the Santa Barbara Ice Company (a corporation) from a judgment against it for damages in the sum of $500, and from an order denying its motion for a new trial.

The action was for personal injuries caused by an obstruction placed on a sidewalk in the city of Santa Barbara by Charles C. Pike, one of the defendants herein. He had restored the cement which had been torn up for the purpose of digging a trench, in which pipes were laid connecting a certain shop, owned by one Abraham, with the refrigerating main of the ice company located beneath the street. George E. Voorhees, Jr., an officer of the ice company, in whose name its franchise to lay pipes in the streets of the city of Santa Barbara had been obtained, was also a defendant, but a motion for nonsuit in his behalf was granted by the court, as it appeared that the corporation was the owner of the franchise, and that Mr. Voorhees had acted for it in obtaining the authority to lay the pipe for the refrigerating system.

It appears from the evidence that the Santa Barbara Ice Company caused the digging of the trench across the sidewalk to Abraham's place of business, and that the earth was replaced, after the installation of the pipe, by the company's workmen under direction of a foreman employed by the corporation. Pike, who was a cement worker, called upon Abraham, and solicited the contract for repairing the sidewalk. He was referred to Grant, the acting manager of the ice company, with whom he communicated by telephone. His account of the conversation over the wire differs from that of Grant, but the jury evidently acted principally upon Pike's testimony. According to Pike, Grant expressed surprise that application for the contract to do the work should be made to him, as he and Abraham had talked the matter over, and he had left it to Abraham. He said that there were other repairs to the sidewalk needed in addition to those made necessary by the digging of the trench, that he had told Abraham to have the sidewalk repaired, and that the ice company would be responsible for that part of the work required to cover the break in the sidewalk produced by the digging of the trench. After reporting this conversation to Abraham, Pike did the work of restoring the sidewalk and placed boards and earth over that part of it which had been rendered necessary by the excavation made for the ice company. This obstruction was not protected by barriers nor lights. Over it the plaintiff fell, and sustained the injuries for which the jury awarded her damages. Witness Grant remembered the fact that he had conversed with Pike and had referred him to Abraham. He also testified that Abraham had agreed to fix the sidewalk, but admitted that if Abraham required it, he (Pike) was "to have the sidewalk fixed to cover up the trench."

From this evidence the jury was justified, we think, in concluding that the Santa Barbara Ice Company, through its manager, delegated to Mr. Abraham the selection of some one to restore that part of the sidewalk broken in the process of preparing to lay the pipe. As a licensee operating under its permission to tear up a public street for the purposes of its business, it was bound to restore that street and to use due precaution for the protection of the public while the work was in progress. It cannot escape responsibility upon the theory that the restoration of the sidewalk was under the control of an independent contractor, for its franchise imposes upon it a duty to the public which it cannot evade by the mere device of authorizing some person to have the work done. In such cases the rule respondeat superior applies. Colegrove v. Smith, 102 Cal. 223, 36 Pac. 411, 27 L. R. A. 590; Luce v. Holloway, 103 Pac. 886.

Appellant's counsel contend that a verdict which exonerates Pike and holds the ice company responsible for plaintiff's injuries is absurd, and while they concede the point that the ice company "cannot complain of an error of the jury or court which exonerates one defendant and holds another responsible, if the latter is in fact responsible," they earnestly assert that the verdict shows prejudice on the part of the jurors against the corporation. Whether or not this contention be correct we need not determine, for no assignment of error on the ground of the jury's prejudice appears in the notice of intention to move for a new trial, and therefore the point cannot be here considered. Code Civ. Proc. § 659, subd. 4. Even if we could consider the matter of prejudice we could not say whether or not the verdict was excessive because the transcript does not give the testimony with reference to plaintiff's injuries.

The court gave the following instruction: "Contributory negligence is such negligence on the part of the plaintiff as contributes directly or proximately to cause the injury suffered. A person is negligent who fails to use such care as a person of ordinary pru-

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dence and caution should use under the same conditions and circumstances. Defendant Pike has pleaded as a part of his defense that plaintiff was negligent, and that her negligence contributed to cause the injury suffered by plaintiff. This is a special defense, and is not pleaded in the defense set forth in the answer of defendant Santa Barbara Ice Company. Therefore, if you find that the defendant Pike was negligent in the particulars set forth in plaintiff's complaint, and that through his negligence plaintiff was injured, but also find that plaintiff failed to use ordinary care, and that her own negligence contributed to cause the injury suffered by her, then she cannot recover as against defendant Pike. On the other hand, if you find that the defendant Santa Barbara Ice Company was negligent in the particulars set forth in plaintiff's complaint, and that through its negligence plaintiff was injured, then you should find a verdict against said defendant Santa Barbara Ice Company, notwithstanding you may find that plaintiff's own negligence may have contributed to cause her injury." Of this instruction appellant complains upon the grounds: (1) That the issue of contributory negligence was raised by the allegation in the complaint that the injury occurred without fault or negligence on plaintiff's part, and the traverse thereof in the answer; (2) as there was but one act of negligence of which complaint was made, and that was Pike's, his special plea of contributory negligence should have been available for all purposes of the case; (3) that the case was necessarily tried with this issue before the jury; (4) that no competent evidence on the issue of contributory negligence could have been excluded from the jury; (5) that the case was, as a matter of fact, tried upon that issue. It is unnecessary, however, to consider this instruction critically, for no evidence is recorded in the statement of the case tending to show contributory negligence, nor does anything with reference to that issue appear, except, perhaps, inferentially from the special finding of the jury that plaintiff used ordinary care and prudence in approaching the obstruction on the sidewalk. For aught that appears in the record, it may have been conceded by defendant that no contributory negligence existed. To justify us in reversing a case because of error in an instruction appellant must show that harm resulted from giving the special instruction. Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375; Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892; Allen v. McKay, 120 Cal. 337, 52 Pac. 828; Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821; State Loan & Trust Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600. If the instruction were erroneous, and if the jury had found plaintiff guilty of contributory negligence while finding in favor of Pike and against the ice company, then, perhaps, the latter would have cause for complaint; but we cannot see how harm resulted to it, in view of the finding that there was no contributory negligence. We think, moreover, that the instruction as an abstract proposition of law is correct, although its bearing upon the case as disclosed by the statement is not obvious.

From the foregoing discussion and the conclusions reached, it follows that the judgment in favor of plaintiff and the order denying appellant's motion for a new trial must be affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

157 Cal. 562

PEOPLE v. CORD. (Cr. 1,554.)

(Supreme Court of California. April 5, 1910.)

1. HOMICIDE (§ 203*) — EVIDENCE — DYING DECLARATIONS.

A statement, made by one making a dying declaration, that he entertained no hope of recovery; that he made the declaration in that frame of mind—was competent and sufficient to show that he was without hope of recovery, though he also stated that he did not know what the future had in store for him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 432; Dec. Dig. § 203.*]

2. HOMICIDE (§ 218*)—EVIDENCE—DYING DECLARATION — SENSE OF IMPENDING DEATH — QUESTION FOR COURT.

Whether or not one making a dying declaration was without hope of recovery is a question of fact for the trial court.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 458, 459; Dec. Dig. § 218.*]

3. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS.

The fact that one who had been fatally wounded had not been told by his physician that his wound was fatal did not render a dying declaration inadmissible, when it was made under the belief that he could not recover.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS—"DYING PERSON."

Code Civ. Proc. § 1870, providing that in criminal actions the declaration of a dying person, made under a sense of impending death, may be admitted in evidence, is declaratory of the existing law that the belief that a fatal wound had been received, and that death was about to ensue, was sufficient to render a dying declaration admissible, and a person who had been fatally wounded, and who was in sore distress therefrom, and who believed that he would not recover, and who was soon about to die, was a "dying person," and a statement made in that belief relating to the cause of his injury is admissible, where it appears that he subsequently died from the direct effects of the wound, though he may have revived after making the statement, or may have lived a considerable time thereafter, and may have again begun to hope for recovery.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 435; Dec. Dig. § 203.*]

5. HOMICIDE (§ 204*)—EVIDENCE—DYING DECLARATIONS.

A person was shot, the bullet piercing the cartilage of the third rib and entering the arch of the aorta, and fell down into the aorta, and rested on one of the semilunar valves opening from the left ventricle of the heart. In some unknown manner the puncture of the aorta became closed, and so remained for more than two weeks, when for some reason it again opened, causing almost immediate death from bleeding. The day after he was shot he made a dying declaration, after he had stated that he entertained no hope of recovery. Some three or four days after he was shot he was taken to a hospital for an operation, and he remained in the hospital until the day before his death, a period of two weeks. During that time he had recovered sufficiently to go out riding several times and walk upstairs with assistance. *Held*, that his declaration was admissible as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 438; Dec. Dig. § 204.*]

6. CRIMINAL LAW (§ 854*)—TRIAL—SEPARATION OF JURY.

The fact that a juror in a homicide case was, with the consent of accused, allowed during a recess to go, in charge of an officer, to visit his sick wife in the city, where the trial occurred, was not ground for reversing the conviction, where it was shown that while he was away nothing was said to him, and that the other jurors were locked up, and were inaccessible to any person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

7. CRIMINAL LAW (§ 854*)—TRIAL—SEPARATION OF JURY.

Where a jury in a homicide case were permitted to separate while deliberating on a verdict under such circumstances as to make it appear that they might have been tampered with, a new trial should be granted, unless there is affirmative proof explaining the separation, and showing that accused was not prejudiced thereby; and, where this burden is met, a new trial should be denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

8. CRIMINAL LAW (§ 1158*)—REVIEW—FINDING OF TRIAL COURT.

The court, on appeal from an order denying a new trial in a homicide case, on the ground of the separation of the jury while deliberating, must accept as true the evidence unfavorable to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. § 1158.*]

9. CRIMINAL LAW (§ 854*)—TRIAL—SEPARATION OF JURY.

While the jury in a homicide case were at luncheon, a fire broke out in a barn a block distant from the hotel. One of the jurors was a brother of the landlady of the hotel, and the landlady told the jury that as the roof of the hotel was on fire, the waiters could not continue to serve them, and she asked her relative to get the hose, which was in the kitchen, and the juror did so, and carried it from the kitchen through the dining room to the sidewalk in front. All of this was in the immediate presence of the jurors and the officer, with the exception of an instant, while he was in the kitchen. As the jurors started out to the sidewalk one of them ran upstairs, out in front on a balcony over the sidewalk. The juror came down into the street, and with several other jurors walked across to the opposite side, and remained there a few minutes watching the fire. Another juror took a bucket of water and put out a small fire on the sidewalk, and another juror gave directions to an acquaintance on the street to take care of his horse. No one spoke to either of the jurors about the case. *Held* to justify a finding that the jury was not tampered with, so that the court properly refused to grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

10. WITNESSES (§ 355*)—IMPEACHMENT—EVIDENCE—GENERAL REPUTATION.

A witness may not be impeached by proof of a bad reputation for truth, unless he is held in such bad repute generally in the community in which he lives; for, under Code Civ. Proc. § 2051, it is the general reputation that is to be proved, and a witness to the reputation must at least be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue, though it is not necessary that the witness should know that the majority of the community have that impression.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1154; Dec. Dig. § 355.*]

11. CRIMINAL LAW (§ 736*)—TRIAL—PROVINCE OF COURT AND JURY — ADMISSIBILITY OF IMPEACHING EVIDENCE.

The court must determine whether general reputation of a witness in the place of former residence is too remote in point of time to be allowed in evidence as impeaching evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1219; Dec. Dig. § 736.*]

12. WITNESSES (§ 352*)—IMPEACHMENT—EVIDENCE.

Where one had neither resided nor done any business in a county for 20 years, but had resided some 200 miles from his former residence, evidence on the subject of his reputation in the county of his former residence was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152; Dec. Dig. § 352.*]

13. CRIMINAL LAW (§ 485*)—EVIDENCE—OPINION EVIDENCE—HYPOTHETICAL QUESTION.

Where the uncontradicted evidence showed that the wound inflicted on decedent was necessarily fatal, a hypothetical question, put to a physician to elicit his opinion that the immediate cause of death of decedent might have been the reopening of the hole in the aorta inflicted by the wound, by reason of some movement or exertion then made by decedent, was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

14. WITNESSES (§ 286*) — EXAMINATION — CROSS-EXAMINATION—REDIRECT EXAMINATION.

An examination on redirect examination, not called for by the cross-examination, and not competent as original testimony, is properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 994; Dec. Dig. § 286.*]

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

W. F. Cord was convicted of manslaughter, and he appeals. Affirmed.

J. A. Allen and Geo. D. Murry (E. O. Miller, of counsel), for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was tried upon a charge of murder of the first degree, and was convicted of manslaughter. He appeals from the judgment and from an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The information charged the defendant with the murder of one John P. Pawley on the 27th day of January, 1908. It appeared that on that day he shot Pawley with a pistol, inflicting a wound from which Pawley died on February 17, 1908. Upon the trial a statement purporting to be a dying declaration of Pawley was admitted in evidence, over the objection of the defendant. It is insisted that this ruling was erroneous for two reasons: (1) Because it was not shown that it was made by Pawley in the belief that he was about to die, and under a sense of impending death; and (2) that at the time he made the statement Pawley was not "a dying person" within the meaning of that term in the statute providing for the admission of dying declarations. Code Civ. Proc. § 1870, subd. 4.

1. The section cited declares that in criminal actions the declaration of a dying person, made under a sense of impending death, with respect to the cause of his death, may be admitted in evidence. The evidence is clearly sufficient to warrant the conclusion that the statement in question was given under a sense of impending death. It was made on January 28th, the day after the deceased received the fatal wound. He was then at his home, lying in bed, and weak from loss of blood caused by the wound. Before making the statement he was informed that he would be asked to relate the facts about the shooting, and that it was necessary first to ask whether or not he thought there was any hope that he would get well. To this he answered: "I don't see no hope in the world." Being then asked, "That is the way you feel?" he said, "I don't entertain no hope at all." After his statement was made and taken down in shorthand, the following conversation occurred between him and the district attorney: "Now, this statement you are making to us, you are making it in view of impending death? Yes, sir. And without any hope of recovery? Yes, sir. We don't know anything about what the future has, but I have no hope of any recovery. That is the way you feel? Yes, sir; the condition of my mind. And it is in that frame of mind that you are making this? In that frame of mind I am making this statement." This shows all that the statute requires on this point. His belief that he could not recover from the wound, and his understanding that he was giving the account of the manner in which he received it, under a solemn sense of approaching death, was clearly indicated by his testimony. The effect of the statements by him as to his mental condition was not destroyed by his remark, after giving the statement, that "We don't know what the future has." This was a mere statement of an obvious conclusion which any person might make under any circumstances. It did not necessarily indicate that he thereby meant to qualify the statement that he was without hope of recovery. Whether or not he was without such hope was a question of fact to be determined in the court below. The evidence taken was competent for that purpose, and is legally sufficient to sustain the conclusion that he was without hope of recovery, and believed that death would soon take place. The evidence does not show that his physician had previously told him that the wound was fatal, but we know of no rule of law which makes such information a necessary prerequisite to the admission of a dying statement. He had been shot in the breast at the junction of the third rib with the breastbone. He was thereby rendered unconscious for a considerable time, and had lost a great deal of blood; the pleural cavity being found full of blood a few days afterwards. He was affected so that he could not breathe easily, except by lying in a half-reclining position, and he was suffering from pain. All these circumstances would give reasonable cause for grave apprehension of fast approaching death in the mind of a person so situated.

2. The claim that he was not, at that time, a dying person is founded on the fact that he lived for more than two weeks after making the statement, and that, until a few hours before his death, he was thought to be recovering. In this respect the case is remarkable, considering the nature of his wound as shown by the autopsy made after his death. It was found that the bullet, a 38 caliber, had pierced the cartilage of the third rib and the edge of the breastbone and had entered the arch of the aorta, and had then fallen down into the aorta and had rested upon one of the semilunar valves opening from the left ventricle of the heart. If the puncture of the aorta where the bullet had entered had remained open, the man would have died from arterial hemorrhage within a few minutes after he was shot. In some manner unknown it became closed and so remained until the time of his death, when for some reason it again opened, causing almost immediate death from the bleeding. It was the opinion of the physicians that immediately after the shooting the orifice was by some means closed long enough to allow the formation of an organized blood clot over it, which kept it closed until the blood clot had become somewhat disorganized, and that then the puncture opened, letting the blood flow and causing death at once. That the bullet had been, in the meantime, resting within the aorta upon the semilunar valve was shown by the fact that there was a thickening of the valve at the place where it was found, caused by inflammation, which must have been produced by irritation continuing for a considerable period of time. A blood clot was found at the place where the aorta had been

pierced by the bullet. Some three or four days after he was shot he was taken to a hospital to have performed upon him the operation of drawing off the blood which had entered the pleural cavity. Nearly two quarts of blood were at that time drawn off by means of a needle. He was in the hospital thereafter until the day before his death, a period of two weeks. During that time he had recovered sufficiently to go out riding several times, and to walk upstairs with assistance. When he left the hospital the bullet had not been located, and the physicians, being ignorant of its situation, then expected that he would recover.

We have no decisions in this state declaring the meaning of the phrase "a dying person," in section 1870 of the Code of Civil Procedure. It does not mean that in order to make such declaration admissible the person making it must be at the time in the act of expiring, or in the final death struggle. It is seldom that a human being in that stage of dissolution is capable of making any statement whatsoever in the nature of a connected or reliable narrative or account of a past transaction. To admit such declarations only when made by a person in that condition would practically exclude them altogether, or render them useless for any purpose. We think the intention of the codifiers was to express, as clearly and comprehensively as was compatible with the necessary brevity, the rule on the subject of the admissibility of dying declarations as it had previously existed. By this rule it was not necessary that the person should be at the time in the throes of death, or that he should die immediately, or within any specified time thereafter, in order to give the declaration probative force. 1 Greenleaf on Ev. § 158; Roscoe, Crim. Ev. *p. 37 (8th Ed.) 61; 21 Cyc. 978; State v. Nash, 7 Iowa, 381; Hall v. Commonwealth, 89 Va. 177, 15 S. E. 517; Swisher v. Commonwealth, 26 Grat. (Va.) 963, 971, 21 Am. Dec. 330; State v. Reed, 53 Kan. 773, 37 Pac. 174, 42 Am. St. Rep. 322; State v. Kilgore, 70 Mo. 553; State v. Tilghman, 33 N. C. 513. It was considered that the belief that a fatal wound had been received, and that death was about to ensue therefrom, would deter such person from uttering a willful untruth about its cause, if not as effectively as would the sanction of an oath, reinforced by the earthly penalty for its violation, at least sufficiently to justify its admission as evidence of the facts recounted. Where a person has been fatally wounded, is in sore distress therefrom, and believes that he will not recover, and is soon about to die, his statement, made in this belief, relating to the cause of his injury is admissible, if it appears that he subsequently died from the direct effects of the wound, although he may have revived after making the statement, or may have lived a considerable time thereafter, and may have again begun to hope for recovery. Such person is to be deemed "a dying person" within the meaning of the statute from the time the wound is received until death results from the injury, and his statement during that period, made in view of death and with the belief that it is near at hand, may be proven to establish the cause of death. In the present case the evidence shows that this wound was necessarily fatal, and that his dissolution therefrom was in progress continuously from the beginning to the close. The remarkable thing is that he lived so long in such a condition. He was never on the road to recovery, as appellant contends, but was constantly on the brink of death from a recurrence of hemorrhage. He believed his death imminent at the time he made the statement. The fact that he and others may have afterwards entertained a false hope of recovery could not have affected the solemnity or veracity of his statement, nor have made him other than a dying person, in the sense of the statute, at the time the statement was made.

3. It is contended that the jury was allowed to separate, after having been put in charge of an officer, during the trial, and before the case was finally submitted to them. One juror, whose home was in Visalia, where the trial occurred, was allowed to go, in charge of a deputy sheriff, to visit his wife, who was sick. This occurred during a recess of the trial, the juror was separated from the other jurors less than an hour, and the defendant's attorney had consented to the visit. It was shown that while he was away nothing was said to him about the case, and that the other jurors were locked up and were inaccessible to any person. There is no merit in the objection.

4. It is also claimed that there was a separation of the jury after they were charged, and before the verdict was returned. The jury was sent out to consider their verdict on June 2d and returned the verdict in the afternoon of the next day. They were taken to the Elder house on June 3d for luncheon, and were there seated at a table with the officer in charge. No one else was at that table. While they were eating luncheon a fire broke out in a barn one block distant from the hotel. As might be expected, the evidence as to what then ensued is conflicting. The court below decided against the defendant, and therefore we must accept the evidence unfavorable to him as true. One of the jurors, Mr. Cottle, was a brother of the landlady. When the news of the fire was first heard by the jury they remained at the table a few minutes. Then the landlady told them that, as the roof of the hotel was on fire, the waiters could not continue to serve them, and she asked Cottle to get the hose, which was in the kitchen, the door from the kitchen into the dining room being wide open. Cottle did so, and carried the hose from the kitchen through the dining room to the sidewalk in front. All this was in

the plain view and immediate presence of the other jurors and the officer, with the exception of an instant while he was in the kitchen. As he returned the jurors all arose and walked with him as he came from the kitchen into the dining room, and on out to the sidewalk, except one juror, Mr. Kellenberg. Kellenberg asked the landlady if he could assist her, and she asked him to run upstairs and assist persons there. As the other jurors started out to the sidewalk, Kellenberg ran upstairs and through a bedroom or hallway, out in front upon a balcony or porch over the sidewalk. He did this so quickly that when the officer reached the street with the other jurors Kellenberg was already on the porch, holding a ladder, while another person carried a bucket of water up the ladder to the roof to extinguish the fire. Kellenberg then came down into the street, and with several other jurors walked across to the opposite side of the street, and remained there a few minutes, watching the fire at the barn. They were about 60 feet away from the others at that time, but all of them were in plain view of the officer. One of them, Ballou, took a bucket of water and put out a small fire on the sidewalk. While this was occurring another juror, Sellers, gave directions to an acquaintance on the street to take care of his (Sellers') horse. No one spoke to either Kellenberg or Sellers about the case. The officer testified that he kept the jurors in view and within hearing, except as above stated, and as close together as he could under the circumstances, and that they did not talk to any one, nor have any chance to do so. While the jurors were thus out in the street other persons were coming and going about in rather close proximity to them. It would, of course, be improbable that there would be any talk about the case under these circumstances. Cottle was out of sight but an instant in going from the open kitchen for the hose; and, as he was very quick about it, it is a reasonable inference, if not a necessary conclusion, that he neither spoke nor was spoken to, in that moment, upon any subject. Where the jury has been permitted to separate while deliberating upon a verdict, under such circumstances as to make it appear that they might have been tampered with, a new trial should be granted, unless there is affirmative proof upon behalf of the people explaining the separation, and showing that the defendant was not prejudiced thereby. People v. Adams, 143 Cal. 210, 76 Pac. 954, 66 L. R. A. 247, 101 Am. St. Rep. 92; People v. Brannigan, 21 Cal. 339; People v. Symonds, 22 Cal. 352. If this burden is met by the people, a new trial should be denied. We think in this case there was reasonably strong proof that the jury was not tampered with, and that defendant suffered no prejudice from the confusion and slight separation growing out of the alarm of fire. There was other evidence showing greater confusion and a more complete separation; but, as, before stated, we must take the view most favorable to the prosecution in support of the decision of the trial court. There was no attempt to show the slightest bad conduct on the part of any member of the jury, or any effort by any person to approach or influence them in any way. The following cases support the conclusion that there was no conduct on the part of the jury prejudicial to the defendant. People v. Bemmerly, 98 Cal. 301, 33 Pac. 263; People v. Sansome, 98 Cal. 239, 33 Pac. 202; People v. Leary, 105 Cal. 495, 39 Pac. 24; People v. Bush, 68 Cal. 627, 10 Pac. 169; People v. Wheatley, 88 Cal. 119, 26 Pac. 95; People v. Yut Ling, 74 Cal. 570, 16 Pac. 489.

5. The witness Anderson, for the defendant, testified that he was well acquainted in a certain community in Santa Clara county, where the deceased, Pawley, had formerly lived; that he knew Pawley there; that he had been a deputy sheriff and policeman there for 27 years; that he knew Pawley's reputation in that community at that time for truth, honesty, and integrity, and that it was bad. This evidence was stricken out by the court. He did not testify that he knew the *general* reputation of Pawley for truth, honesty and integrity, and the facts elicited in his cross-examination show that he knew nothing of Pawley's reputation, except what he had heard from three police officers on one occasion during a trial before a justice of the peace more than 20 years before, in Santa Clara county, where Pawley then lived; that these officers were talking about Pawley's testimony at that trial, and that the witness Anderson had seen Pawley but twice in his life, and that was more than 20 years before his death. It was also in evidence that for the last 20 years of his life Pawley had not lived in Santa Clara county, and had not done business there, but had lived in Tulare county, some 200 miles from his former residence. A witness may not be impeached by proof of a bad reputation for truth, unless he is held in such bad repute generally in the community in which he lives, or is generally known. It is the general reputation that is to be proven. Code Civ. Proc. § 2051. The ultimate fact to be established is his actual personal character, and it is considered that the general opinion of his character held by persons who know him is of probative value as evidence of his real character. Hence the witness to such reputation must at least be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue, although it is not necessary that the witness testifying should know that the majority of the community have that impression. 16 Cyc. 1276, 1277. The question as to what territory and what people comprise the "community," especially in large cities, is not here involved. It

is a question for the court to determine whether or not general reputation in a place of former residence is too remote in point of time to be allowed in evidence. 16 Cyc. 1277. In the present case the deceased had not resided in Santa Clara county for more than 20 years before the shooting. It is obvious from these rules of law governing the subject that the court below, so far as appears, did not abuse its discretion in striking out the evidence of Anderson on the subject of the reputation of the deceased on motion of the district attorney.

6. The court properly refused to allow a hypothetical question to be put to a physician, intended to elicit his opinion that the immediate cause of the death of Pawley might have been the reopening of the hole in the aorta by reason of some movement or exertion then made by him. The wound inflicted by the defendant would nevertheless be the proximate cause of the death. The uncontradicted evidence was that it was necessarily fatal; and, even if not so, the proposed opinion would not have affected the proposition that Pawley suffered death at the hands of the defendant. If the opinion had been given as proposed it would have been immaterial to any issue in the case. Furthermore, the witness in answer to previous questions on cross-examination had stated that he hardly thought such a thing possible.

7. Another witness testified that Pawley's reputation for peace and quiet was bad. On redirect examination the court refused to allow him to testify further in regard to Pawley's temper when he became angry. There had been nothing in the cross-examination calling for such testimony as an explanation, and it was not competent as original testimony for the defendant.

We do not consider it necessary to discuss the alleged errors in giving and refusing instructions. They were not, as defendant claims, of a character to mislead the jury, but were correct in law, and were applicable to the case as submitted to the jury.

The judgment and order are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; ANGELLOTTI, J.; HENSHAW, J.; MELVIN, J.

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157 Cal. 552

In re GHIO'S ESTATE.

ROCCA v. THOMPSON.

(Sac. 1,669.)

(Supreme Court of California. April 5, 1910.)

1. TREATIES (§ 7*) — CONSTRUCTION — OPERATION AS TO STATE LAWS.

An intent of the federal government to materially abridge by treaty the autonomy of the several states and interfere with and direct the state tribunals in state proceedings affecting private property within their jurisdictions will not be deemed to exist, unless the language used plainly expresses it, or necessarily implies it.

[Ed. Note.—For other cases, see Treaties, Dec. Dig. § 7.*]

2. EXECUTORS AND ADMINISTRATORS (§ 24*)—RIGHT TO APPOINTMENT—ITALIAN CONSUL GENERAL—"LAWS OF THE COUNTRY."

The treaty between the United States and the Argentine Republic of July 27, 1853 (article 9, 10 Stat. 1009), provides that if any citizen of either of the two contracting parties shall die without will in any of the territories of the other, the Consul General or consul of the nation to which decedent belonged, or the representative of such Consul General or consul, may intervene in the possession, administration, and judicial liquidation of decedent's estate, conformably with the laws of the country, for the benefit of the creditors and legal heirs. *Held*, that the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states, and qualifies the right and the method of intervention, as well as the procedure after intervention takes place, so that if a consul intervenes he must do so in the manner, to the extent, and for the purpose prescribed by the laws of the jurisdiction where the property is situated, and the Italian Consul General, under the treaty of May 8, 1878, between Italy and the United States (article 17, 20 Stat. 732), providing that the respective Consuls General, etc., shall enjoy in both countries all the rights which are or may hereafter be granted to the officers of the same grade of the most favored nation, would not have the right to be appointed administrator of the estate of a subject of Italy resident in California, leaving property there with his heirs resident in Italy, in view of the California law providing that the public administrator of the county shall officiate in such a case.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 4, p. 3721.]

3. TREATIES (§§ 7, 8*) — CONSTRUCTION—"INTERVENE."

In the construction of treaties, words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such sense is clearly intended, and where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred; and as the treaty with the Argentine Republic of July 27, 1853 (10 Stat. 1005), giving the Consul General or consul of either nation the right to intervene in the administration and judicial liquidation of the estate of a subject of his nation dying in the other nation, intestate, relates to local proceedings for the settlement of estates, the word "intervene," used therein, should be given the meaning it usually has in that connection, which, in proceedings in rem, does not usually include the right to take the property from the custody of the court or officer upon whom the law imposes the duty of administering and distributing it, and hence the word in the treaty will be deemed to imply an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding itself, especially as the object of the treaty to allow the consul to represent the subjects of his country who are interested as heirs or creditors would be fully met by such construction.

[Ed. Note.—For other cases, see Treaties, Dec. Dig. §§ 7, 8.*]

4. PARTIES (§ 38*) — INTERVENTION—"INTERVENE."

Intervene," when applied to matters of law, means to interpose in a lawsuit so as to become a party to it, and at civil law signifies the act of a third person who becomes a party in a suit pending between other persons.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 38.*

For other definitions, see Words and Phrases, vol. 4, p. 3731.]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Proceedings for settlement of the estate of Giuseppe Ghio. From an order granting letters of administration to George F. Thompson as administrator, Salvatore L. Rocca appeals. On rehearing, after judgment in the District Court of Appeal. Affirmed.

The opinion of the District Court of Appeal (per Hart, J., concurred in by Chipman, P. J., and Burnett, J.) is as follows:

"On the 27th day of April, 1908, Giuseppe Ghio died, intestate, in the county of San Joaquin, this state, leaving an estate consisting of personal property of the value of about $1,061.85. The deceased, at the time of his death, was a resident of San Joaquin county, but a citizen of Italy. His surviving heirs are a widow and three minor children who were, at the time of his death and when the proceeding here involved was heard in the court below, residents of Italy. Both the public administrator of San Joaquin county and Salvatore L. Rocca, the Consul General of the kingdom of Italy, in and for the states of California, Oregon, Washington, Nevada, and the territory of Alaska, petitioned for letters of administration of the estate of said deceased. The court, upon the hearing of the matter of the petitions of the contesting petitioners, made an order granting letters of administration to George F. Thompson, the said public administrator, and, necessarily, refusing to grant letters to said Salvatore L. Rocca, Consul General, etc. This appeal is prosecuted from said order.

"The ultimate question submitted here for determination is one of more than ordinary magnitude. It involves the important proposition of whether foreign consular officers stationed and representing their governments in the United States are entitled, under and by virtue of the rights conferred upon them by the provisions and stipulations of the treaties subsisting between this and the governments they so represent, to supersede the public administrators in the matter of the administration of the estates of aliens (citizens of the countries they represent) denizened in this country, dying here intestate and leaving estates within the jurisdiction of our local courts. It is not claimed that there is any provision contained in the treaty between this government and the kingdom of Italy which, in terms, authorizes the exercise by the consular officers representing the latter government in the United States of the power and right contended for here by the appellant. It is, however, the contention that under the 'most favored nation clause' of said treaty the Consuls General of Italy, stationed here, are, by virtue of the provisions of article 9 of the treaty between this government and that of the Argentine Republic, entitled to exercise the power and right claimed by the appellant in preference to the public administrator.

"The Italian treaty with this government provides that Consuls General of Italy are entitled to 'all the rights, prerogatives, immunities and privileges which are now or may hereafter be granted to the officers of the same grade of the most favored nation.' Article 9 of the Argentine treaty reads as follows: 'If any citizen of either of the two contracting parties shall die without will or testament in any of the territories of the other, the Consul General or consul of the nation to which the deceased belonged, or the representative of such Consul General or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.' U. S. Treaties 1904, p. 24; 10 Stat. 1009.

"Whether the position of appellant is tenable or otherwise rests and hinges entirely upon the meaning of the word 'intervene,' as used in the foregoing article of the Argentine treaty, and, therefore, upon the correct interpretation of said word as so employed his contention must either be sustained or rejected. In support of his contention, appellant cites the following authorities: In re Fattosini, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119; In re Lobrasciano, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040; In re Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Devlin on the Treaty Power, § 202.

"The construction given by the foregoing authorities of the language of the provision of the Argentine treaty upon which appellant relies to sustain his position is that the Italian consul, under the 'most favored nation clause' of the Italian treaty is entitled to the possession, *for the purposes of administration*, of the property of an Italian subject dying intestate and leaving estate within his consular jurisdiction. The cases of In re Logiorato, 34 Misc. Rep. 31, 69 N. Y. Supp. 507, and Lanfear v. Ritchie, 9 La. Ann. 96, hold to opposite views, and maintain that the full extent of the right and power prescribed to the Italian consul is to 'intervene' in such cases as the one at bar in the sense in which that word is used in our local statute law, and that such is the true interpretation of the word 'intervene,' as used in the Argentine treaty. In other words, it is held in the last-mentioned cases that to intervene is to 'come between,' and 'the right to intervene in a judicial proceeding is a right to be heard *with others who may assert demands or defenses.*' (Italics ours.) This is, obviously, the meaning of intervention or of the right to intervene as prescribed in our local Code. Section 387, Code Civ. Proc. The effect of the construction thus given the provision of the Argentine treaty, that the Consul General 'shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, *conformably with the laws of the country,*' etc., is that said language means nothing more than that such intervention or such right to intervene shall be in accordance with the procedure or rules laid down by our local laws concerning the right to intervene in any case or under any of the circumstances indicated therein. In other words, assuming that, by virtue of the terms of the 'most favored nation' clause contained in the Italian treaty, the Italian consul, as to the estate or property of a subject of the kingdom of Italy, dying intestate in this country, is brought within the rights conferred by article 9 of the Argentine treaty, he is thus limited to the exercise of the right or power only of making himself a party to the proceedings in administration as an *intervener*, but must do so according to the mode prescribed for intervention by our Code, for the prosecution or defense and protection of the rights of the creditors and of the rightful heirs of the deceased or the legal successors to his estate, and *not as an administrator of the estate* in preference to the officer created by our local laws and invested with the power and right and duty to administer the estates of persons dying intestate, leaving estate situated here, but having no lawful heirs within the jurisdiction of the state.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Mr. Devlin, in his very excellent volume on the treaty power, seems to approve the construction of the language of article 9 of the Argentine treaty as expounded by the New York Supreme Court in the case of In re Lobrasciano, supra, for, without comment, he repeats the language as used in that case that 'the power conferred upon the consul by the words above quoted (the right to intervene) is not limited by the succeeding words, "conformably with the laws of the country for the benefit of the creditors and legal heirs." These words relate merely to the procedure of administration,' proceeds Mr. Devlin, 'and not to the right to administer.'

"In the case of In re Wyman, supra, the Supreme Court of Massachusetts, holding with the contention of appellant here upon the construction of article 9 of the Argentine treaty, and applying such construction to the rights of the Russian vice consul under the 'most favored nation' clause of the Russian treaty, brushes aside the ruling in the Louisiana case of Lanfear v. Ritchie, supra, by declaring that the decision was rendered and filed 'at a time when we might expect the doctrine of state rights to be strongly insisted upon.'

"It is an established and incontrovertible principle that a treaty negotiated by the government of the United States with a foreign power becomes, upon the adoption of such treaty, a part of the law of every state of the American Union, and that where the provisions and stipulations of the treaty are at cross-purposes with the statute of any state the latter must succumb to the former. This principle is essentially an indispensable attribute of the treaty-making power vested alone in the general government, and is expressly declared in the second subdivision of article 6 of the federal Constitution in the following language: '* * * All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution and laws of any state to the contrary notwithstanding.'

"The courts, with few exceptions, in the construction of the scope and effect of the treaty-making power delegated to and therefore exclusively vested in the federal government, have gone to the extreme limits, and recognize nothing within the rights reserved by the states to themselves which must not give way to the force of treaty stipulations. The federal courts have uniformly held this power to extend even to the abrogation, pro tanto, of all and every character of state legislation involving subjects of exclusive internal cognizance, where the stipulations of treaties and the provisions of local statutes conflict. As stated, this proposition proceeds from the fundamental principle of our system of government 'that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution.' Hauenstein v. Lynham, 100 U. S. 490 (25 L. Ed. 628); Foster & Elam v. Neilson, 2 Pet. 253, 7 L. Ed. 415; The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227; Mr. Pinckney's Speech, 3 Elliott's Constitutional Debates, 321. And the same principle is enunciated and sustained by some of the state courts, as in the New York and Massachusetts cases cited and relied upon by appellant and to which we have hitherto referred. See, also, People, etc., v. Gerke & Clark, 5 Cal. 381.

"There is not, and there could never be, since the establishment of the general government by the adoption of the federal Constitution, any doubt that the treaty-making power of the federal government must, from the very necessities of our complex governmental system, be sufficiently broad to cover and include all of the usual subjects of treaties between different nations. Yet, it is not to be wondered that questions involving the extent to which the power could be exercised presented for judicial solution, when the nation was still young, many perplexing and troublesome problems, and that, as an act of Congress attempting to deal with subjects clearly within the reserved rights of the states in contravention of such rights would be void as being in excess of the power of the national government, the early judges were to no little extent startled at the proposition that said government could accomplish through treaty stipulations what it was powerless to do by congressional legislation. Under the decided cases in which this power has been defined, we are unable to find the line beyond which the government may not extend its exercise.

"In the case of In re Logiorato, supra, in which, as we have seen, the contention of appellant as to the construction of the language upon which he relies in the Argentine treaty is controverted and discarded, the learned surrogate concedes 'that a solemn treaty of the United States with Italy is of binding force, and that it must control all courts, even to the extent of ousting them of jurisdiction or of *changing the rules of their procedure.*' (Italics ours.) And, thus we are led to inquire: May the federal government, through a treaty compact, change the nature of the preliminary proceedings, the mode of trial, and the rules of evidence established by the local Legislatures in criminal cases in which the laws of the commonwealth are charged to have been violated by citizens of another country who are residents of this? If so, why does not the power extend to the changing of the mode and character of the punishment to be imposed in all cases of infraction of the local criminal laws by foreigners denizened here? Is it legitimately within the treaty-making power, as applying to aliens residing in this country, to change our procedure and the character of our system of pleadings in civil cases in law and in equity? We shall not undertake to answer these questions. Nor are we to be understood as declaring that, under the treaty-making power granted by the states to the central government, it would not constitute the exercise of competent authority to stipulate or provide for the trial in our *state courts* (we are not now speaking of the practice in consular courts, which are not state or local tribunals, and in which the practice and procedure must, necessarily, be prescribed and regulated by congressional legislation or perhaps by treaty negotiations, or by both) of alien residents by any mode or procedure upon which this government and another power might agree, however radically different such mode or procedure might be from that authorized by the system established by our local Legislatures. We neither affirm nor deny the proposition, for, as we have said, we are unwilling to venture an opinion, based upon the decisions we have examined, as to the limitations, if, indeed, there be any, upon this power, except that it cannot be so used as to change the character of the government or to be inconsistent with the nature and structure thereof or the objects for which it was formed. The discovery of the exact and precise limitations upon the exercise of this power by our national government, keeping in view the rights which the states have reserved to themselves or have never given away, is a task which may well be commended to the genius and industry of some curious publicist.

"But we think that it can be safely laid down as an incontrovertible proposition that, where a foreign power, under the stipulations of a treaty with this government, claims rights which do not intrinsically or in themselves constitute the 'usual subjects' of treaties, such rights must be granted in language so clear and unmistakable that no serious question can arise as to the intention of the high contracting parties in relation thereto, and that in no case should the enjoyment of such rights be vouchsafed upon a strained or far-fetched construction.

"It may happen, and perhaps in the history of our foreign relations it has happened, that, in some particular instances, in order to promote and maintain the friendly commercial and political comity so essential to the peace, prosperity, and happiness of all civilized countries, requests are made or concessions asked and granted by treaty stipulation (in consideration of the concession of similar rights to this government) as to certain rights which, in strictness, do not involve or appertain to subjects which are peculiarly and inherently of international concern; that is to say, subjects which in themselves are not indispensably necessary to the maintenance of full and complete international amity. Such requests or concessions, if granted, are obviously acceded to for no other reason than that they are requested, or, perhaps, demanded, and not because they relate to the usual subjects of treaties. We can readily understand how, for instance, in the absence of an express provision in the treaty with regard thereto, a foreign power maintaining treaty relations with this government, could insist under the 'most favored nation' clause upon privileges as to our public educational advantages equally with the other governments in conventional amity with this, for the very obvious reason that the subject of education is one of universal interest and concern to all civilized governments. Such a subject naturally comes within the category of the 'usual subjects' of treaties. So with all those subjects with reference to which Congress possesses the sole power of legislation, as, for instance, the tariff, interstate commerce with its various ramifications, and like questions.

"This leads us to the consideration of the specific question submitted here for decision.

"As we have already explained, the Italian consul claims the right to administer upon the estate involved in this controversy by virtue of the 'most favored nation' stipulation of the Italian treaty by reference to the effect of said stipulation upon the provisions of article 9 of the Argentine treaty. As before stated, the determination of the question is dependent upon the construction which may be properly put upon the language of the Argentine treaty by which it is provided that the consul of a foreign county is entitled to 'the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.' We may as well say, in limine, that we do not agree with the appellant's construction of the language of article 9 of the Argentine treaty. The New York and Massachusetts cases which are cited in support of his construction are entitled to great weight in the consideration of the question, as are likewise, the views of Mr. Devlin, who has furnished the profession with a learned and valuable treatise on the Treaty-Making Power; but we are not satisfied with the conclusion reached by those writers and are of the opinion that it cannot be sustained upon principle or sound reason.

"In the first place, we see nothing in the right to administer upon the estate of a deceased alien, dying intestate and leaving property in this country, which justifies the conclusion that such right constitutes one of the 'usual subjects' of international treaties. The subject is one, on the contrary, which in itself, it seems to us, cannot and could not affect international relations or become an essential feature of the most perfect commercial and political relations between this and other governments. The object of the administration of estates of deceased persons in this country is: First, to protect the creditors thereof; and, secondly, to execute, as to the legal heirs, the law of descents. The rights of creditors are paramount to those of the heirs, but it is the duty of the courts and other officers charged with the responsibility of administering such estates to watch and protect the interests of both with equal vigilance and good faith. This being done, the object of administration is fully and effectually accomplished. Administration of the estates of deceased persons, like that of the estates of minors and incompetents, is a subject, as before suggested, essentially of local concern and possesses none of the characteristics of international importance. And this is equally true where the deceased is an alien resident and his legal heirs citizens and residents of a foreign country. The duty of administering the estate faithfully in the latter case is as binding upon the local officers charged with its performance as if the deceased and his heirs were citizens of this country. The legal heirs of the deceased in the case at bar, although citizens and residents of Italy, are undoubtedly entitled to the residue of the estate of said deceased after the payment of creditors and the expenses of administration. This right, flowing from treaty stipulations, has often been so adjudicated and sustained by our courts, and it involves a proposition which constitutes an appropriate subject of the treaty-making power. The full extent of the interest, therefore, of a foreign government in the estate of a citizen of the country over which that government prevails dying intestate here is to see that the alien heirs of the latter or those entitled to succeed to his estate receive in full all that they are entitled to. In other words, such government is interested to the extent only that it may insist that the rights of its own subjects in this country shall be fully conserved and protected. This being so, is it to be supposed, in the absence of an express provision in the treaty to that effect, that this government intended, at the time of the execution of the treaty between it and the kingdom of Italy, that, under the 'most favored nation' clause, the consular officers of the latter stationed here should be authorized to oust a duly created local officer, specifically clothed with the power and duty of administering upon such estates as the one involved here, of his right to exercise the duties of his public office? We cannot be persuaded that such was the intention. There is no reason of which we can conceive why such should have been or was the intention. There is every reason why the intention was not to thus trespass upon the rights of the states and thereby set at naught a local statute specifically enumerating those entitled to administer upon the estates of persons dying intestate and leaving property within the jurisdiction of our local courts.

"Foreign consular officers stationed in this country should, undoubtedly, as they always are, be invested with plenary power to protect not only the general rights of the governments to which they belong, but also the individual personal and property rights of citizens of their countries who are denizens of this. And where, as in the case at bar, such officers are given the right by treaty to intervene in the administration of the estates of citizens of their own country dying intestate here—that is, given the right to officially and as parties to the proceeding for that purpose to exercise such surveillance over such estates as to enable them to fully protect the interests of the estates and all interested therein—they are thus given a power as plenipotentiary in extent as they are entitled to exercise, and the power so given and limited is not inconsistent with the rights of the states. In California (and we presume the same may be done in most if not all of the states) the probate court has the power to appoint and authorize an attorney to represent and protect the interests of absent heirs to all estates, and to the extent of his authority such attorney may in a sense intervene in the administration of those estates. While the right to appoint an attorney for that purpose is not expressly authorized by statute, but is a part of the inherent power of the probate court, it would not for a moment be contended, if the law provided that an attorney should be so appointed and 'intervene' in behalf of absent heirs, he would thus be clothed with authority to administer upon such estate in preference to those enumerated in section 1365 of the Code of Civil Procedure.

"We think the clear intention of the Argentine treaty was to confer no greater right upon consular officers in cases like the present one than to see that the public administrator administers the estate so as to fully protect and preserve the interests of the creditors and heirs; that is, to see that the estate shall first discharge its obligations to its creditors and then to require the devolution of the residue upon those who are citizens and residents of a foreign country who are legally entitled to the same.

"But we are not without very excellent authority that the meaning here given to the word 'intervene' and the language following the use of that term, 'conformably with the laws of the country,' is correct.

"In the case of In re Logiorato's Estate, supra, the learned writer of the opinion thus disposes of the question: 'It will be observed that the right assured to the Consul General is to "intervene," and that this intervention is to be "conformably with the laws of the country." To intervene is to "come between" (Webst. Dict.), and the right to intervene in a judicial proceeding is a right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire corpus of a fund which is the subject of the proceeding. A right to intervene "conformably with the laws" of the state of New York is something different from a right to set aside the laws of the state, and take from a person who, by those laws, is the officer intrusted with the administration of the estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. * * * The eminent text-writers cited in the opinion of the learned surrogate (in the Fattosini Case) do not intimate that the courts of civilized states, acting under general laws framed for the protection of foreigners equally with their own citizens must grant administration, contrary to the terms of those laws, to consuls, under any circumstances whatever. Thus in Wools. Int. Law, p. 154, the learned writer, in enumerating the duties of consuls, includes the power "of administering on the personal property left within their consular districts by deceased persons, when no legal representative is at hand, and when law or treaty permits, and thus of representing them, it may be, before the courts of the district." Consuls may accept administration, but no right to override the local law is suggested. See, also, Wheat. Int. Law (3d Ed.) 167, 168.'

"Caleb Cushing, as Attorney General of the United States, in a letter addressed to Mr. Cavalcante D'Albuquerque, envoy of the Emperor of Brazil, defined the meaning of the word 'intervene' as employed in international law. 8 Op. Atty. Gen. 99. This letter was written in the year 1856, three years subsequently to the conclusion of the treaty between the Argentine Republic and the United States, and therein the following language is used: 'The administration of the estate of a foreign decedent is primarily a question of the local jurisdiction, and his consul can intervene only so far as the local law may permit.' In the same letter, at page 99, the learned Attorney General proceeds: 'In all these cases, the consul of the decedent's country has no jurisdiction; he may intervene by way of advice or in the sense of surveillance, but not otherwise as consul and of right. Thus, if the decedent, being a foreigner, leaves in the state a minor heir, the consul of his country may intervene to see that he have a proper guardian to secure his interests in the succession.' It will thus be noticed that Mr. Cushing's interpretation of the word 'intervene' corresponds with that which we hold to be the correct meaning of the term as it is used in the Argentine treaty.

"Mr. John Hay, as Secretary of State, addressed an official letter, dated February 3, 1900, to Senator E. O. Wolcott, in which he said: 'With regard to the second inquiry, pertaining to the last clause of article 3, it may be said that the right of a consular officer to appear personally in behalf of the absent heirs or creditors until they are otherwise represented, does not imply that consular officers have the status of attorneys or are to perform the duties of a public administrator. By the law of nations a consular officer is the provisional conservator of the property within his consular district belonging to his countrymen deceased therein. The United States Consular Regulations direct our consular officers, when the foreign local authorities institute proceedings in relation to the property of deceased Americans who leave no representatives in the foreign country, to intervene by way of observing the proceedings, but it is not understood that this involves any interference with the functions of a public administrator.'

"But we think it is unnecessary to address further consideration to the question in controversy.

"Though in view of the construction we have given the Argentine treaty, it is not necessary to decide the question, we may suggest that it is a matter of serious doubt whether the 'most favored nation' clause in a treaty can in any event be invoked to secure advantages and privileges to a government granted by treaty to another country than the one seeking them to avail itself of such privileges, except where such advantages and privileges may be granted freely and without consideration. If, for example, it clearly appeared from the language of the Argentine treaty that the consular officers of the Argentine Republic were accorded the right to administer upon the estates of citizens of that country dying intestate in this, in preference to the public administrator or to any of the other persons mentioned in section 1365 of the Code of Civil Procedure, in consideration of a like privilege or right conceded to any of the diplomatic officers of this government stationed in the Argentine Republic, then we doubt very much whether the 'most favored nation' clause in other treaties could avail to give such governments the same right. This, it seems to us, would be particularly true where, as we have held to be the fact here, the privilege or right sought to be exercised under said clause does not spring from or belong to, intrinsically, any of the usual subjects of treaties. But, as stated, we do not feel that we are called upon to determine this question. An able consideration of the proposition, however, may be found in the opinion of Attorney General Cushing, rendered in the year 1855, in response to a request therefor from the Secretary of State (6 Op. Atty. Gen. p. 148), and also in the cases of Bartram v. Robertson, 122 U. S. 116, 7 Sup. Ct. 1115, 30 L. Ed. 1118, and Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386.

"Other points are urged and discussed in the briefs, but we do not deem it necessary to consider them.

"For the reasons herein expressed, the order appealed from is affirmed."

Ambrose Gherini, Clary & Loutitt, and R. K. Barrows, for appellant. Eustace Cullinan, John E. Budd, and Cullinan & Hickey, for respondent. John J. O'Toole, amicus curiæ.

SHAW, J. Salvatore L. Rocca appeals from an order of the superior court granting to George F. Thompson, as public administrator of San Joaquin county, letters of administration upon the estate of Giuseppe Ghio, deceased, and refusing the application of said appellant for such letters. The appeal was submitted to the District Court of Appeal of the Third District and decided in favor of the respondent. A rehearing in the Supreme Court was ordered, because, as treaty rights were involved, it was deemed advisable that the highest state court should consider the matter. Giuseppe Ghio, at the time of his death, was a resident of San Joaquin county, Cal., and a citizen of the kingdom of Italy. He left a small estate situated in San Joaquin county. His heirs at law are his wife, Maria, and three minor children. All of them reside in Italy. The appellant is the Consul General of the kingdom of Italy for California, Nevada, Washington, and Alaska territory. The deceased died intestate on April 27, 1908, in San Joaquin county.

The sole question for consideration is whether or not where a citizen of Italy, being a resident of California, dies intestate, leaving property in this state, and his lawful heirs all reside in Italy and are citizens of that country, the Consul General of Italy is entitled to letters of administration upon his estate, in preference to the public administrator of the county of his residence.

The appellant bases his claim to such letters upon the provisions of the treaty of May 8, 1878, between Italy and the United States. The clauses relating to this subject are articles 16 and 17, which are as follows:

"Art. 16. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consul or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."

"Art. 17. The respective Consuls General, consuls, vice consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation." 20 Stat. 732.

Under article 17, the appellant, as Consul General of Italy, claims the rights which are given to Consuls General of the Argentine Republic by the treaty between that country and the United States, concluded July 27, 1853 (10 Stat. 1005). The last clause of article 9 of that treaty is as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul General, or consul of the nation to which the deceased belonged, or the representative of such Consul General or consul, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Page 1009.

Article 6 of the Constitution of the United States declares that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." And section 10, of article 1, further provides that: "No state shall enter into any treaty, alliance, or confederation." We will assume that the treaty-making power of the federal government is so far superior to the lawmaking power of Congress that it would authorize the federal government to control by treaty the power of the states to confer and limit the right of administration of estates and the power of the state courts to appoint administrators, so far as the estates of resident citizens of foreign countries are concerned. See, on this subject, note to Yeaker v. Yeaker, 81 Am. Dec. 536. If this is the case, the treaty with the Argentine Republic, if construed in accordance with appellant's contention, supersedes, in part, the provisions of our Code of Civil Procedure of California, giving the right of administration of the estates of persons dying intestate to the public administrator, in the absence of resident legal heirs, and gives to the consular agents of that country a paramount right to letters upon the estates of citizens of that country residing here, who die intestate leaving real or personal property in this state and no resident heirs. The favored nation clause of the Italian treaty would give the like right to the appellant, as Consul General of Italy, in the present case.

Similar favored nation clauses are found in the treaties with Austria-Hungary (Treaty of 1870, art. 15, 17 Stat. 831); Denmark (Treaty of 1826, art. 8, 8 Stat. 342); Japan (Treaty of 1894, art. 15, 29 Stat. 852); Kongo (Treaty of 1891, art. 5, 27 Stat. 929); Korea (Treaty of 1882, art. 2, 7 Fed. Stat. Ann. 680); Russia (Treaty of 1832, art. 8, 8 Stat. 448); Spain (Treaty of 1902, art. 28, 33 Stat. 2120); Switzerland (Treaty of 1850, art. 7, 7 Fed. Stat. Ann. 842); Tonga (Treaty of 1886, art. 11, 25 Stat. 1442); and Zanzibar (Treaty of 1886, art. 2, 25 Stat. 1439). Foreign consuls and consular agents are given the same "privileges" as those of the most favored nation by the treaties with Belgium (Treaty of 1880, art. 2, 21 Stat. 777); Costa Rica (Treaty of 1851, art. 10, 10 Stat. 922); France (Treaty of 1853, art. 12, 10 Stat. 999); Germany (Treaty of 1871, art. 3, 17 Stat. 922); Greece (Treaty of 1902, art. 2, 33 Stat. 2123); Honduras (Treaty of 1864, art. 10, 13 Stat. 705); Netherlands (Treaty of 1878, art. 3, 21 Stat. 663); Paraguay (Treaty of 1859, art. 12, 12 Stat. 1097); Persia (Treaty of 1856, art. 7, 11 Stat. 710); Roumania (Treaty of 1881, art 2, 7 Fed. Stat. Ann. 773); and Servia (Treaty of 1881, art. 2, 22 Stat. 968). The treaty of 1903 with China gives Chinese consuls here the same "attributes, privileges and immunities" as those of the most favored nation. Article 2, 7 Fed. Stat. Ann. 487. The consuls from the countries thus given the same "rights," "prerogatives," or "powers," being those embraced in the list first given, could doubtless claim the same rights as those of Italy, with respect to estates of citizens of their respective countries dying here. Perhaps those included in the second list would claim the same right as a "privilege" within the intent of the respective treaties. The treaty of 1887, with Peru (25 Stat. 1461, art. 33), which terminated in 1899 by notification from Peru, provided that the consuls of each country, in the absence of heirs or representatives, should, ex officio, be the executors or administrators of the citizens of their country who died within their consular jurisdiction.

The question presented would directly affect the right of administration upon the estates of all citizens of all the above-named countries residing in this state, of whom there is doubtless a large number. It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

So far as we are aware, the exact point has not been considered in any of the states except Massachusetts and New York. In New York it has arisen only in the surrogate courts of two of the counties, New York county and Westchester county. The surrogate court of the latter county held that the Consul General of Italy was entitled to letters of administration upon the estate of a citizen of Italy who died leaving property in that county, in preference to the county treasurer, who, by the state law, was entitled as public administrator, in the absence of heirs and creditors. In re Fattosini, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119. The same court, in a similar case, apparently decided that the Italian consul was entitled, by virtue of his office, to maintain a proceeding in the surrogate court, before any grant of letters of administration, to obtain possession of the effects of the deceased, in order that the consul might administer the same under the direction and control of the court. It does not appear that letters had been granted to the consul. In re Lobrasciano's Estate, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040. The surrogate court of New York county held, in a similar case, that, where the public administrator refused to act and the Italian consul was legally competent under the state law, he would be entitled to letters, under the statutory provision that, when in such case the public administrator refused to act, any person legally competent might be appointed. But his right in preference to the public administrator was denied. In re Logiorato's Estate, 34 Misc. Rep. 31, 69 N. Y. Supp. 507. The Massachusetts Supreme Court decided that, under the most favored nation clause of the treaty with Russia and by referring to the treaty with the Argentine Republic, the Russian vice consul had a right to administer, paramount to that of the public administrator, in the case of a citizen of Russia who died in Massachusetts leaving personal property there; his legal heirs being in Russia. McEvoy v. Wyman, 191 Mass. 276, 77 N. E. 379. In a Louisiana case (Lanfear v. Ritchie, 9 La. Ann. 96) the Swedish consul applied for an order that he supersede the duly appointed public administrator in the possession of the estate of a deceased citizen of Sweden, whose heirs were Swedish subjects residing in Sweden. The contention was that this was guaranteed by the treaty with Sweden. The treaty then in force did not contain any favored nation clause, nor purport to give to consuls in either country the right to administer the estates of its deceased citizens. The court denied his application on that ground, and also on the ground that a treaty could not control the state courts. In Aspinwall v. Queen's Proctor, 2 Curteis, 241, the English court held that the United States consul, as such, had no right, under the act of Congress of 1792, to administer upon the estate of an American traveler who died while in England leaving property there. The court said that "the crown is the party to see that the property of any person dying in its dominions goes into proper hands," and that the law of the United States could not be allowed to control, even if it purported to do so.

We do not agree with the Supreme Court of Massachusetts and the surrogate of Westchester county, N. Y., in regard to the meaning and effect of the Argentine treaty. They held that the right given thereby "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," included the right to be appointed administrator of the estate in place of the person who, might be designated by the laws of the particular state to be such administrator and who had either been previously duly appointed by the local state court, or was applying for such appointment. It appears clear to us from this language that, whatever right was given, it was intended to be a right which should conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states. If the right asserted is necessarily contrary to those laws, it cannot be said to conform to them. Our law declares that in the absence of next of kin entitled to inherit, the public administrator shall take charge of and administer the estate for the benefit of the creditors and heirs. The right claimed under the treaty is that, in such a case, the consul of the country of which the deceased was a citizen shall take charge and administer; a right directly in conflict with our law. The contention of the appellant is that the only effect of the phrase "conformably with the laws of the country" is that the consul, when appointed, must administer the estate in compliance with the local law of administration. The more obvious interpretation is that the phrase qualifies the right and the method of intervention, as well as the procedure after intervention takes place; that is, that, if the consul intervenes, he must do so in the manner, to the extent, and for the purposes prescribed and allowed by the laws of the local jurisdiction in which the property is situated. This is the grammatical effect of the qualifying clause.

Whether the matter in hand is the possession, the administration, or the judicial liquidation of the estate, the treaty secures to the consul only the right to "intervene" therein. The word "intervene" is here used with reference to a proceeding in a judicial tribunal. In that connection the word has a settled meaning. The dictionaries declare that when applied to matters of law it means: "To interpose in a lawsuit so as to become a party to it." Cent. Dic.; Stand. Dic. Bouvier defines intervention at common law thus: "The admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings." And in the civil law as "the act by which a third party becomes a party in a suit pending between other persons," citing Pothier Procés Civiles, lère part, c. 2, S. 6, 3 (1 Bouv. Dic. [Rawle's Ed.] 1114). A similar definition is given in our Code of Civil Procedure (section 387).

Appellants say that the word should be construed according to its literal meaning, "to come between," and that "to come between," in the possession and administration of an estate, means to have a preferred right to act as administrator, if it refers to a time before the appointment is made, or to supersede any other appointee, if used in reference to any subsequent time. This claim is based on the assertion that an intervention was unknown in the civil law, from which it is supposed the Argentine Republic takes its system of legal procedure, and also upon the principle that in construing treaties words are to be given their popular rather than their legal signification.

The Constitution of the Argentine Republic was adopted on May 25, 1853. It was avowedly modeled upon the Constitution of the United States, which it closely follows, both in general plan and in specific provisions. Its government is federal in form, with "provinces" which correspond to our states; each having power to make its own local laws subject, however, to the civil, criminal, commercial, and mineral codes when such should be enacted by the national Congress. Argentine Const. arts. 105, 108, and 67 [10], vol. 9, Senate Exec. Doc. The treaty with this country was made in July, 1853. At that time the public men of that country must have been very familiar with the form of government of the United States and with the fact that it committed local affairs to the several states. It is not probable, therefore, that the words of the treaty under consideration were chosen with the intent to have the international agreement become a part of, and in part supplant, the laws of the states of the United States, or of the provinces of Argentina, in matters committed solely to the states or provinces. The assertion that an intervention, as our law defines it, was not known in civil law countries, is shown to be without foundation by the foregoing citation of Bouvier to Pothier, and also by the fact that our own Code definition of an "intervention," and that of many of the other states, is taken from the Code of Louisiana. Horn v. Volcano W. Co., 13 Cal. 69, 73 Am. Dec. 569. The procedure and jurisprudence of that state, as is well known, was derived from the Code Napoléon and from the system in use in the early Spanish American colonies, both of which are adaptations of the civil law. Justice Field said, in Geofroy v. Riggs, 133 U. S. 271, 10 Sup. Ct. 298 (33 L. Ed. 642), with regard to the construction of treaties: "As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Appellant quotes this canon of construction as decisive of the sense in which the word "intervene" is to be understood. The court in that case held that the phrase "in all the states of the Union," in the clause of the treaty with France giving citizens of France the right to inherit the property of citizens of the United States, included the District of Columbia. The subject in hand and the context indicated that the phrase was used, in the most comprehensive sense, to include the entire country. But treaties are subject to the same rules of interpretation as other documents. The clause of the Argentine treaty relates to legal proceedings for the settlement of estates and the words used are to be given the meaning they usually have when used in that connection. The right to intervene in a legal proceeding partaking of the nature of a proceeding in rem is not usually understood to include the right to take the property from the custody of the court, or from the officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving him the right to appear in court for them, either officially, or in their name, to protect their interests, and requiring that he be served with notices to them, when notice is required. The use of the word "intervene" implies an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding himself. He has, in addition, a duty pertaining to his office imposed upon him by his own government, that of seeing to the safe-keeping and proper disposition of the effects of citizens of his country who may die while traveling, or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may "intervene in the possession" of the estate, conformably with the laws of the country. The custom of nations would permit this, and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to himself as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to accept its possession and discharge their duty concerning it. The theory of respondent is, in our opinion, in harmony with the spirit and purpose of the treaty and is in accord with the obvious meaning of the language used.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

12 Cal. App. 678

McELHANEY v. McPHERSON. (Civ. 657.)

(Court of Appeal, First District, California. Feb. 23, 1910. Rehearing Denied April 22, 1910.)

1. CONTRACTS (§ 28*)—EXISTENCE OF PROMISE TO PAY—EVIDENCE.

Evidence *held* to support a finding that defendant did not promise to pay plaintiff for releasing an obligation due plaintiff from defendant's husband.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 133; Dec. Dig. § 28.*]

2. APPEAL AND ERROR (§ 994*) — REVIEW — CREDIBILITY OF WITNESSES.

The Court of Appeal will not pass on the credibility of witnesses, though much of the testimony was read from depositions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3901; Dec. Dig. § 994.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by J. M. McElhaney against Sarah M. McPherson. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. J. Hambly, for appellant. Rogers, Bloomingdale & Free, for respondent.

HALL, J. Plaintiff appealed from the judgment in favor of the defendant and the order denying his motion for a new trial.

The action was brought to recover from defendant the sum of $725, which it is alleged she orally promised to pay plaintiff in consideration of the release and discharge by plaintiff of an antecedent and existing obligation due to plaintiff from one S. A. McPherson (the husband of defendant). Subdivision 3, § 2794, Civ. Code. The court found in favor of plaintiff as to the existence of the obligation alleged to be due from S. A. McPherson to plaintiff, but found that defendant did not promise or agree to pay plaintiff $725, or any other sum, for a release or discharge of such obligation, and that plaintiff did not cancel or release such obligation. Plaintiff attacks the sufficiency of the evidence to support the findings in favor of defendant. That the evidence in the record is sufficient to support the finding that defendant did not promise or agree to pay plaintiff the sum of $725 or any other sum we have no doubt.

Plaintiff and S. A. McPherson had had certain dealings for the sale of certain land belonging to said McPherson. S. A. McPherson had sued plaintiff, and had recovered a judgment for the possession of the land against plaintiff, who had appealed therefrom. Plaintiff had brought suit against said S. A. McPherson for commissions as a broker for the sale of a portion of the land, and this suit was pending. He also asserted a claim against one Frisbie in connection with the same matter. S. A. McPherson had left the state, and plaintiff, Frisbie, and defendant met in Oakland at the residence of Frisbie. At this meeting the terms of a settlement were arrived at as between plaintiff and Frisbie. Plaintiff testified that it was also agreed between him and defendant that she would pay him $725 for a release and discharge of his claims against her husband. The parties met the next day at the office of M. C. Chapman, an attorney, where an agreement between plaintiff and Frisbie was drawn up by Chapman and executed by plaintiff and Frisbie. A writing was also drawn in the form of an agreement between plaintiff and defendant. This was neither signed by plaintiff nor defendant, and, while the things to be done by plaintiff are fully set forth in the writing, the amount of money to be paid by defendant to plaintiff in consideration thereof is left blank. The writing is unilateral in form, and was only intended to be signed by plaintiff, and recites that "for and in consideration of the sum of —— dollars * * * to me in hand paid," etc., which is followed by words of present release and discharge of plaintiff's demands against defendant's husband, and covenants to satisfy and discharge of record a certain contract, and to dismiss the pending suit against defendant's husband. Plaintiff, of course, does not rely upon this writing, but testified that, both at Frisbie's house and at Mr. Chapman's office, defendant orally made the promise to pay him $725. As to what he testified concerning what took place at the office of Mr. Chapman he is supported by the testimony of Mr. Chapman. On the other hand, defendant testified that she made no such promise either at the house of Mr. Frisbie or at Mr. Chapman's office. She only received a copy of the writing to submit to her husband's attorney at San Jose. Her testimony is corroborated by Mr. Frisbie. The effect of his testimony is that no settlement was agreed upon by Mrs. McPherson. She was undecided what to do, and wished to consult her advisers at San Jose before agreeing to a settlement. Defendant testified that she said: "You can draw up all the papers you wish, but I will never pay it as long as I feel as I do at the present time. * * * The talk all the way through was that I would go to San Jose to see my attorneys before I would decide differently. * * * I did not promise to pay the $725; I was to consult the lawyer before I made any decision whatever."

The brief of appellant is largely addressed to matters that affect the credit to be given the witnesses. With this, however, this court has nothing to do. That much of the testimony was read from depositions does not affect the rule. But it is fair to say that the testimony was given more than 12 years after the transaction occurred, and it is not surprising that the witnesses are not clear as to everything that was said. It is significant, however, that the amount that it is claimed defendant agreed to pay was not inserted in the document that was prepared as evidence of the settlement. If she had finally agreed to pay $725, no reason appears why the amount should not have been inserted. On the other hand, the leaving of the amount blank is entirely in accord with her claim that she did not agree to any payment, and wished to consult her attorney before agreeing to any settlement.

As the finding that defendant never made the promise sued on is sustained by the evidence, it becomes immaterial as to whether or not the other findings in favor of defendant are supported by the evidence or not. The finding in favor of defendant as to the alleged promise is controlling as to the judgment.

Our attention is also briefly called to some alleged errors in admitting testimony. We find nothing under this head that would justify a reversal. Most if not all the rulings objected to relate to evidence directed to the issue found in favor of plaintiff.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

12 Cal. App. 681

JEWELL v. COLONIAL THEATER CO. et al. (Civ. 727.)

(Court of Appeal, First District, California. Feb. 28, 1910.)

1. ACCOUNT, ACTION ON (§ 6*)—PLEADING—BILL OF PARTICULARS.

Under Code Civ. Proc. § 454, providing that a pleading need not set out the items of an account, but plaintiff must deliver on demand a copy of the account, etc., where defendants were indebted to plaintiff in a gross sum for services rendered and for traveling expenses incurred, under an express contract, the complaint need not show how much was for services and how much for traveling expenses, since an uncertainty in this regard could have been cured by a bill of particulars.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 10; Dec. Dig. § 6.*]

2. MASTER AND SERVANT (§ 80*)—ACTION FOR SERVICES—EVIDENCE—SUFFICIENCY.

In an action for services rendered as an actress, and for traveling expenses, evidence *held* to support findings in favor of plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 118; Dec. Dig. § 80.*]

3. MASTER AND SERVANT (§ 80*)—ACTION FOR SERVICES—ADVANCEMENTS—COUNTERCLAIMS—EVIDENCE—SUFFICIENCY.

In an action for services rendered as an actress, and for traveling expenses, in which defendant counterclaimed for money advanced or loaned, evidence *held* to show an executed alteration of the contract, and to sustain the theory that the advancements had been fully repaid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 118; Dec. Dig. § 80.*]

4. PARTIES (§ 90*)—DEFENDANTS—MISJOINDER—LIABILITY.

Though defendants did not plead a misjoinder of defendants, only such as are shown by the evidence to be liable may be held for the indebtedness.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 148; Dec. Dig. § 90.*]

5. PRINCIPAL AND AGENT (§ 136*)—AUTHORIZED ACTS OF AGENT—BREACH OF CONTRACT—LIABILITY OF AGENT.

Where a contract showed on its face that it was made by a person as agent for another, and there is no question as to his authority to act as such, he is not liable for a breach of the contract by his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 478; Dec. Dig. § 136.*]

6. PRINCIPAL AND AGENT (§ 146*)—UNDISCLOSED PRINCIPAL—BREACH OF CONTRACT—LIABILITY OF AGENT.

An agent who binds himself by the terms of a contract without disclosing his principal is liable for breach of the contract by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 522; Dec. Dig. § 146.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Izetta Jewell against the Colonial Theater Company, a corporation, and others. Judgment for plaintiff, and defendants appeal. Reversed in part and affirmed in part.

F. J. Castelhun and F. C. Castelhun, for appellants. F. H. Dam, for respondent.

HALL, J. Plaintiff recovered judgment against all the defendants for the principal sum of $300, and the defendants appealed from the judgment and the order denying their motion for a new trial. Defendants jointly demurred to the complaint generally, and upon the grounds of uncertainty and ambiguity. The demurrer was properly overruled. It fairly appears from the complaint that defendants are indebted to plaintiff in the gross sum of $506.75 for services rendered as an actress and for traveling expenses incurred, under an express contract, whereby defendants agreed to pay plaintiff said sum therefor. It was not necessary for the complaint to show how much was for services and how much was for traveling expenses. Any uncertainty in this regard could have been cured by a bill of particulars. Code Civ. Proc. § 454; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761. Defendants in a joint answer denied the allegations of the complaint, and set up a counterclaim in the sum of $350 for money alleged to have been advanced and loaned to plaintiff by defendants. The court found that defendants were indebted to plaintiff in the sum of $300 for services rendered and for traveling expenses incurred, under an express contract, whereby defendants agreed to pay plaintiff said sum, and found against defendants on the counterclaim; and the main question presented by the record is as to the sufficiency of the evidence to sustain these findings.

Plaintiff was engaged at New York by Frank Bacon, acting for Martin Kurtzig. The contract was in writing, and signed "Izetta Jewell. Martin Kurtzig, by Frank Bacon," and by its terms plaintiff was engaged as an actress to play leading business for a season of 52 weeks, beginning on or about September 17, 1906, at a weekly salary of $100 per week. The contract also provided that "the said manager shall pay all expenses of transportation of the person and baggage of the said actor during travel and fare both ways. This contract may be canceled at any time after the first performance by either party giving two weeks' notice in writing to the other." This contract was dated August 11, 1906, and, as before stated, signed "Martin Kurtzig, by Frank Bacon." Kurtzig testified that Bacon was authorized to enter into such contract for him, and that he was the manager of the defendant corporation, for whom the contract seems to have been made. The evidence shows without conflict that the plaintiff came to San Francisco from New York under this contract, and commenced services thereunder as an actress in the Colonial Theater in San Francisco, and so continued until the 6th day of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

May, 1907, when the theater was closed, and she was dismissed, without any previous notice, and without any fault upon her part. It was shown without conflict that her salary for the last week was not paid, save that she herself testified that she had drawn $41.25 thereon. She was not given the two weeks' notice required by the contract, nor paid for the two weeks following her dismissal, although the evidence was uncontradicted that when a leading actress is discharged without the two weeks' notice it is the universal custom to pay the full two weeks' salary for that period. It was shown that the fare to New York was $83, and that had not been paid her.

It is thus apparent that when she was discharged she was entitled, under the written contract, to a balance of $58.75 for the week preceding her discharge, $200 for the two weeks following her discharge without notice, and $83 for return fare to New York, making a total of $341.75. The court found for her in the sum of $300, and we think that this finding, under the circumstances above detailed, should be sustained. It is true that some of the items above set forth are not in strict accord with the issues presented by the pleadings, in that it is alleged that the traveling expenses had been "incurred," when in fact she had not yet bought her ticket to New York. But no objection was made to the evidence upon this ground, and the case seems to have been tried upon the theory that such proof was within the issues. If such objection had been made, the pleading could, and doubtless would, have been amended so as to conform to the proof. Under the contract introduced in evidence she was entitled, when discharged, to payment of her return fare. For these reasons we think the finding is sustained so far as it affects such of the defendants as are bound by the contract with plaintiff, a point which we shall discuss later.

We have assumed thus far that the finding upon the counterclaim is sustained. It is clear from the evidence that certain moneys were advanced or loaned to plaintiff, either by Kurtzig acting for himself, or for the company. There is a conflict as to the amount. But there is evidence that after plaintiff arrived in San Francisco it was orally agreed between her and certain of the individual defendants acting for the company that her salary should be increased from January 1, 1907, to $125, of which she should be paid $100 in cash each week and the balance $25 credited against her indebtedness, and that this was done until her indebtedness was fully paid. So far as this was a variation of the written contract it was only admissible so far as it was executed. A written contract may be altered by an executed oral agreement. Civ. Code, § 1698. This evidence showed an executed oral alteration, and sustained the theory that the advancements to plaintiff had been fully repaid.

We now come to the question as to what defendants are shown to be liable for the debt due to plaintiff. Defendants did not plead a misjoinder of defendants, but nevertheless only such as are shown by the evidence to be liable may be held for the indebtedness. Rutenberg v. Main, 47 Cal. 214. The evidence does not show any liability upon the part of either Bacon or Mandlebaum. On its face the contract showed that Bacon was acting only as the agent of Kurtzig, and the evidence is without conflict that he had authority to act as such agent. He is therefore not liable, and the findings against him are not sustained by the evidence. The same is true of Mandlebaum. Whatever he did was as manager for the Colonial Theater Company, and after plaintiff knew who the principal was. The evidence shows that the Colonial Theater Company was the principal for whom the contract was made, and it is liable. Kurtzig is liable, as he bound himself by the terms of the contract without disclosing his principal.

Some other points are made as to rulings of the court, but we do not think any are of sufficient importance to require discussion or a reversal of the order or judgment.

The judgment and order are reversed as to the defendants Frank Bacon and F. Mandlebaum, and affirmed as to defendants Colonial Theater Company, a corporation, and Martin Kurtzig.

We concur: COOPER, P. J.; KERRIGAN, J.

12 Cal. App. 766

LOMA PRIETA LUMBER CO. v. HINTON.

(Civ. 724.)

(Court of Appeal, First District, California. March 9, 1910. Rehearing Denied by Supreme Court April 29, 1910.)

1. CONTRACTS (§ 1*)—DEFINITION.

A "contract" is the meeting of minds upon and agreement to do a definite thing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 2, pp. 1513–1534; vol. 8, pp. 7615, 7616.]

2. CONTRACTS (§ 28*)—BUILDING CONTRACTS—SUFFICIENCY OF EVIDENCE.

In an action on a building contract, evidence *held* to show that plaintiff furnished certain millwork to defendant at her instance and request.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 28.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the Loma Prieta Lumber Company against Mary E. Hinton. From a judgment for defendant and from an order denying plaintiff's motion for new trial, it appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Albert H. Elliot, for appellant. James G. Maguire and Joseph Leggett, for respondent.

COOPER, P. J. This action was brought to recover the sum of $1,845.60 for millwork furnished by plaintiff, to be used and which was used, in the construction of a building for the defendant. The court filed findings, upon which judgment was entered in favor of defendant. This appeal is from the judgment and the order denying plaintiff's motion for a new trial.

There is no controversy as to the following facts: That the building was constructed for defendant; that the cost of the building exceeded $1,000, and that there was no contract in writing, and no contract of any kind filed for record; that one Bugbee was the architect who drew the plans and specifications, and one Johnson was the superintendent in personal charge of the construction of the building; that the millwork was furnished by plaintiff, and was of the reasonable value of $1,845.60; that plaintiff has not been paid for said millwork; that no lien was filed against the building.

The court found in effect that plaintiff did not furnish the millwork to defendant at her instance or request, and upon this finding judgment was ordered in favor of defendant. It is here claimed that this finding is not supported by the evidence, and that is the main question, and, in fact, the only question that need be considered in this case.

On behalf of the plaintiff, Bugbee testified that he drew the plans and specifications for the building, and that he was to receive 10 per cent. on the total cost of the building for his services in drawing the plans and superintending the construction; that he informed defendant that he would have to employ a superintendent to take charge of the hiring of the labor and purchasing the materials and to let the subcontracts, and that defendant would have from time to time to advance the money as needed to pay for such labor and materials; that to this the defendant consented, and that the witness, in pursuance of such arrangement, employed Johnson as superintendent, agreeing to pay Johnson one-half of the 10 per cent. which he was to receive, and that either himself or Johnson purchased the necessary materials, employed the labor, let the subcontracts and paid for the same with moneys advanced by defendant as needed; that he told defendant that he thought the building could be constructed for a total cost of $8,000, but afterwards several changes were made at the request of defendant, such as putting in basins and wardrobes in each room, which considerably increased the cost. Johnson testified on behalf of the plaintiff that he was the superintendent in charge of the building, and that the contract or arrangement was made in his presence substantially as testified to by Bugbee; that he ordered the labor and materials from time to time; that plaintiff furnished the millwork at his request; that he had every laborer sign a pay roll which was turned over to defendant, and that she gave the witness money to pay the men according to the pay roll; that defendant would come on Friday or Saturday to look at the pay roll, and then go to the bank and get the money with which to pay the men, and then hand the money to the witness; that defendant did this 15 or 20 times; that the witness kept a pay roll in his own handwriting from which he refreshed his memory, and that defendant paid the following items: November 10th, $26.25; December 8th, $34.95; January 26th, $12.50; December 19th, $72.95; February 9th, $169.25; February 16th, $361.60; February 23d, $207.20; March 2d, $396.95; March 9th, $254.75—which said items were on the pay roll for labor. The witness continued from such pay roll to give other items for labor—plumbing and other materials which were furnished for the building and used in the construction thereof. He further testified that for getting the bills and the money to pay them promptly 2 per cent. discount was allowed, and defendant desired to and did get such discount; that defendant went with witness to the bank and introduced him, and asked the bank to let witness have money from time to time on her orders, and that he did often go and get the money with which to pay the bills upon the orders given him by defendant; that the changes and extras in the building in deviation from the original plans as made from time to time added $2,000 to $2,500 to its cost.

If the above quoted testimony is true, the defendant is liable to the plaintiff as a matter of law, for the reason that Bugbee and Johnson were her agents in the purchase of the materials, which included the millwork.

Defendant's counsel further insist that the evidence offered by defendant shows that she made an oral contract with Bugbee, by the terms of which he was to construct the building as an independent contractor for $8,000. Defendant testified in her own behalf, and her statement of the contract is as follows: "I wish to say that he suggested the $8,000 himself, and when I could get $5,000—the bank notified me that they had collected $5,000 insurance, and I went to Mr. Bugbee, and asked him what we could do with that on the lot. He said for '$8,000 I could put you up a rooming house with sixty rooms,' and I said, 'A temporary building?' He said, 'Oh, no; a building that will last twenty years.' I said, 'I will see if the bank will let me have $3,000 more in addition, and let you then know.' The bank allowed me the loan of $8,000—$3,000 in addition to what I had received from the insurance—and then I went to Mr. Bugbee, and said we can get no more, and I had no more, and he said he could do it, and he began to excavate and got Mr. Johnson to excavate—not much excavating, it was more clearing away the bricks from the lot." The witness further said that Mr. Bugbee agreed to construct the building for $8,000; but in order to arrive at the truth we must examine her testimony as a whole.

In cross-examination she testified that she paid out $2,440, in addition to the $8,000 for the construction of the building, and also $300 additional for clearing the lot. She also admitted that she paid the following amounts for material and labor on the building, to wit: Plumbing, $1,000; the Linwood Company, $600; painting, $150; hardware, $154; Christian Lumber Co. bill, $150; electric wiring, $23; that the roofing was $63, of which she had paid $40 and was paying $10 a month on that. She further testified that there was a balance of $300 due for lumber, which she had agreed to pay; and further as follows: "Mr. Bugbee always promised to give me an accounting, but he went away without doing it. Q. What do you mean by that? A. I wanted to know how much it was. Q. You wanted to know how much the labor bill was? A. Yes, sir. Q. And Mr. Bugbee said he would give you an accounting? A. Yes, sir. Q. How many times did you ask him for such an accounting? A. I would remind him and he would put me off. * * * Q. In the talk with Mr. Bugbee concerning the construction of this building, what was said about his compensation? A. He said that $8,000 would cover everything. He said he could contract for the building, but he didn't like to sign a contract because he was doing all his work this way, and he had been able to save one woman a thousand dollars by not having a contract. Q. That is, by not letting out a contract to a contractor? A. By not having a contract he was able to do the work cheaper for the owner by not having a contract. Q. By not having a contract with whom? A. With the owner—the person that was building. Q. He told you that by not having a contract with the owner that in another case he had saved the owner $1,000? A. Yes, sir. Q. Because he said he could buy the materials cheaper by paying cash? A. Yes, sir. Q. What was said by you or him about paying Mr. Bugbee for his services? A. There was nothing said. Q. What was agreed upon, or what was determined upon between you and Mr. Bugbee, as to what was to be paid for his services? A. He said that he could make it all in the commissions that he was to have. Q. The commissions from whom? A. The people he was dealing with—buying from—by paying cash he knew how and when to buy, and so on, and that would cover everything. Q. As I understand you, he was to buy the material? A. Yes, sir. Q. And he was to get his pay by the commissions from these people that sold the material to him? A. Yes, sir."

It was further shown that the defendant, in her verified answer filed by her in a prior suit brought in the superior court by Johnson against her relative to the same building, stated in said answer as follows: "That in or about the month of November, 1906, M. G. Bugbee individually on his own behalf entered into an agreement with the defendant, by which M. G. Bugbee personally and individually agreed to furnish plans for and erect and construct the building mentioned in plaintiff's complaint for the defendant at a gross cost not exceeding the sum of $8,000." The witness was further asked and answered as follows: "Q. Did Mr. Bugbee agree with you that if the building should cost less than $8,000 he was to pocket the difference between the building cost and $8,000? A. No, sir; he told me about how he had treated others, and I supposed he had the same benevolent intentions towards me, but he didn't say—we didn't have any agreement that if it cost less than $8,000 that either he or I should have what was left. Q. It wasn't your intention that if the building cost $6,000 that Mr. Bugbee was to get the difference? A. He said he saved an owner in one case a thousand dollars—he might be able to do it for somebody else."

Mrs. Moody, the daughter of defendant, testified as to the contract as follows: "In my presence he told my mother that he could put up the house for $8,000, and I turned to him and said, 'Mr. Bugbee, does that include everything?' and he said, 'Yes.' I said, 'Your fees and everything?' and he said, 'Yes, that includes everything.' I don't remember anything more that was said." In cross-examination Mrs. Moody said that in the conversation between her mother and Mr. Bugbee nothing was said about Bugbee's compensation. The following questions were asked her and answered as follows: "Q. Then at that conversation between your mother and Mr. Bugbee, you did discuss the question of Mr. Bugbee's fees? A. No, sir; the price of the building. Q. I will ask you at that time was anything said about Mr. Bugbee's compensation? A. No, sir. Q. Nothing was said about it? A. No, sir. Q. Nothing at all was said about what Mr. Bugbee was to get out of this? A. No, sir. Q. What was Mr. Bugbee to get out of it for building the building? A. I do not know. Q. Didn't you just testify, Mrs. Moody, that Mr. Bugbee said that the $8,000 would include his compensation? A. Yes, sir; but I didn't know how much that was to be. Q. Then there was something said about Mr. Bugbee's compensation? Didn't you ask him if it also included his fees? A. No, sir."

When we view the above evidence on the part of the defendant, we do not think it of sufficient dignity to raise a conflict. A contract is the meeting of minds upon and agreement to a definite thing. The contract as stated by the architect and by the superintendent is reasonable and consistent with each and every act of the parties done in pursuance thereof and in connection with the building. An oral contract for $8,000 is out of the ordinary way of doing business. There was nothing said about the time or the amount of the payments, or the manner in which they should be made. If such a contract was made defendant would not have any concern with the payment of the bills except in so far as to prevent liens upon her property. She would not have to get an accounting from Bugbee as to the bills paid. She would not have sworn in a different case relating to the same contract that the agreement was that Bugbee would build for "not to exceed $8,000." The defendant testified that Bugbee was to get his compensation by charging and collecting a commission from the materialmen. That is wholly inconsistent with the agreement to pay Bugbee $8,000 to construct the building; and not only this, but the benefit of the discount on the bills was received by the defendant as they were paid by her or under her direction.

The testimony of Mrs. Moody, the daughter, is equally unsatisfactory. She does not state anything said about the time, manner, or amount of payments; and while she testified in direct examination that she asked Bugbee if the $8,000 included "his fees and everything," in almost the next breath in cross-examination she said that nothing was said about Bugbee's compensation; that she did not ask him if the $8,000 included his fees. If Bugbee had been the original contractor he would have taken the receipts, had the benefit of the discounts on the bills, and retained the bills instead of their being receipted and given to the defendant. The defendant would have taken receipts from Bugbee for payments on the contract, but no such receipts were produced. The acts and conduct of the parties speak with more force than bare words. The question cannot be answered by the defendant merely saying, "The contract was $8,000." We look for the truth to the facts and the entire history of the transaction. No reasonable person could read the testimony in this record and have a doubt remaining as to the fact that the building was constructed for the defendant on a percentage basis, and that she was responsible for the materials purchased and used in its construction.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

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12 Cal. App. 783

RANDALL v. GLASS. (Civ. 769.)

(Court of Appeal, Second District, California. March 9, 1910. Rehearing Denied by Supreme Court April 29, 1910.)

SALES (§ 52*)—VALIDITY—VIOLATION OF STATUTE.

In an action for the price of metallic disks to be used as money in defendant's business college, evidence *held* not to show that such disks were, contrary to law, in the likeness and similitude of genuine coins of the United States.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 483; Dec. Dig. § 52.*]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by George W. Randall against D. R. Glass. From the judgment and from an order denying his motion for new trial, defendant appeals. Affirmed.

J. W. Stephenson, for appellant. H. Conner, for respondent.

SHAW, J. This is an action to recover the agreed price of certain metallic disks which plaintiff made and delivered to defendant pursuant to an order for the same given by defendant. The disks were not designed to represent money, but intended to be used in place thereof in pretended business transactions conducted by the students of the business college of defendant. Defendant appeals from the judgment and an order of court denying his motion for a new trial.

As a defense to the cause of action defendant alleged "that said disks are in likeness and similitude as to design, color, and inscription of the coins of the United States * * * issued as money by and under the authority of said government"; his contention being that the disks are counterfeits of the United States coins, the making of which is contrary to law, and hence the agreement to pay for the same is nonenforceable. As to the issue thus tendered the court found "that none of said disks so made and delivered to defendant by plaintiff are in likeness and similitude as to color, design, and inscription of any of the coins issued as money by the United States government, or the Republic of Mexico." Other than the criticism of the use of the conjunctive, "and," instead of the disjunctive, "or," in this finding, which under the facts of the case is without merit, the sole ground upon which appellant contends for a reversal is that the finding is not supported by the evidence; appellant insisting that the disks so nearly resemble United States coins as to constitute counterfeits thereof. At the trial, samples of the pieces of metal were introduced in evidence as ocular proof in support of the allegation of the answer, and these exhibits are brought up with the record. They consist of copper pieces in size similar to the $5, $10, and $20 gold coins of the United States, and aluminum pieces similar in size to the minor silver coins of the United States. The edges are not milled, and in color the copper disks bear no resemblance to gold coin, and the specific gravity of the aluminum coins clearly distinguishes them from silver. The inscriptions upon these disks, while not entirely alike, are similar, and that upon one will serve as an illustration of all. On one side thereof in raised letters is the following: "San Bernardino Business College. The Famous Lightning, Legible Shorthand Taught in three months or no charge. San Bernardino, Cal." On the obverse side in raised characters covering nearly half the length of the diameter of the disk, which is otherwise smooth, is the following: "$20.00." Aside from the fact that the disks are similar in size to gold and silver coins of the United States, they bear no resemblance whatever to such coins, or those of the Republic of Mexico. They do not purport to be money, and it is clear from the record that they were not intended to be passed or used as money. Appellant might with equal reason insist that a piece of paper similar in size to a $20 bill of United States currency, one side of which contained an advertisement of his "famous lightning, legible shorthand," with the characters "$20.00" printed upon the obverse side thereof, constituted a counterfeit of the United States currency. It is incredible that any one, however illiterate or unskilled in business dealings, could be deceived into the belief that these disks constituted coins of the United States. They are not counterfeits in resemblance or similitude of the gold or silver coins of the United States, nor of any foreign country the coins of which are current or in actual circulation in the United States. Sections 5457 and 5458, U. S. Comp. St. 1901; United States v. Sprague (D. C.) 48 Fed. 828; United States v. Stevens (D. C.) 52 Fed. 120; United States v. Hopkins (D. C.) 26 Fed. 443.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The defense set up and supported by appellant's testimony is, nevertheless, unique in that he testifies in support of an allegation to such effect that the disks are not in the likeness and similitude of genuine coins, by reason of which fact "the college would be ridiculed by the scholars using it," hence he is not bound by the contract; and, if this position be deemed inadequate as a defense, he then insists that the disks bear such a striking resemblance and similitude to United States coins as to constitute counterfeits thereof, and, hence, upon grounds of public policy, he is entitled to judgment relieving him from his contractual obligations. Neither position is sustained by the record.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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12 Cal. App. 779

WELLER v. STEVENS. (Civ. 744.)

(Court of Appeal, Second District, California. March 9, 1910. Rehearing Denied April 8, 1910; Denied by Supreme Court April 29, 1910.)

Accord and Satisfaction (§ 11*)—Elements.

Where plaintiff's assignor, who had built ice machines for defendant, the price thereof to be determined by the cost of construction, rendered a statement for a balance due of $3,030.67, and defendant in reply refused to pay the statement in full, but stated that a certain amount was due, and inclosed a check therefor, but did not declare that it was in full of all demands, his letter, on the contrary, indicating that as to the balance he expected plaintiff to bring suit, and upon the return to him of a receipt on account made no objection, but arranged for a meeting to adjust the parties' differences, there was no accord and satisfaction, to constitute which there must be an offer on conditions and an acceptance with knowledge thereof.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75, 76; Dec. Dig. § 11.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by D. R. Weller against Will P. Stevens. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Lucien Earle, for appellant. Jones & Weller, for respondent.

SHAW, J. Action to recover a balance of $2,609.40 and interest alleged to be due upon an open account for goods sold and delivered by plaintiff's assignor to defendant. In addition to a general denial, defendant pleaded, by way of a separate defense, an accord and satisfaction. The findings as to all the issues were against defendant, and judgment went for plaintiff in accordance with the prayer of the complaint, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

Appellant's claim for a reversal is based upon the ground that the facts proved established an accord and satisfaction, as alleged in his answer. Hence he claims the finding to the contrary is unsupported by the evidence.

It appears from the evidence that defendant employed plaintiff's assignor to manufacture certain ice machines; the price thereof to be determined by the cost of construction. The machines were constructed in accordance with the specifications therefor and duly delivered to defendant. Thereafter plaintiff's assignor sent to defendant a statement of account as to the cost of manufacturing the machines, showing a balance due of $3,030.67. Upon receipt of this statement defendant wrote a letter to the assignor protesting against the charges as being exorbitant, and showing that according to his figures the balance due was only $421.27, as to which, says he in the letter, "I am inclosing you a check for $421.27 covering the same." There was an absence of anything on the check indicating that it was delivered in full payment of the account, and there is nothing in the letter transmitting the check showing that it was intended as a payment in full of the account. On the contrary, it appears therefrom that defendant conceded a liability to the extent of $421.27, for, among other things in his letter, he says: "I consider (the charges) altogether too high, and I certainly shall not pay this price unless a jury and judge say that I shall pay the same, and, when they do, I am glad to state that the bill will be promptly paid. * * * So you see I think your bills are unreasonable and will never pay the same willingly as they now stand." And in closing he states: "I deeply regret that I cannot see my way clear at the present time to pay the bill as you have seen fit to render it." In reply to this letter, plaintiff's assignor wrote: "We inclose herewith the receipt on account for $425.27. We cannot render you receipt in full for the reason that your version of the conditions under which these machines were ordered and built cannot be accepted." And further requesting that a meeting be arranged between them in order to effect an amicable settlement of the account. Defendant replied to this, expressing his willingness to hold the suggested meeting at a date therein named by him. Defendant testifies: "I did not know prior to this statement that was rendered to me by the plaintiff what the machines were going to cost. I had conversations with the plaintiff, but could get nothing out of them. The date that I wrote to the plaintiff the letter on the 22d of November, 1906, was the first time that I knew the total price of the machines. Prior to that time I had no definite price from them as to the cost of the machines." This is substantially all the evidence touching the question at issue, and we think it clearly justified the court in finding the issue in favor of plaintiff. Defendant testifies that he intended the check to be in full payment of the account; but there is absolutely nothing in the record tending to show that he gave expression to such intention. His undisclosed intention could not bind the plaintiff. Neither upon the check nor in the letter was there any statement to indicate to plaintiff that it was intended to be in full payment. "The nature of the offer or tender by the debtor is an important consideration in determining whether there has been an acceptance and satisfaction. To constitute an accord and satisfaction it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions." 1 Cyc. 332. Appellant asserts that, "according to the weight of authority, where a claim is in dispute, and the debtor sends or gives the creditor a check for a less sum, which he declares to be in full payment of all demands, the retention thereof by the creditor constitutes an accord and satisfaction." This statement of the law is correct; but in the first place, it does not appear that there was any dispute prior to the receipt of the statement. Defendant received the statement and, regarding it unreasonable, refused to pay it in full, but did concede that a certain amount was due and paid it. He did not declare that it was in full payment of all demands; on the contrary, his letter clearly indicates that as to the balance he expected plaintiff to bring suit, which he declared he would not pay willingly, but that it would be promptly paid upon the rendition of judgment against him. Moreover, when plaintiff's assignor notified him they could not accept his version of the case, and inclosed a receipt on account for the amount of the check, he made no objection to such application, but at their suggestion fixed a time to meet them for the purpose of adjusting their differences as to the balance of the account which he had refused to pay.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

12 Cal. App. 757

GRANGERS' UNION v. ASHE et al.

(Civ. 677.)

(Court of Appeal, First District, California. March 9, 1910. Rehearing Denied April 7, 1910; Denied by Supreme Court April 29, 1910.)

1. JUDGMENT (§ 251*)—CONFORMITY TO PLEADINGS.

Where the complaint alleged that defendants were liable as partners, and the findings were that there was no such partnership, but defendants in effect denied liability as partners, or as individuals, they raised an issue not raised in the complaint and one upon which an individual judgment might be based.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

2. JUDGMENT (§ 251*)—ACTION FOR GOODS—PARTNERSHIP—PROMISE TO PAY—EFFECT.

In an action against an alleged partnership for goods sold, where one of the alleged partners promised to pay for the goods to be sold, it was immaterial that he was not a partner with the other, or that the allegation of partnership was not proved.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

3. INTEREST (§ 47*) — ACTION FOR GOODS — CLAIM — JUDGMENT — WHEN INTEREST ACCRUES.

In an action for goods sold, it was error to allow interest on the amount of the claim from the date it was found to be due, since no interest can be recovered in an action on an open account prior to the filing of a complaint.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 106, 107; Dec. Dig. § 47.*]

Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by the Grangers' Union, a corporation, against R. Porter Ashe and another. Judgment for plaintiff, and defendants appeal. Reversed in part; modified and affirmed in part.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

See, also, 106 Pac. 889.

John T. Thornton, Leo. C. Lennon and T. M. O'Connor, for appellants. Briggs & Hudner, for respondent.

KERRIGAN, J. This is an action for goods sold and delivered. The case was tried by the court sitting without a jury, and judgment went for plaintiff against the defendants. The appeal is from that judgment, taken within 60 days after the entry thereof under sections 941A, 941B, and 941C of the Code of Civil Procedure.

The facts of this case are simple, and no question of difficulty is presented. The defendants claim that the goods were sold and delivered to the Ruinart Stock Farm, a corporation. Plaintiff, on the other hand, alleged in its complaint that the defendants were copartners, doing business under the name of Ruinart Stock Farm, and were liable as such for the goods and supplies furnished. The evidence introduced by the defendants tended to prove that the goods were, as claimed by them, sold and delivered to the Ruinart Stock Farm, and in corroboration of this evidence it was shown by the plaintiff's books of account that the merchandise in question was in fact charged to the Ruinart Stock Farm. Plaintiff, however, introduced evidence that Gaston M. Ashe represented to the manager of the plaintiff that he, with his brother and codefendant, would be personally responsible for said goods; that, upon being asked by said manager how the account should be charged, Gaston M. Ashe said that it had better be charged to the Ruinart Stock Farm, and, accordingly, the merchandise was so charged. There is no evidence in the record showing that the defendants were partners, and the court found they were not, and the record shows that Gaston M. Ashe had no authority to represent to plaintiff that R. Porter Ashe would be liable personally for the supplies furnished.

The complaint alleges that the defendants are liable as partners, while the findings are that there was in reality no such partnership; wherefore defendants suggest that the judgment should have been rendered in their favor. But they, in effect, denied liability as partners or individuals, and thus, it may be said, raised an issue not raised by the complaint, and one upon which an individual judgment might be based. Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434; Vance v. Anderson, 113 Cal. 532, 45 Pac. 816; Doble Co. v. Keystone, etc., Co., 145 Cal. 491, 78 Pac. 1050. However, it appearing that Gaston M. Ashe had promised to pay for the goods to be sold, it makes no difference that he was not a partner with R. Porter Ashe, or that the allegation of the partnership was not proved. Bates on Partnership, vol. 2, § 1068; Id. vol. 1, §§ 170, 171; Courson v. Parker, 39 W. Va. 521, 20 S. E. 583; Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716; Ency. of Plead. & Prac. vol. 15, p. 955; Hunter v. Martin, 57 Cal. 365; Wallace v. Baisley, 22 Or. 572, 30 Pac. 432; Marx Bros. v. Calpepper, 40 Fla. 322, 24 South. 59; Whitwell v. Thomas, 9 Cal. 499.

The court allowed interest at the rate of 7 per cent. per annum on the amount of the claim from the date it was found to be due. This was error. No interest can be recovered in an action for goods sold and delivered upon an open account prior to the filing of the complaint. Pac. Mutual Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Heald v. Hendy, 89 Cal. 633, 27 Pac. 67; Easterbrook v. Farquarson, 110 Cal. 311, 42 Pac. 811; Lane v. Turner, 114 Cal. 396, 46 Pac. 290. Calculating interest at the legal rate on the principal sum found to be due from the date the complaint was filed until the judgment was rendered would give an amount less by the sum of $40 than the amount allowed as interest on the judgment.

There being no evidence to support the judgment against R. Porter Ashe, it must as to him be reversed, and it is so ordered. As we have just seen, however, there is evidence to support the findings against Gaston M. Ashe; and as to him the judgment is directed to be modified by deducting therefrom the sum of $40 as of its date of entry, and as so modified it is affirmed.

We concur: COOPER, P. J.; HALL, J.

12 Cal. App. 739

FISHER v. WESTERN FUSE & EXPLOSIVES CO. (Civ. 672.)

(Court of Appeal, Third District. California. March 8, 1910.)

1. Negligence (§ 108*) — Pleading—Sufficiency.

In an action for negligence, it is sufficient, under the Code, to allege that the act complained of was negligently done by defendant, and that it caused damage to plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174–180; Dec. Dig. § 108.*]

2. Master and Servant (§ 329*)—Injuries to Third Person — Negligence of Servant—Complaint — Sufficiency — "Reckless"—"Heedless."

A complaint for injuries caused by the explosion of a powder magazine, which alleges that the explosion was the result of the reckless and heedless act of defendant's servant in igniting the powder, alleges negligence; the words "reckless" and "heedless" implying negligence.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.*

For other definitions, see Words and Phrases, vol. 7, pp. 5999-6001; vol. 8, p. 7781.]

3. MASTER AND SERVANT (§ 300*)—INJURIES TO THIRD PERSONS—ACTS OF SERVANT—LIABILITY OF MASTER.

A master is civilly responsible for wrongs committed by his servant while acting about the business of his master within the scope of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1209; Dec. Dig. § 300.*]

4. MASTER AND SERVANT (§ 329*)—LIABILITIES FOR INJURIES TO THIRD PERSONS—ACTS OF SERVANT.

A complaint in an action for injuries caused by the explosion of a powder magazine, which alleges that defendant had in its employ a servant whose duty it was "to handle, carry, and take charge of the powder in said magazine," and that the magazine exploded as a result of the servant's negligence, implies that it was a part of the duty of the servant to exercise care to prevent an explosion, and, where he negligently permitted or caused the explosion, he violated his duty as a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.*]

5. MASTER AND SERVANT (§ 329*)—LIABILITIES FOR INJURIES TO THIRD PERSONS—ACTS OF SERVANT.

The complaint also shows by necessary implication that the servant acted within the scope of his authority, though there is no express allegation to that effect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1269; Dec. Dig. § 329.*]

6. NUISANCE (§ 3*)—PRIVATE NUISANCE—EXPLOSIVES.

To constitute the keeping of gunpowder a nuisance, there must be negligence in the fact or the manner of keeping and storing the gunpowder; and whether the storing of gunpowder is a nuisance depends on the locality, quantity, and surrounding circumstances.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. § 3.*]

7. NUISANCE (§ 3*)—PRIVATE NUISANCE—EXPLOSIVES.

Where a powder magazine was imperfectly constructed and improvidently maintained, and its location, manner of construction, and maintenance was dangerous to life and property, the magazine was a nuisance, and the owner thereof was liable for an explosion thereof.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. § 3.*]

8. EXPLOSIVES (§ 8*)—KEEPING OR STORING—LIABILITY—NUISANCE.

Where the maintenance of a powder magazine was a nuisance, the owner thereof was responsible for damages caused by an explosion, regardless of negligence in causing the explosion.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Xavier Fisher against the Western Fuse & Explosives Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 107 Pac. 332.

G. R. Lukens, for appellant. Reed & Nusbaumer, W. H. Orrick, M. C. Chapman, and A. A. Moore, for respondent.

BURNETT, J. The appeal is from the judgment on the judgment roll alone. The only question for determination concerns the ruling of the court below overruling a general demurrer to the amended complaint.

The action was brought to recover damages for the destruction of plaintiff's dwelling house, and the gravamen of the charge is contained in the following allegations: "That on the said 19th day of July, 1898, defendant carelessly, negligently, deceitfully, secretively, improvidently, and unsafely maintained a powder magazine, which was improperly constructed, containing not less than 5,000 pounds of powder, and situated upon the corner of Clark and A streets in Melrose. * * * Defendant on said 19th day of July, 1898, had in its employ a careless, heedless, reckless, and dangerous servant, whose duty it was to handle, carry, and take charge of the powder in said magazine, and to whom it gave free access to said magazine at all times. Said servant was a Chinaman, called Ah Ung, and his carelessness, recklessness, heedlessness, and unfitness were at all times well known to defendant. On the said 19th day of July, 1898, the said powder stored in the said magazine was exploded as a result of defendant's aforesaid negligence, and by reason of the act of said servant in recklessly and heedlessly igniting said powder." The foregoing is followed by an averment that the said explosion damaged plaintiff's said property to the extent of fourteen hundred dollars.

Under the authorities, it is sufficient to allege that an act was negligently done by defendant, and that it caused damage to plaintiff. The rule is stated in Stephenson v. Southern Pac. Co., 102 Cal. 147, 34 Pac. 619, as follows: "In adopting what is known as the Code system of pleading, courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence, or rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification of a rule of Code pleading is founded in wisdom, and grows out of a fundamental rule in common-law pleading, to the effect that 'no greater particularity is required than the nature of the thing pleaded will conveniently admit.' Stephen's Pleading, 367. * * * In cases of negligence the sufferer may only know the general, the immediate cause, of the injury, and may be entirely ignorant as to the specific acts or omissions which lead up to it. * * * The term 'negligence' for the purpose of pleading is a fact to be pleaded—an ultimate fact, which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act and makes it a legal wrong. The absence of care in doing an act which produces injury to another is actionable. The term 'negligence' signifies and stands for the absence of care. * * * As a result of the application of these principles to Code pleading in cases of negligence and to others of kindred character, it is held in this state, and in nearly all the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done." Here the particular act immediately causing the injury was the explosion of the gunpowder. This was the result of "the reckless and heedless" act of defendant's servant in igniting said powder. Both "reckless" and "heedless" imply "negligence or the want of care."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The only question, then, remaining arises from the fact that the negligent act is alleged to have been done by the "said servant" instead of by the defendant. The rule in such case is that the principal or master is civilly responsible for wrongs committed by his agent or servant while acting about the business of the principal or master and within the scope of the employment of the agent or servant. Thompson on Negligence, § 518. The same author in section 520 declares the rule more specifically as follows: "A mere statement of the rule suggests that the principal or master will in all cases be liable for wrongs committed by his agent or servant, while acting about the business of the former, and within the scope of his employment, through inattention, negligence, or want of skill. The cases already cited, and a great array of other adjudications, may be appealed to in support of this statement. It is perhaps the only branch of the doctrine upon which all the cases unite, and as to which there is no dispute. It is a rule so plain and easy of application that it could scarcely be made clearer by illustration." Among the many instances of the application of the rule cited by the author in section 521 we note only the following: "The defendant sent the servant to a factory to receive for her certain bags of paper shavings. It was arranged that the shavings should be thrown down through a hatchway beneath so as to prevent injury to passers-by. He failed to so guard it, and a person passing by was struck by one of the falling bags and injured. It was held that the defendant was liable, since her servant was acting about the very matter which he was sent to perform, the receiving of the goods. * * * The plaintiff placed her horse in care of the defendant, a livery stable keeper, to be boarded. The watchman of the defendant allowed three men, partially intoxicated, to go into the loft of the stable, which was full of dry hay, to sleep there during the night, knowing that they were smokers, and that they were in the habit of carrying pipes and matches with them. An hour and a half later the stable took fire and the plaintiff's horse was burned to death. It was held that the livery stable keeper was responsible for the act of his watchman, and that whether the watchman was negligent in allowing the three men to sleep in the loft was a question for the jury. * * * A person contracted to give a pyrotechnic display, and committed the performance of the contract to his agent. He thereby became answerable in damages to a person who was hurt through the negligence of the agent in discharging a fire bomb." In the case at bar the business of the agent was "to handle, carry, and take charge of the powder in said magazine." In other words, the care, custody, and management of the powder were committed to the servant. This necessarily implies that it was a part of his duty to exercise care to prevent an explosion of said powder. If he therefore negligently permitted or caused said explosion, the case is presented of a clear and unmistakable violation of his duty as said servant. It thus appears by necessary implication that the servant was acting within the scope of his authority, and appellant is mistaken in its contention that an express allegation to that effect is required.

On this branch of the subject respondent cites the following cases: Birnbaum v. Lord, 7 Misc. Rep. 493, 28 N. Y. Supp. 17, was a suit to recover damages for negligence on the part of a driver of defendant's wagon in running over a 12 year old boy who was crossing a street in New York City. It is therein said: "The complaint was sufficient in alleging that the wagon belonged to defendant and was driven by one of their agents or servants, although it does not otherwise allege that the latter was engaged in the defendant's business; but that is involved in the allegation that the wagon was driven by their agent or servant, for, if the driver was not engaged upon his master's business, he would be neither agent nor servant, but his own master." In Lewis v. Schultz, 98 Iowa, 341, 67 N. W. 266, the Supreme Court of Iowa said: "Appellant insists that the case was tried and submitted to the jury upon an issue not made in the pleadings or supported by the evidence; i. e., that the loss was the result of the act of a servant within the scope of his employment. The petition alleges that defendants, their servants and agents, set out the fire. Surely this raised an issue as to whether the person who set out the fire was an agent of the defendants, and also as to whether the act was within the scope of his employment."

In Louisville N. A. & C. Ry. Co. v. Kendall, 138 Ind. 313, 36 N. E. 415, we find the question considered as follows: "The complaint alleges that upon the arrival of said train at defendant's depot in the town of Salem * * * plaintiff as a passenger undertook and did get on the platform of one of the cars of said train to enter same, but that without fault or negligence on plaintiff's part, on account of the carelessness and negligence of one of defendant's agents, whose name is to the plaintiff unknown, he was by such employé of defendant pushed from the platform of said train just as the same was starting; * * * that all of said injuries were caused by and the direct result of said carelessness and negligence of one of defendant's agents in pushing plaintiff off its said train as aforesaid and wholly without the fault or negligence of plaintiff." It was held that the case was brought within the rule sustained by the authorities that "the master is liable for a tortious or negligent act of a servant committed while performing his master's service, though not previously authorized nor subsequently ratified by the master, if an injury result therefrom to one to whom the master owes protection from such injury." In Lewis v. Chicago, St. Paul & K. C. Ry. Co., (C. C.) 35 Fed. 639, a demurrer to the complaint was overruled by Justice David J. Brewer, wherein he said: "I also take it to be settled under the rules of pleading that what was equivalent to a common count under the old practice is good now as against an objection, raised by demurrer; and I think that is all that can be said about this pleading. It alleges that the defendant by one of its employés committed an assault and battery upon the plaintiff, another employé. That is the allegation in the pleading of a substantive and ultimate fact. What the particular facts may be, whether that assault and battery was committed in the line of his employment and in the discharge of a duty which he owed the defendant, the master, as an employé, does not now appear." The foregoing decisions commend themselves to our judgment, and they support the action of the court below in overruling the demurrer to the amended complaint.

There is, also, another aspect of the complaint which should not be overlooked. This is presented in the allegations that the magazine was imperfectly constructed and improvidently maintained, and that this negligence was a contributing cause of the injury. We find thus exhibited the familiar case of a nuisance, and upon this theory a cause of action is stated. The question is elaborately reviewed in Kinney v. Koopman, 116 Ala. 310, 22 South. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119, and a large number of cases cited. Therein it is held that "storing and keeping gunpowder and dynamite in large quantities near dwellings in a thickly settled portion of a city, and near a public street is not a nuisance per se. To constitute such keeping a nuisance and impose liability for an accidental explosion there must be negligence in 'keeping' or in the 'manner' of keeping and storing the gunpowder." And furthermore it is said: "We are of the opinion that a count prima facie sufficiently shows a want of due care, which charges the storing of large quantities of gunpowder in a wooden building in a populous place in the city of Cullman. The demurrer was properly sustained to the count which merely charged the storing of gunpowder and its explosion without further averment showing that on account of location, quality, and surrounding circumstances it was dangerous." Here, as we have seen, the location, manner of construction, and of maintenance do appear so as to show that the said magazine was dangerous to life and to property. The distinction made in the Kinney Case, supra, is recognized and approved in Kleebauer v. Western Fuse, etc., Co., 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62. It was contended there by plaintiff that the mere fact of the storage of a large quantity of gunpowder where damage might result from an explosion amounted to a nuisance per se, and he requested the following instruction which was given by the lower court: "A magazine of powder so situated that in case of explosion from any cause it is liable to injure the persons and the dwellings of persons living in the vicinity is a nuisance; and therefore, if the jury believe from the evidence that the defendant corporation maintained at the time mentioned in the complaint, at the town, or village, or place called Melrose, a magazine, and kept stored therein large quantities of gunpowder, which, in case of explosion, was liable to injure the persons, dwellings, or other property of the residents of the said town, or village, or place called Melrose, your verdict should be for the plaintiffs." This was condemned by the Supreme Court and the other line of authorities was approved, holding that whether the storing of gunpowder is a nuisance depends upon the locality, quantity, and the surrounding circumstances. The Supreme Court said: "It does not appear that, when the defendant commenced its business, it was not located in a proper place, and at that time sufficiently removed from a residence neighborhood. It was carried on with the utmost care. The damage in question resulted from a cause entirely beyond its control, and without any carelessness or negligence on its part whatever, and under the more recent and better line of authorities, as shown under the circumstances it is not responsible."

Since by appropriate allegations it appears that the magazine as constructed and maintained constituted a nuisance, it is the contention of respondent that appellant was responsible for the damage caused the plaintiff without regard to the "precipitating cause of the explosion." In other words, the negligence of appellant sufficiently appears in the said averments showing the maintenance of a nuisance, and since, in the absence of this want of proper care, the injury would not have resulted, a cause of action is stated, regardless of the further negligence in causing the explosion. This doctrine finds support in the authorities. The rule is stated in Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 36, as follows: "As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence"—citing a large number of cases. Under either view, therefore, the amended complaint is not open to attack by general demurrer. The proximate cause of the damage appears to have been the negligence of defendant in the construction and maintenance of its magazine and the reckless act of the servant acting within the scope of his authority—these two conditions coexisting at the time of the explosion and both contributing to the injury done to plaintiff.

The cases cited by appellant involve different facts, as will be seen from the following reference to them: The trouble in Smith v. Buttner, 90 Cal. 95, 27 Pac. 29, was that no fact was averred showing that the alleged negligence caused or contributed to the injury. As said by the court: "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say, it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury. To illustrate, suppose a plaintiff injured by the falling of a sign negligently and insecurely fastened by defendant. It would not suffice for him to allege the negligence in hanging the sign; that plaintiff in lawfully and without negligence, passing under it, was thrown down and injured through such negligence. This would be a mere assertion of the cause. It would be necessary to show that the sign fell upon him in consequence of such negligence, thereby causing his injury." Here, as we have seen, "what was done" is stated—that is, the powder was negligently ignited—and this, superadded to the negligence in the construction and maintenance of the plant, caused the damage. In Indianapolis & St. Louis Railroad Company v. Horst, 93 U. S. 291, 23 L. Ed. 898, it is merely stated that "a plaintiff is bound to state his case, but not the evidence by which he intends to prove it." The vice of the complaint in Going v. Dinwiddie, 86 Cal. 633, 25 Pac. 129, was that no fact was alleged showing that the justice of the peace acted without jurisdiction; the action being for false imprisonment "on a pretended charge of contempt of court." The Supreme Court properly said that "it is clear that the acts complained of were done by the defendant in his official character as a judicial officer and there is no averment in terms that said acts were without or in excess of his jurisdiction, nor are any facts averred from which such want of jurisdiction appears. And that a judicial officer is not liable for acts done in his official capacity and within his jurisdiction is as thoroughly established as any other principle of law." It necessarily followed that the omission to show affirmatively the want of jurisdiction was a vital error. An instruction of the court and not a question of pleading, as we have already seen, was involved in the case of Kleebauer v. Western Fuse & Explosives Co., supra.

Of the cases cited by appellant in support of its position that the pleading should allege that the act was done within the scope of the servant's employment and duties, in only one—Daniels v. Carney, 148 Ala. 81, 42 South. 452, 7 L. R. A. (N. S.) 920, 121 Am. St. Rep. 34—was a question of pleading involved. This is in harmony with appellant's view, but, as remarked by respondent, the case is against the weight of authority. It was alleged that the defendant owned the steamboat, and that it was being operated by its servants. There would seem to be no difference in principle, as suggested by respondent, between such a case and one relating to an accident on a street railway. In the latter instance surely an allegation that the motorman in operating the car was acting within the scope of his authority would not be required. This element is implied in the averment that the agency which is being operated belongs to defendant, and that it is operated by defendant's servant.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

12 Cal. App. 685

PEOPLE v. FREDONI. (Cr. 216.)

(Court of Appeal, First District, California. March 3, 1910.)

1. CRIMINAL LAW (§ 20*)—ELEMENTS OF OFFENSE—INTENT.

One who innocently aids in the commission of a crime is not guilty within Pen. Code, § 31, making those persons guilty of a crime who aid and abet in its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 21, 24, 25; Dec. Dig. § 20.*]

2. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—ERRORS IN INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

The error in an instruction defining principals as all persons aiding "or" abetting in the commission of a crime, while Pen. Code, § 31, makes those persons guilty who aid "and" abet, is cured by the charge that to find accused guilty, the evidence must show that he was unlawfully concerned in the commission of the crime, and that, if accused acted with another in its commission, each unlawfully aiding and abetting in its commission, he is guilty.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. Criminal Law (§ 1172*)—Appeal—Harmless Error—Instructions.

Where there was no evidence tending to show that accused innocently aided in the commission of the crime, the error in an instruction, defining principals as persons aiding or abetting in the commission of a crime, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

4. Criminal Law (§ 1086*)—Appeal—Questions Reviewable.

Where the record on appeal does not show that objection was made to evidence, the merits of the admissibility of the evidence will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2794; Dec. Dig. § 1086.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

G. Fredoni was convicted of robbery, and he appeals. Affirmed.

Henry Brickley and W. D. Foote, for appellant. Attorney General Webb, for the People.

COOPER, P. J. The defendant was found guilty of the crime of robbery, and sentenced to a term of six years in the state prison at Folsom. He prosecutes this appeal from the judgment and the order denying his motion for a new trial.

The first claim made is that the court erred in instructing the jury that: "All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid or abet in its commission, or, not being present, advise and encourage its commission, are principals in any crime so committed." This instruction was again substantially repeated in a different form; and it is said that the instruction was erroneous and injurious to the defendant, for the reason that section 31 of the Penal Code makes those persons guilty of a crime who "aid *and* abet in its commission." A person who innocently aids in the commission of a crime would not be guilty; and, if the instruction given was the only one upon the question, and if the evidence showed that the aid given by defendant might reasonably have been consistent with his innocence, the objection would be serious; but upon an examination of the record we find that the court elsewhere instructed the jury that in order to find the defendant guilty the evidence should show "beyond all reasonable doubt and to a moral certainty that the defendant was unlawfully concerned in the commission of the crime as charged in the information," and again, that if the jury find beyond all reasonable doubt that the crime as charged in the information was committed, and "that the defendant was unlawfully concerned in its commission, and that he, the said defendant, acted together with some other person or persons in the commission of said crime, each unlawfully aiding and abetting in its commission in his own way, then I instruct you that it is all the law requires to make the defendant guilty of the crime charged." The court further charged the jury that, unless they believed beyond all reasonable doubt that a crime had been committed as charged in the information, and "that the defendant was unlawfully concerned in its commission, and that he, the said defendant, acted together with some other person or persons in the commission of said crime, each unlawfully aiding and abetting in its commission in his own way, then I instruct you that it is all that the law requires to make the defendant guilty of the crime charged." It therefore appears clear that the jury were instructed and understood that unless the defendant criminally aided in the commission of the offense, they could not find him guilty. This cured the defect in the instruction complained of. People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; People v. Warren, 130 Cal. 683, 63 Pac. 83. See, also, People v. Price, 9 Cal. App. 218, 98 Pac. 547, where it was held that the use of the disjunctive "or" instead of the word "and" could not have misled the jury, and was not injurious to the defendant. Not only this, but there was no evidence even tending to show that the defendant innocently aided in the crime, and therefore the jury could not have misapplied the instruction. People v. Morine, 138 Cal. 626, 72 Pac. 166.

The next contention is that the court erred in admitting, "over the objection of defendant," evidence tending to prove a subsequent and distinct robbery. It is sufficient to say that we have examined the record, and find that no objection was made to the evidence. Therefore we decline to discuss the merits of the contention.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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12 Cal. App. 688

GAGE v. BILLING. (Civ. 704.)

(Court of Appeal, First District, California. March 4, 1910.)

1. Brokers (§ 86*)—Action for Service—Evidence—Sufficiency.

Where, in an action for compensation for services rendered by an attorney in obtaining a proposition to purchase the property from defendant, the client proved that he agreed to pay a reasonable commission on the attorney securing a satisfactory purchaser, and that he failed to secure a purchaser, and the attorney merely testified that the client requested him to place the matter before parties whom he thought would handle the proposition, without denying the testimony of the client, a verdict against the client was contrary to the evidence, for the agreement testified to by the client was reasonable, and established the usual condition to such employment.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. PLEADING (§ 327*)—BILL OF PARTICULARS—EFFECT.

A claim set forth in a bill of particulars, though not strictly within the complaint as filed, must be considered as a part of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 994; Dec. Dig. § 327.*]

3. BROKERS (§ 48*)—EMPLOYMENT—COMPENSATION—WHEN EARNED.

A broker employed to procure a purchaser of real estate is not entitled to a commission, where he fails to secure a purchaser, in the absence of an express contract for compensation in case of failure.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 48.*]

4. BROKERS (§ 6*)—EMPLOYMENT—COMPENSATION—WHEN EARNED.

A claim by an attorney for services in obtaining a proposition to purchase from the client certain property is a claim for services as a broker, and not as an attorney, where it appeared that charges were also made for everything in the nature of counsel, advice, and interviews with the client.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 6.*]

5. EVIDENCE (§ 471*) — OPINION EVIDENCE — CONCLUSION OF WITNESSES.

The testimony of an attorney that he was employed as an attorney, and not as a broker, was an expression of his opinion merely, and did not conclude the matter, which must be determined by the nature of the services rendered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2170–2185; Dec. Dig. § 471.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by J. H. Gage against F. W. Billing. From an order denying a new trial after verdict for plaintiff, defendant appeals. Reversed.

Wyckoff & Gardner, for appellant. Emil Pohli, for respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a new trial. It is alleged in the complaint: "That within two years last past the defendant became indebted to one Emil Pohli for and on account of services rendered by said Pohli to said defendant as said defendant's attorney at law, at said defendant's special instance and request, in the sum of $2,000, the said last-mentioned sum being the reasonable value of said services." Plaintiff sued as assignee of Pohli. Upon demand of defendant plaintiff furnished a bill of particulars, in which he sets out three charges or items. The first item is for counsel and advice in regard to certain matters specified in the item, for which a charge is made of $500. The second item is for "services of said Emil Pohli, said plaintiff's assignor, in obtaining a proposition to purchase from said defendant, or from a corporation to be formed by said defendant, the right to all the lime deposits in and upon the San Vicente ranch, the property of the Santa Cruz Lime Company," for which a charge is made in the sum of $1,000. The third item is for services in interviews with defendant and his agents, and other services set forth, for which a charge is made in the sum of $500. Thereafter defendant filed an answer denying the indebtedness, and denying that Pohli ever rendered any services to defendant as his attorney at law, or any service at all, save under an express agreement, by the terms of which defendant agreed to pay a reasonable sum therefor if Pohli should secure a purchaser satisfactory to the defendant, and at a price and upon terms satisfactory to the said defendant, for certain lands, and that said Pohli attempted to secure such purchaser, but has entirely failed therein, and has not secured such purchaser for such land, or any part thereof. The case was tried before a jury. At the trial Pohli admitted a set-off or counterclaim in the sum of $750, which defendant had likewise pleaded. The jury returned a verdict for plaintiff in the sum of $1,750, less the $750, or a net verdict for $1,000.

Appellant attacks the verdict as not sustained by the evidence. Upon this point his first contention is that defendant testified explicitly in accordance with his affirmative defense that all the services rendered by Pohli to defendant were rendered under an express agreement that he should receive no compensation unless a sale was effected, and that there is no evidence in the record to the contrary. So far as the evidence in the record relates to the second item in the bill of particulars for which a charge is made of $1,000, we think that this contention is correct. Mr. Pohli testified in chief to the effect that in the latter part of 1905 defendant consulted him as an attorney in regard to his (defendant's) rights as a minority stockholder in the Santa Cruz Lime Company, which owned the San Vicente ranch, supposed to contain valuable deposits of lime, as well as valuable growths of timber. He also testified as to advice given and consultations regarding defendant's rights, and how they could best be protected and conserved. Among other things Pohli advised defendant that a practical way to deal with the question was to obtain from the controlling stockholder (Mr. Packard) an option, and attempt to take over the property himself; that a holding corporation should be formed. All this testimony was pertinent to the first item in the bill of particulars. In relation to his employment to obtain a purchaser of the property in question the witness, after giving testimony relating to the first item in the bill of particulars, said: "Mr. Billings at one time did claim he was capable of doing the whole business himself, but, being advanced in age, he would rather have some one else do it; he also claimed that he had means to do it himself; he requested me to place the matter before parties whom I thought could handle the proposition." The witness continued to the effect that he succeeded in interesting Mr. Gavin McNab, who visited the property, but no sale was effected or any terms ever agreed upon. The defendant gave testimony as to the employment of Pohli. Upon this point defendant said: "I finally asked him if he had any chance to sell any property of any kind. He said he had one probable purchaser for the property, which I described to him at the time as good as I could, so we went on, and he wanted to know what commission he was to have, and I told him I would give him a very fair commission if he would make the sale; the property being so large we could not say beforehand what the commission would be, but I would be willing to give him a commission. Pohli agreed to it, and said that that is correct; he would receive no commission unless we get to a sale."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Although Pohli was a witness and in court, and must have known whether or not defendant told the truth, he did not contradict or deny the defendant's testimony, and we find nothing in his testimony given in support of plaintiff's cause of action that necessarily or at all contradicts the testimony of the defendant as to the terms upon which he was employed or requested to find a purchaser for the property. We are not unmindful of the rule that it is not always necessary that a witness be expressly contradicted to raise a conflict; for testimony may be so improbable or contradictory in itself as to justify its disbelief. But no such case as that is presented here. The agreement for a commission or compensation only in the event of a sale is not only reasonable, but it is the usual condition attached to such employment. Indeed, in the ordinary employment of a broker or agent to sell real estate, no compensation is earned unless a purchaser is procured willing to purchase on the seller's terms. Pohli simply testified that: "He requested me to place the matter before parties whom I thought could handle the proposition." He had been advised by defendant's pleading that he relied on an express contract, under which no compensation was to be paid unless a sale was effected, and yet neither before defendant testified to the terms of such agreement, nor afterwards did Pohli take the pains to give testimony on the vital point at issue. In this connection it is significant that Pohli rendered a bill to defendant before the action was brought, and after the services were completed, for a total sum of $1,000, with a credit for the offset of $750. The two persons who knew the facts were both in court. One, the defendant, gave specific testimony, not improbable, but entirely reasonable, and showing a contract in accordance with the usual custom in such cases. He was not impeached in any way; was not even cross-examined as to the evidence in question. The other person, Mr. Pohli, did not contradict such witness, and gave no testimony necessarily in conflict with this explicit testimony of the defendant. In such a case the testimony of the witness explicitly testifying to the particular facts should be taken as true. Newton v. Pope, 1 Cow. (N. Y.) 109; Lacy v. Wilson, 24 Mich. 479; Matthews v. Lanier, 33 Ark. 91.

As to the first item in the bill of particulars, we have already set forth the testimony of Pohli that tends to sustain such item. His testimony shows advice and counsel given as an attorney at law before and independent of any employment to secure a purchaser of the property or any interest therein. So likewise, as to the last item of the bill of particulars, the evidence of Pohli shows services of the same nature, and distinct from the charge set forth in the second item of the bill of particulars. But as the valuation placed upon the services set forth in the first and third items amounts to the sum of $1,000 only, and Pohli admitted the correctness of the offset of $750, the evidence relating to these items would only support a net verdict of $250.

Appellant also contends that the evidence does not support the verdict for the reason that the services set forth in the second item of the bill of particulars are not services rendered as an attorney at law, but are the services of a broker, and are neither embraced within the allegations of the complaint, nor is the value thereof recoverable, for the reason that a broker or agent employed to effect a sale or to procure a purchaser is, under the general rules of law, entitled to compensation only when he has procured a purchaser ready and willing to purchase on the employer's terms. The services charged for in the second item of the bill of particulars are not strictly within the allegations of the complaint as filed, but they are clearly set forth in the bill of particulars, which, when filed, must be treated as part of the complaint. Millet v. Bradbury, 109 Cal. 172, 41 Pac. 865; Chapman v. Bent, 133 Cal. xix, 65 Pac. 959. They were thus brought within the issues presented by the complaint read in connection with the bill of particulars. They were, however, services of a broker to secure a purchaser, and the broker failed to secure such purchaser, and for this reason, in the absence of an express contract for compensation in case of failure, the broker was entitled to no compensation. Ayres v. Thomas, 116 Cal. 143, 47 Pac. 1013; Wylie v. Marine Nat. Bank, 61 N. Y. 416; Caston v. Quimby, 178 Mass. 153, 59 N. E. 653, 52 L. R. A. 785; Fairchild v. Cunningham, 84 Minn. 521, 88 N. W. 15. We are aware that it is not always easy to separate the services that an attorney at law may render as such from the services that he may render as a broker, or in some other capacity. But in the case at bar plaintiff himself made such segregation in his bill of particulars. The second item is for "services of said Emil Pohli, said plaintiff's assignor, in obtaining a proposition to purchase from said defendant, or from a corporation to be formed by said defendant, the right to all the lime deposits in and upon the San Vicente ranch, the property of the Santa Cruz Lime Company." That this item was intended to cover only the mere matter of obtaining as a broker an offer to purchase is made perfectly clear by the charges in the other two items of the bill of particulars, where charges are made for everything in the nature of counsel, advice, interviews with defendant and his agents, the writing of letters, and communications over the telephone with defendant, examining an option, and preparing an acceptance thereof, and the like. It is clear to us that the charge of $1,000 set forth in the second item of the bill of particulars is for Pohli's services as a broker. And that is so, notwithstanding that he testified that he was not employed as a broker. Such testimony was but his opinion, and does not conclude the matter. Whether or not he acted as a broker must be determined by the nature of the service for which the charge was made. This clearly appears to have been, so far as the $1,000 charge is concerned, for obtaining an offer to purchase. This was the service of a broker. Plaintiff—that is, Pohli—made a separate and different charge for everything that he did in the matter that might be reasonably classed as the work of an attorney at law as such.

As plaintiff's assignor did not succeed in procuring an offer that was acceptable to defendant, no recovery can be had for the second item of the bill, and for this reason the verdict is not sustained by the evidence.

The instructions that appellant insists should have been given at his request were fully covered by two other instructions given by the court at defendant's request.

The order is reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

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12 Cal. App. 754

In re TRIBUNE PUB. CO. OF PALO ALTO.

(Civ. 756.)

(Court of Appeal, First District, California. March 9, 1910.)

NEWSPAPERS (§ 3*)—"NEWSPAPERS OF GENERAL CIRCULATION"—REGULAR INTERVALS.

Under Pol. Code, § 4460, defining a "newspaper of general circulation" as one which shall have been established, printed, and published at regular intervals for at least one year preceding the date of publication, etc., where a newspaper had been published weekly for part of a year and daily for the balance of the year preceding the filing of a petition to have it declared a newspaper of general circulation, it was published at "regular intervals" for one year within the statute, which does not require the interval between the dates of publication to be equal from beginning to end, but only to be regular, and not spasmodic or occasional.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 16–19; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4791–4794; vol. 8, pp. 7731, 7732.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Application by the Tribune Publishing Company of Palo Alto, a corporation, to have the Palo Alto Tribune declared a newspaper of general circulation, contested by the California Press Association. From an order overruling a demurrer to the petition, contestant appeals. Affirmed.

McGowan, Squires & Westlake, for appellant. Willard, Swart, Ferrell & McGovern, for respondent.

KERRIGAN, J. This is a proceeding instituted under section 4458 et seq. of the Political Code to have the Palo Alto Tribune declared and adjudged a newspaper of general circulation, and entitled to print public or legal notices.

The only allegation of the petition material in this appeal shows that the said newspaper was printed and published in Palo Alto at regular weekly intervals from March 16, 1906, down to and including October 1, 1908, and that from said last mentioned date down to the commencement of this proceeding it was printed and published in said place at regular daily intervals. Section 4462 of said Code authorizes any one to appear and contest such a petition; and the contestant here, on behalf of the California Press Association (an organization of newspapers of general circulation), interposed a general demurrer to the petition and contested the same on the ground that the Palo Alto Tribune was not a newspaper of general circulation as defined by section 4460 of the Political Code, in that it had not been published for regular intervals for one year. This demurrer was overruled, and upon final hearing the prayer of the petition was granted. Section 4460 defines a newspaper of general circulation as follows: "A newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals in the state, county, city, city and county, or town where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement. * * *"

The Palo Alto Tribune, as above stated, was published weekly during a part of the period of one year preceding the filing of the petition in the superior court, and daily during the remainder of that period; and the single question presented for determination is: Can it be said under those circumstances that such newspaper was published at regular intervals for one year? It does not appear that the efficiency of a journal would be at all impaired by a change from weekly to daily publication. It might perhaps be said, in answer to the claim of the contestant that the publication in this case was irregular, that a newspaper published every day is necessarily published every week, and the argument could be made that a newspaper published weekly for nine months, and thenceforth daily for three months, has been published weekly for a year. But we think it unnecessary to resort to such an argument, for it appears plain to us, bearing in mind the purpose of the act as well as the language of the provision in question, that the publication in this case constitutes a publication at regular intervals for one year. The section does not require the interval between dates of publication to be equal from beginning to end, but it must be regular; that is, not spasmodic or occasional.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

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12 Cal. App. 694

O'CONNELL v. WALKER et al. (Civ. 566.)

(Court of Appeal, Third District, California. March 5, 1910.)

ATTACHMENT (§ 115*) — AFFIDAVIT — ALTERNATIVE FORM—SUFFICIENCY.

Under Code Civ. Proc. § 538, providing that the affidavit for attachment, where the claim arises upon a contract, must contain the statement that payment has not been secured, or if originally so secured that the security has become valueless, an affidavit alleging that payment of the debt has not been secured, "or" if originally so secured that such security has without any act of plaintiff become valueless, was insufficient to authorize the writ of attachment as the use of the word "or" does not state either alternative with certainty.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 315–322; Dec. Dig. § 115.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by Kate A. O'Connell, administratrix of the estate of George P. O'Connell, deceased, against David F. Walker and others in which a writ of attachment was issued against the property of Walter J. Bartnett. From an order refusing to discharge the writ, Bartnett appeals. Reversed, with directions.

Gray & Cooper, for appellant. Daniel O'Connell, for respondent.

HART, J. The court below declined to grant the motion of the appellant to discharge the writ of attachment issued in this action, and this appeal is from the order denying said motion.

The defendants were the directors of the California Safe Deposit & Trust Company for several years prior to and at the time that said company was declared to be insolvent by the state bank commissioners in the month of December, 1907, and at the time said corporation was adjudged insolvent and a receiver thereof appointed, on the 18th day of January, 1908, by the superior court in and for the city and county of San Francisco. This action is against said corporation and the directors thereof. The complaint alleges that the plaintiff, as administratrix, etc., in the year 1907 deposited with the savings department of said company the sum of $1,774, which it agreed to pay to her on demand, and "although she has demanded said money from said company, no part thereof has ever been paid to her, and the whole of said sum with interest thereon is still due and owing to this plaintiff." It is further alleged that during the incumbency in office of the defendants, other than the corporation, as directors of the latter, the moneys and funds of said corporation were loaned on inadequate security; that they were directly or indirectly borrowed by the directors and officers of said corporation; that the officers of the corporation overdrew their accounts; that dividends were made and paid from other than the surplus profits arising from the business of said corporation; and, in divers other ways, specifically alleged, it is declared that the funds of the corporation were wrongfully diverted and converted by said directors and officers. Subsequently to the filing of the complaint, there was filed on behalf of plaintiff an affidavit on attachment, upon which a writ of attachment was issued and executed against the property of the defendant and appellant, W. J. Bartnett.

The individual liability of the directors for the claim of the plaintiff is founded on the provisions of section 3 of article 12 of the state Constitution. That section provides that "the directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation, or joint-stock association, during the term of office of such director or trustee." It is claimed, however, among other contentions against the legality of the order from which this appeal is prosecuted, that the affidavit upon which the writ of attachment was issued is fatally defective in that it does not properly adhere to the requirements of the statute prescribing the conditions upon which, only, a writ may be issued, and that said writ was therefore irregularly issued.

Among other prerequisites which are required by the statute to be observed before a writ of attachment is authorized to be issued is that the affidavit upon which such writ may alone be issued, where the claim declared upon arises out of a contract, express or implied, for the direct payment of money, must contain the following statement: "That the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." Code Civ. Proc. § 538.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

The allegation in the affidavit upon the subject of nonsecurity, etc., literally follows the language of the statute and reads as follows: "And the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, *or*, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." The specific complaint against the validity of the affidavit as the foundation for the issuance of the writ lies in the alternative form in which it is therein declared that the claim sued on is not secured by a lien of any character. Under the decisions in this state, the point appears to be well taken. The respondent has filed no brief on this appeal, and therefore the point suggested is not combatted here.

In Wilke v. Cohn, 54 Cal. 212, an affidavit for a writ of attachment contained, as here, an allegation as to nonexistence of security for the claim which was the basis of the action in the alternative form, and the court, holding said affidavit to be insufficient and the attachment irregularly issued, says: "It would be proper to follow the language of the statute, in saying that payment had not been secured by any mortgage or lien upon real or personal property, because it includes two or more phases of the same fact, attended with the same results, namely, that no security had ever been given; but, to use the above language, and then say, '*or*, if originally so secured, such security has become valueless', is not to state either with certainty. It does not say that no security was ever given; neither does it say that security was given, but that the same has become valueless." To the same effect is the case of Winters v. Pearson, 72 Cal. 553, 14 Pac. 304.

Our attention has been directed to no subsequent decision of the Supreme Court overruling the cited cases, and we assume that if the rule as therein stated had since been receded from counsel for the respondent would have called our attention thereto. As stated, under these decisions the affidavit was insufficient to authorize the issuance of the writ of attachment, and the motion to dissolve the writ should have been granted.

Some other points were made against the regularity of the issuance of the writ, but the first point suggested being decisive of the case, said points need not be noticed.

The order is reversed, with directions to the court below to discharge the writ of attachment.

We concur: CHIPMAN, P. J.; BURNETT, J.

12 Cal. App. 707

In re CAMPBELL'S ESTATE. (Civ. 693.)

(Court of Appeal, Third District, California. March 7, 1910. Rehearing Denied April 4, 1910; Denied by Supreme Court May 6, 1910.)

1. Appeal and Error (§ 171*)—Review—Objection in Lower Court.

Where there was no demurrer to the petition, and no objection in the lower court to any testimony as not within the issues presented by the petition and answer, and the case was tried on the theory that all material issues were properly presented, neither party on appeal may for the first time contend that there was no issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1069, 1161–1165; Dec. Dig. § 171.*]

2. Bastards (§ 3*)—Presumption of Legitimacy.

Where there is a marriage in legal contemplation, the legitimacy of the wife's children born while it is in force is presumed, under Civ. Code, § 193, providing that all children born in wedlock are presumed to be legitimate, and such legitimacy may not be disputed, excepting by the husband or wife, or the descendants of one or both of them under the express provisions of section 195.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

3. Slaves (§ 14*) — Property — Inheritance from Father—"Marriage."

Under the statutory definition of marriage in Missouri as a civil contract to which the consent of parties capable in law of contracting is essential, there could be no marriage in legal contemplation between slaves in that state, who had no capacity to contract; and hence, where a man and woman, slaves, "took up with each other" in Missouri, with their mistress' consent, according to the custom of slaves, the relation being merely temporary and subject to termination at any time, either by their own act or that of their mistress, there was no such marriage as would permit their children to inherit from their father.

[Ed. Note.—For other cases, see Slaves, Dec. Dig. § 14.*]

4. Marriage (§ 40*) — Presumption—Rebuttal.

If there was a presumption of marriage from their cohabitation and repute, it was removed where it appeared that the man left Missouri, and afterwards was legally married to another woman in California during the lifetime of the woman with whom he previously lived.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 40.*]

5. Evidence (§ 35*)—Judicial Notice—Laws of Another State.

The statute of another state must be proved like any other fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.*]

Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Proceedings for settlement of the estate of Basil Campbell. Petition by G. Wyatt

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wheeler and another for partial distribution. From an order denying the petition, petitioners appeal. Affirmed.

See 108 Pac. 676.

W. A. Gett and A. C. Huston, for appellants. Geo. Clark, W. A. Anderson, and A. G. Bailey, for respondent.

CHIPMAN, P. J. G. Wyatt Wheeler and John W. Wheeler filed their petition for a partial distribution of the above-entitled estate, claiming to be sons of Basil Campbell, deceased, by his wife, Mary Stephens, alleging that "the only other heir of said deceased is his surviving wife, Mary Jane Campbell" it is also alleged that the last will of deceased has been lately admitted to probate, and the said Mary Jane Campbell duly appointed executrix thereof. The petition was opposed by the executrix in her official capacity and by her individually, and by Leonora Williams, devisee and legatee under said will, denying the averments of the petition. The court found "that the said G. Wyatt Wheeler is not, nor is the said John W. Wheeler, the offspring or child of any marriage whatever between the person known as Mary Campbell, also known as Mary Stephens; that the said G. Wyatt Wheeler is not, nor is the said John W. Wheeler, a son or heir at law of the said Basil Campbell, deceased; that neither of said petitioners is entitled to succeed to any part of the estate of said deceased." The petition was denied by the court, and petitioners appeal from this order. The findings are challenged as unsupported by the evidence.

The will was not admitted in evidence, and respondent makes the preliminary point that the record does not show that petitioners are provided for in, or that they are omitted from, the will of Basil Campbell, deceased, "and this sufficiently justifies the finding that they are not entitled to share in the estate of deceased, and this one finding, not overthrown, is all the support the order appealed from needs." The point is apparently an attack upon the sufficiency of the petition. There was no demurrer to it, and no objection made to any of the testimony as not within the issues presented by the petition and answer. The cause was tried upon the theory that all the material issues were properly presented, with no objection from either party. The court will not allow either party now for the first time to say that there was no issue. Carroll v. Briggs, 138 Cal. 452, 454, 71 Pac. 501.

Petitioners claim that they are the sons of deceased, Basil Campbell, born to Mary Stephens while his wife. Contestants dispute the marriage, and also dispute the alleged parentage of the petitioners on the father's side. The controversy harks back to a period more than three score years ago, and is an echo of the old slave days. It seems to us that the questions presented relate to the principles of law as established and applied to a condition of facts peculiar to the system of slavery, rather than to any controversy as to what the facts are. These principles, as we conceive them to have been settled, must control the case, and in them, we think, the judgment of the learned trial court finds support, although it be admitted that the principal facts, adduced by petitioners, are deemed to be true. We will state enough of the evidence to show the facts from which we are to determine whether or not, in legal contemplation, the relation of marriage ever existed between Basil Campbell and Mary Stephens.

Basil Campbell was born a slave about the year 1830, and belonged to Catherine Stephens, at Bunceton, Cooper county, Mo.; she purchased him, when he was a boy from the Campbell estate, and he was thereafter known as Basil or Bas Stephens; Mary Stephens was also a slave and belonged to Catherine Stephens; her age is not very satisfactorily shown, but it appeared that she was probably 20 or 25 years older than Basil. From the deposition of William Wheeler, a witness for petitioners, it appeared that he was 78 years old in 1908, which would make him about the same age as Basil; he was a "superannuated Methodist preacher." He testified: "Mary Stephens was my mother; she was a slave and went by the name of the people she belonged to; my father's name was Abraham Wheeler; Mary belonged to Catherine Stephens, and Abraham Wheeler belonged to Ben Wheeler. * * * My father was Mary's first husband; have no knowledge where they were married. * * * I think my father died in 1880; my mother was married twice; I think my mother had six or seven children; my mother's eldest child was Lewis; he lived in Cooper county and belonged to the same people I did; next child was Andy, and then Walsh; I don't know who was the father of Andy, Lewis, or Walsh; I think they were by different fathers; my mother lived with Catherine Stephens, and my father lived with Ben Wheeler until he was sold; the Wheeler place is distant 2½ miles from the Stephens place." (It appeared that Abraham was sold to Judge Usher of Sheridan county, Mo.) Other witnesses speak of Mary's marriage to Abraham, which latter was probably what is known as a "slave marriage." The date of the alleged marriage of Basil to Mary is not fixed definitely, but from all the evidence it would appear to have taken place when he was about 18 years old and when Mary was probably 40. One witness for petitioners, an old colored woman, Violet Glasgow, living near Bunceton, declared that "Bas and Mary were married right here below the mill by Uncle Rev. Bas Levins, a Baptist minister." On cross-examination she testified: "I wasn't present when Bas and Mary were married; my father and mother were there; I know they were married down there where I told you; I could not tell you when they were married; it is so long ago; they told me they were married. * * * My father and mother told me that Basil and Mary were married, and I knew when they went to the wedding; I couldn't go; had to attend to the children, but I got some of the wedding cake and sweet potatoes; the Rev. Bas Levins was an old man; a colored man." No witness, other than Violet Glasgow, referred to any ceremony connected with the marriage of Bas and Mary, and the testimony of this witness generally, in other particulars, indicates that her memory was poor, and her statements not to be explicitly relied upon. Other witnesses who testified that Bas and Mary were married, witnesses familiar with the Stephens household and in a position to know the facts, testified that "they took up with each other," according to the custom among slaves, lived together and cohabited and had children, and were generally reputed to be man and wife, and on these facts they predicated their marriage.

Mr. W. H. Stephens, a resident of Bunceton, a witness for petitioners, deposed: That he knew Bas and Mary and the two boys, John and Wyatt. "I only knew of the relationship of these four negroes from what I have heard the black and white people of the neighborhood say, and Bas and Mary were considered by all of them as husband and wife in the way of the time. * * * Was there frequently between the time of the birth of John and Wyatt and the time Bas went to California in 1854; they all lived at Grandmother Stephens' place; Mary took Bas' leaving quite hard." He was asked if Bas and Mary were husband and wife according to custom, and answered: "Well, it was regarded as near as any couple; some of them had a big wedding, and some had a very private wedding, and some had none. Some had no wedding. These three were common. This didn't belong to the big class, or I would have heard about it." On cross-examination he was asked the custom among the slaves, and answered: "Some had big weddings, some private, some none—just took up with each other—so it was agreeable to the white folks, there was no objection; Bas and Mary just took up with each other, so far as I know." T. B. Stephens, a witness for petitioners, son of Catherine Stephens, 75 years old, residing near Bunceton, deposed: That he knew John and Wyatt Stephens and their mother, Mary. "Q. Who was the father? A. I could not say who their father was. Q. Who was their reputed father? A. Bas Campbell. Q. Did Bas and Mary live together on the place of your mother? A. Yes, they were together on the place. Q. What was the common understanding as to whether or not they were living together as man and wife? A. Well, that was the general understanding. Q. Your mother was living there on the place at the time? A. Yes. Q. Was this relationship known to her? A. Yes, I suppose it was. * * * Mary had five children before John and Wyatt were born; before Bas came to the place cannot say Mary was ever married; a man visited her named Wheeler, who she claimed to be her husband; * * * it was supposed that Bas and Mary were cohabiting all the time; * * * was not present when Bas and Mary were married; never heard of any ceremony; so far as I know Bas and Mary were simply living together on Mary's place, and Mary had two children during the time, and Bas reputed to be their father; after Bas left in 1854, Mary never took up with any other man that I know of. * * * I think they slept together by the approval of my mother."

Thomas S. Stephens, residing at Bunceton, 74 years old, who describes himself as a "retired capitalist," was a witness for petitioners. He deposed: "Was acquainted with Basil Campbell; I reckon I knew him when I knew anybody; knew him right here at my mother's home. * * * I went to California in 1853. Bas went to California in 1854; he went with John D. Stephens in taking cattle across; Basil was then a married man; his wife was called Mary Stephens (after her owner); she was known as Big Mary; Bas was married a long time before he left for California; he had two children named John W. Wheeler and Wyatt." He testified to having herded cattle with Bas near Knights Landing. "No one else was with us; during that time Basil talked with me about himself and his family in Missouri; * * * he said he wanted to make money enough to buy them and take them out there; * * * I knew Basil before 1844; I knew him before his marriage to Big Mary; * * * I suppose the marriage that occurred between Basil and Big Mary was recognized by Catherine Stephens; that was the custom of the country; I reckon they were married, for the Stephenses did not allow them to live together until they were married." He described the houses where the negroes slept and the room that Bas and Mary lived in. "The custom was that if one of a married couple went clean out of the country, they had a legal right to marry again; the custom was if a nigger was sold down south to go to the cotton fields, and left his wife here, of course she had the right to marry again, and he could get a wife down there; but we never looked on Bas as leaving his wife to marry anybody else, because he was speaking about coming back here and taking her and his boys back; * * * unless a man was sent entirely out of the country, a marriage was supposed to continue between slaves; I can't tell you whether Mary was divorced or separated from Wheeler; there was no law from 1840 to the Civil War, by which slaves were divorced. * * * Wheeler was sold out of the neighborhood; he was sold to a party living 40 or 50 miles away; don't know whether he got a divorce; niggers didn't get divorces; he never came back."

Jos Stephens, a witness for contestants, 72 years old, who came to California in 1854, and has lived here ever since, testified: "I have known Basil Campbell ever since I have known anybody. I knew Basil Campbell back in Missouri ever since I have known anybody. * * * I knew Big Mary. She had five or six or seven children when Bas came to California. Never while in Missouri did I hear any talk among any people in the neighborhood that Basil and Big Mary were married."

J. S. Tutt, a witness at the trial for contestants, 82 years old, formerly living near Bunceton, testified that he knew Bas and Mary there. He was asked what he knew as to whether Bas was a single or married man, and answered: "He was considered a single man, as far as I know." He testified that slave marriages were with the consent of the owners; that he knew nothing of Bas' marriage; "just my impression; I never heard of it." He was asked to explain "how a slave marriage would take place, or how one negro would get the privilege of being or staying with another." He answered: "Well, I don't know whether I can explain it exactly, Mr. Clark. In some instances they had their favorite girl or waiting maid that waited on the girls, and they generally gave them a pretty elaborate wedding, you know, and ceremony and dancing; but as a rule, you know, the other class—field hands—what we called 'outsiders,' why if a man had a notion that he wanted to live with a woman as his wife, he would go to the master and ask his permission, and if he got it, that was all there was to it." He testified that it was the right of the master to separate the slaves after they were married and allow them to have intercourse with other slaves. He testified: "My conception of a slave marriage in those days was that it was almost a marriage of convenience than anything else. It was a certain custom, too, but the man generally had the privilege, and exercised it a great deal, to quit whenever he felt like it." He testified that such intercourse as he had mentioned "was considered a slave marriage in the neighborhood," agreeable to custom there at that time. He also testified that, "in order for a negro man to cohabit with a negro woman, it was necessary to get the consent of the master," and that was considered a slave marriage "good in point of custom as long as it lasted." One or two other witnesses, who had known Bas and Mary in Missouri, testified that Bas' reputation was that of a single man.

It is undisputed that Basil came to California in 1854; that he never thereafter had any communication by letter or otherwise, with Mary; that in 1861 she went to Texas and died there about 1887; that Basil was formally married in California to Rebecca Dolton in 1866, and, after her death, he married Mary Jane Campbell in 1893. It appeared without conflict that Mary's first slave marriage was with Abraham Wheeler, who was alive when Basil "took up" with Mary, and did not die until 1880, and was never divorced from her. There was evidence that Basil visited his old home in Missouri, in 1876, and then met John W. Wheeler, and that he, at that time, spoke of both John and Wyatt as his sons. It did not appear that he made any reference to Mary as his wife, who, with Wyatt, was then living in Texas. He was then married to Rebecca Dolton, and had been for 10 years. In 1894 John wrote Basil a letter in which, among other things, he said: "I wrote you several letters since you was out here in 1876 and you didn't seem to recognize me as your son tho I always feel interested in you because I was always taught so by mother and all the white ones of the family." Basil made no reply, nor had John W. heard from him after his visit in 1876. John was never in California.

Section 1387 of the Civil Code provides that: "The issue of all marriages null in law, or dissolved by divorce, are legitimate." The section also declares that: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." No claim is here made that any such acknowledgment occurred. Nor is there any claim that Basil made such acknowledgment as is mentioned in section 230 of the Civil Code, as that section is interpreted in Estate of De Laveaga, 142 Cal. 158, 75 Pac. 790. Subdivision 5 of section 1962, Code Civ. Proc., provides that: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." But this latter section presupposes a marriage. The only claim to the legitimacy of petitioners, therefore, having any standing in the case must rest upon sufficient evidence that there was a marriage between Basil and Mary, and such acknowledgment by Basil of his paternity of petitioners as appears in the evidence must be viewed only as bearing upon the question of his marriage to Mary, and not as in any sense tending to establish legitimacy by acknowledgment. The crux of the case is: Was there a marriage between Basil and Mary? If there was, in legal contemplation, a marriage, the presumption of legitimacy of their children follows (Civ. Code, § 193); and legitimacy of a child may be disputed "only by the husband or wife, or the descendants of both." Civ. Code, § 195.

In the case of U. S. v. Roach, Ex. (decided in 1875) 92 U. S. 27, 23 L. Ed., bottom of p. 597, the action was against the United States to recover the value of certain cotton seized in 1863. The claimant, Hall, was a slave owned by Benjamin Roach, who filed an interpleader. Subsequently Roach died, and his executrix was made a party. Hall claimed under a contract of purchase from his master. The court said: "In order to see the proposition in its true light, it is necessary, as it were, to roll back the tide of time, and to imagine ourselves in the presence of the circumstances by which the parties were surrounded when and where the contract is said to have been made. * * * The case must be determined as if slavery had not been abolished in Mississippi, and the laws referred to were still in force there. The destruction of the institution can have no effect upon the prior rights in question." Holding against Hall's contention, the court said: "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage"—citing cases. "This regulation was harsher than that which obtained in regard to the Roman bondman, the Saxon villein, Russian serf, the German and Polish slave"—citing Cobb on Slavery, § 266. We derive but little aid from an examination of the decisions defining what may constitute a legal marriage generally between free men and free women capable of contracting. The statutory definition of marriage in the state of Missouri, as in our own state, precludes the possibility of a marriage between slaves. "Marriage is considered in law as a civil contract, to which the consent of parties capable in law of contracting is essential." In State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. Rep. 869, the above is given as the statutory definition of marriage in that state. It is the same here. Civ. Code, § 55. In that case it was held, notwithstanding the statutes regulating the marriage ceremony, requiring license, etc., that a marriage according to the common law was valid. Speaking of the contract, the court said: "While it is here declared to be a civil contract, it is almost universally held to be something more than an ordinary contract. Marriage is a status, created by contract, and we formulate the definition of it as follows: Marriage is the civil status of one man and one woman capable of contracting united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of the sex. The contract of marriage in this case comes up to every requirement of this definition. It created the relation of husband and wife between defendant and Bertha, so long as they both should live. In form, then, the contract was good, and constituted a valid marriage at common law. 1 Bish. Mar. & Div. §§ 2, 3. This relation between them is indissoluble, except by death or a decree of court." The court reached its conclusion with some reluctance, but mainly because there were no words in the act declaring marriage not in conformity to the statute null and void. In Kilburn v. Kilburn, 89 Cal. 50, 26 Pac. 637 (26 Am. St. Rep. 447), marriage was defined as a contract "according to the form prescribed by the laws by which a man and woman capable of entering into such a contract mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife." Said the Supreme Court of the United States, in Maynard v. Hill, 125 U. S. 211, 8 Sup. Ct. 730, 31 L. Ed. 659: "It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make."

We might cite a multitude of cases to like effect. Mr. Schouler expresses the rule as universally held to be sound: "The word 'marriage' signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife." Schouler on Dom. Rel. § 12. The relation here shown, between Basil and Mary, falls far short of measuring up to the requirements indispensable to a marriage. A relation which neither party has the capacity to create, and which either party could terminate at will, or which could be terminated by their master, is not a marriage relation, and it is mockery to speak of it as such. Nevertheless, there was a universal custom of marriage among slaves, as among white people, "but this custom was a thing separate and distinct from the law which governed the marriages of the free." 1 Bish. on Mar. & Div. § 654 (New Commentaries).

The case of Johnson v. Johnson, 45 Mo 595 (decided in 1870), is cited by appellants. The action was for divorce by the wife. Both parties were negroes. Defendant was formerly a slave in Virginia, and whilst he lived there he married a negress, also a slave, by whom he had three children. His wife and children were sold to some person in Texas, and his master took him to Mexico, from whence he was brought to St. Louis, Mo. Later, in the year 1849, he married the plaintiff, then a free woman of color, and a year later he was emancipated by his master. Thereafter he continued to live and cohabit with plaintiff as his wife for about 13 years, when she left him, and commenced this proceeding for a divorce. It was pointed out in the opinion that by common consent, and universal usage existing among slaves, they were permitted to select their husbands and wives, and were known and recognized as husband and wife by their masters and the community in which they lived; "but whatever moral force there may have been in such connections, it is evident there was nothing binding or obligatory in law." Howard v. Howard, 51 N. C. 235, is cited, where it was said:

"Marriage is based upon contract; consequently the relation of man and wife cannot exist among slaves. It is excluded both on account of their incapacity to contract, and by the paramount right of ownership in them as property." So also it was said, as is further pointed out: "The duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other recognized, without doing violence to the rights of the owner. In other words, the subject of the contract must cease to be slaves before the incidents inseparable to the relation of marriage, in its proper sense, can attach." The court then, in the principal case, takes up the question whether slaves in a state of slavery could contract a marriage so as to be binding upon them after their emancipation. It was shown that the common law was changed in that state with reference to marriage, and the subject placed under municipal regulation. "But the authority of law was exclusively applicable to free persons, and did not reach those persons who were in a state of slavery when the marriage was contracted." In this view the court reverted to the common law and its analogous principles in the case before it. Said the court: "Though the slave could make no civil contract, and his marriage was absolutely void in legal contemplation, yet it is apparent there was the moral assent of the mind." Instancing the marriage of infants, and of insane persons, afterward held good when ratified or consummated, upon the removal of the disability, the court held that cohabitation and recognition of the relation after emancipation was an assent to and confirmation of the contract. The court said: "If, after the emancipation, there was no confirmation, by cohabitation or otherwise, it would be obvious there would be no grounds for holding the marriage as subsisting or binding." The court further said: "As the appellant, when he was emancipated, continued to live and cohabit with respondent, and constantly acknowledged her as his wife, the marriage should be recognized, and be deemed valid and binding. That in his earlier days he was previously married can make no difference. His first marriage in his then state of servitude had no legal existence; he was at liberty to repudiate it at pleasure; and by his continuing to live with respondent and acknowledging her as his lawful wife after he had obtained his civil rights, he disaffirmed his first marriage and ratified the second." This case seems to hold that had there been no subsequent ratification the court would have been forced to hold that there was no marriage.

The case of Lee v. Lee, 161 Mo. 52, 61 S. W. 630, is also cited by appellant. In that case, however, the legality of the slave marriage was not before the court; the question being as to the right of their children to inherit under the Revised Statutes of 1899. In the case of Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376, the controversy arose out of the relation of a white man and an Indian woman. The stipulated facts showed a marriage according to Indian custom, consummated by living and cohabiting together as husband and wife. Among other contentions it was urged that the marriage must be recognized under the law of nations; the Indian tribes being treated as states. Said the court: "What, then, constitutes the thing called a marriage? What is it in the eye of the jus gentium? It is the union of one man and one woman, 'so long as they shall both live,' to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the state. Nothing short of this is marriage. And nothing short of this is meant when it is said that marriages, valid where made, will be upheld in other states"—citing Story's Conflict of L. c. 5; Wheaton's L. of N. 137; Reynolds v. Reynolds, 3 Allen (Mass.) 605. In Estate of Hazzard, 13 Phila. (Pa.) 335, it was held, where a marriage had taken place between testator and wife, who were slaves in Virginia, at a time when such marriages were permitted, but not recognized as a valid contract by that state, that the children of testator born in slavery were illegitimate, and must be so considered in Pennsylvania; that they could not have inherited from each other. The court said that, the marriage not being recognized by the law of Virginia, "we are bound to respect that law, however repugnant to the present condition of society or the law, either of Virginia or our own state."

In volume 1, c. 21 (section 646 et seq.) Mr. Bishop considers: (1) Slave marriages; (2) the effect of emancipation on these marriages; (3) the status and rights of the children. He points out that there were two, if not three, reasons for the legal doctrine which denies validity to slave marriages: First, that slaves had in law no such freedom of will as is required to pass the matrimonial consent; secondly, that the duties of the husband and wife are incompatible with the duty which the slave owes to his master; third, sometimes urged, that the slave's acquisitions accrued to the latter. The author expresses some doubt as to the sufficiency of the first and third reasons, although the cases seem to be against him; but, as to the second, he says: "That the duties of husband and wife are incompatible with those of a slave is a proposition evidently sound in law, and upon it the doctrine which denies to slaves the power of matrimony may well rest." He then deduces the doctrine that since for reasons stated these customary slave marriages were valid as far as in the nature of the case they could be, "they are deemed to have been, not null in the widest sense of the word, but only null as compared with ordinary marriages, and were good in law for any purpose for which they could so be held, not inconsistent with the master's superior claims or the general policy of slavery. This rule would seldom permit validity to be assigned them in everyday litigation of the courts; hence judges would naturally speak of them as void." It is difficult to perceive any purpose for which the marriage was held good, except to distinguish the relation from that of fornication. When we consider the incompatibility of the duties of common marriage with those due from the slave to the master and the inconsistency of a true marriage relation with the master's superior claims, as well as the general policy of slavery, there remains no essential element that could give any sort of validity to such a union. It was tolerated concubinage, but not matrimonial cohabitation. What are some of the duties and reciprocal rights arising out of the sacred relation of husband and wife? Marriage necessarily supposes a home and mutual cohabitation; each has the right to the society of the other; and obligation rests upon both to live together—to adhere to each other so long as they shall live—the husband has the right to fix the domicile, and the wife's domicile merges in that of the husband, and wherever he goes she is bound to go; each spouse is entitled to the society and affection of the other, and the husband may recover damages from any person who would withhold her from him, and may sue for damages all persons who seek to entice her away; the husband is bound to support his wife, and she may not leave him so long as she is comfortably provided for. Then there are the wife's obligation to render family services; the right of the father to the custody of the children. Schouler's Dom. Rel. § 34 et seq. These and others that might be mentioned are recognized rights, duties, and responsibilities attending marriages among all civilized people, and yet not one of them attaches, as of right, to these so-called slave marriages.

Mr. Story, in his work upon the Conflict of Laws (8th Ed.) § 113, says: "The general principle certainly is, as we have seen, that between persons sui juris, marriage is to be decided by the law of the place where it is celebrated. Note, sections 80, 81. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is invalid everywhere." This rule was quoted approvingly in Pearson v. Pearson, 51 Cal. 120; State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683; Estate of Hazzard, supra. Mr. Bishop says: "It is necessary that there should be one universal rule whereby to determine whether parties are to be regarded as married or not, and that the only practicable rule is to refer this question to the law of the country wherein they exchange the mutual consent to be husband and wife." Our Civil Code (section 1646) lays down the rule: "A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law or usage of the place where it is made."

Without prolonging a discussion, the present length of which is justified only by the importance of the questions and the apparent sincerity, zeal, and earnestness of appellants' counsel in urging their contentions, we find no great difficulty in reaching the conclusion that no marriage was proven ever to have taken place between Basil Campbell and Mary Stephens. When Basil and Mary "took up with each other," having their mistress' consent, they knew that the relation was but temporary; that they had no power to perpetuate it; that they could be permanently separated any moment, either by their own act or that of their mistress; that Mary had a slave husband then living, two or three of whose children were in the family. Basil left Missouri, not to return, in 1854, and though he may have then had in mind the thought of bringing Mary and the children to him some day, he took no steps to that end; he married in this state in 1866, while Mary was living; ceased all communication with Mary in 1854, who not long thereafter went to Texas and there died; he never communicated with her in any way after leaving Missouri, and indicated by his marriage here a renunciation of any relation with her—in short, the entire conduct of both parties is consistent with their acceptance of the fact that their former relation was not that of husband and wife. If it be insisted that a presumption of marriage arose from cohabitation and repute, this presumption is removed by proof of Basil's formal and lawful marriage in this state. Case v. Case, 17 Cal. 598. It was held in Jones v. Jones, 48 Md. 391, 30 Am. Rep. 466: The presumption of a marriage between A. and B., founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A. and C. during the lifetime of B.

We do not find it necessary to dwell upon the effect which emancipation had upon these so-called slave marriages. Mr. Bishop states the doctrine as now settled: "That though during slavery the slave marriage is substantially void in law, if after emancipation the parties continue to cohabit matrimonially, it is thereby made good." And so, it was held in Johnson v. Johnson, supra, where a slave had two wives, and after emancipation he continued to live with the second one, and acknowledged her as his lawful wife, he not only ratified the second slave marriage, but disaffirmed the first.

It is said that a statute passed by the Missouri Legislature in 1865 validated the marriage and legitimatized the children. But no such statute is in evidence. The laws of another state must be proved like any other fact. Estate of Harrington, 140 Cal. 244, 73 Pac. 1000, 98 Am. St. Rep. 51; Estate of Richards, 133 Cal. 524, 65 Pac. 1034.

As already pointed out in the earlier part of this opinion, the legitimacy and right of appellants to inherit depend upon a marriage being proven; and, as we conclude that there was no marriage shown, the finding of the court is sustained.

The finding that neither of the petitioners is a son of deceased is immaterial for, in view of the other findings, neither of them is entitled to inherit, although both may be sons of deceased.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

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12 Cal. App. 707

In re CAMPBELL'S ESTATE. (Sac. 1,776.)

(Supreme Court of California. May 7, 1910.)

In Bank. On rehearing. Denied.

For opinion of the District Court of Appeal, see 108 Pac. 669.

PER CURIAM. Rehearing denied, no formal action having been taken thereon.

SHAW, J. I dissent from the denial of the application to vacate the judgment of the District Court of Appeal in this cause. I do not think that the decisions holding that a marriage contracted in good faith between slaves is not a marriage at all should be followed. And if it were conceded that such a marriage is technically null on the ground that the parties were slaves without capacity to contract, under the decisions of the courts of the slave states made during the existence of that condition, nevertheless the children born of such a marriage should be considered as legitimate under our statute. Section 1387 of the Civil Code declares that "The issue of all marriages null in law, or dissolved by divorce, are legitimate." There being no evidence in the record as to the law of Missouri where the marriage of the deceased with the mother of the petitioners took place, and where they were born of that marriage, it is to be assumed that the law of that state is the same as our own. If ever there was a law which should be broadly and liberally construed, it must be admitted that this law is of that class, when applied to a marriage which, in all respects except the capacity to enter into it, was as formally solemnized and as faithfully observed as that of free persons. I can conceive of no sound reason for refusing to apply this statute to the children of a marriage which is null only because the man and woman who entered into the relation were slaves. The question is of little future importance, but I cannot allow a doctrine which I deem so repugnant to humanity to receive even the silent sanction of acquiescence without a protest. I think it proper to add that the denial of a rehearing in this court does not necessarily mean an approval of the opinion of the district court. People v. Davis, 147 Cal. 350, 81 Pac. 718.

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157 Cal. 573

NATIONAL BANK OF THE PACIFIC v. WESTERN PAC. RY. CO. (S. F. 5,323.)

(Supreme Court of California. April 7, 1910. Rehearing Denied May 7, 1910.)

1. ATTACHMENT (§ 178*)—LIEN ACQUIRED.

The general rule is that a creditor who attaches property for his debt obtains a lien only on the title or interest the debtor has in the property at the time of the levy, and, if at that time all title and interest has passed from the debtor to a third person, the attaching creditor gets nothing by the levy.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 528–534; Dec. Dig. § 178.*]

2. ATTACHMENT (§ 180*)—CORPORATE STOCK—LIEN—PRIOR UNREGISTERED TRANSFER.

A holder for value of corporate stock by a previous unregistered transfer in good faith prevails against an attaching creditor or execution purchaser with notice of the transfer.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 571; Dec. Dig. § 180.*]

3. ATTACHMENT (§ 180*)—TRANSFER OF SHARES—"PERSONAL PROPERTY"—CORPORATE STOCK—LIEN.

Under Civ. Code, § 324, declaring that shares of stock in a corporation are "personal property" and may be transferred by indorsement and delivery of the certificate, and providing that such transfer is not valid, except as to the parties thereto, until the same is entered on the books of the corporation, etc., a bona fide transfer of corporate shares, though unregistered, takes precedence over a subsequent attachment or execution levied on the stock for the debt of the vendor, in whose name the shares stand on the corporation books.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 571; Dec. Dig. § 180.*

For other definitions, see Words and Phrases, vol. 6, pp. 5346–5358; vol. 8, p. 7753.]

4. CORPORATIONS (§ 129*) — TRANSFER OF SHARES—REGISTRATION — RECITALS IN CERTIFICATE.

The right to sell, transfer, or pledge corporate stock, being given by statute, cannot be curtailed by a recital in the certificate that it is transferable only on the books of the company and on surrender of the certificate; such recital, while serving to give notice of the rights of the corporation under the statute, not changing the relative rights of the stockholder and third persons with respect to each other, nor making an unregistered transfer subject to an attachment lien.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 479; Dec. Dig. § 129.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the National Bank of the Pacific against the Western Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles S. Wheeler, Warren Olney, Jr., and F. W. M. McCutcheon, for appellant. Gavin McNab, R. P. Henshall, and Chauncey S. Goodrich, for respondent.

SHAW, J. A general demurrer to the complaint was overruled. The defendant refused to answer, and judgment was given for plaintiff upon the facts stated in the complaint. The defendant appeals.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On June 15, 1908, the plaintiff became the owner of 1,000 shares of the capital stock of the defendant corporation, previously belonging to J. Dalzell Brown. The certificate for these shares was duly indorsed by Brown and delivered to the plaintiff. The consideration paid for the stock by the plaintiff was $25,000. Brown was indebted to the defendant in a sum exceeding $50,000. On July 28, 1908, the defendant began an action against Brown to recover said debt, and caused a writ of attachment to be issued therein, which on July 29, 1908, was levied on Brown's interest in said stock. The action is still pending. At the time the attachment was levied, the transfer of tue stock from Brown to the plaintiff had not been entered on the books of the defendant corporation, as required by section 324, Civ. Code, and the defendant had no notice or knowledge of said transfer. This condition continued until March 11, 1909, when the plaintiff presented its certificate of stock to the defendant, and demanded that the transfer from Brown to plaintiff be duly entered upon the defendant's books. Defendant refused to comply with the demand, basing its refusal on the claim that, by virtue of the levy of said attachment, it had a lien upon said stock prior and paramount to the right and title of plaintiff thereto. This action was thereupon begun to compel the defendant to enter the transfer on its books and issue to the plaintiff a new certificate for the stock, free from the lien of the attachment. The judgment directed that this be done.

Section 324, Civ. Code, declares that shares of stock in a corporation are personal property, and that they may be transferred by indorsement and delivery of the certificate. It further provides that "such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer."

"The rights or shares which a defendant may have in the stock of any corporation" may be attached by leaving with the proper officer of the corporation a copy of the writ and a notice that the stock or interest of the defendant is attached in pursuance of the writ. Code Civ. Proc. §§ 541, 542, subd. 4. When such stock is sold on execution, the sheriff must give the purchaser a certificate of the sale. "Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied." Code Civ. Proc. § 699.

The general rule is that a creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy, and that, if at that time all title and interest therein has passed from the debtor to a third person, the attaching creditor gets nothing by the levy. Tuohy v. Wingfield, 52 Cal. 319; Howell v. Foster, 65 Cal. 173, 3 Pac. 647; Ward v. Waterman, 85 Cal. 508, 24 Pac. 930. Where a statute declares a previous transfer of title void as to creditors of the transferror, there is an exception to this rule. The exception is, of course, founded upon the theory that as the law makes the transfer void as to the creditor, there is, as to him, no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all other parties. Examples of this are found in the case of transfers tainted with actual fraud and transfers of personal property in good faith not followed by immediate delivery and actual and continued change of possession. The latter are conclusively presumed to be fraudulent. All such transfers are expressly declared to be void as to the creditors of the person making the transfer. Civ. Code, §§ 3439, 3440. Another example is that of a chattel mortgage not executed and recorded in the prescribed mode, which the statute declares to be absolutely void as against other creditors of the mortgagor, regardless of the good faith of the transaction. Civ. Code, § 2957. The contention of the defendant is that the provisions in section 324, declaring that a transfer of corporate stock is not valid, except as to the parties, until it is duly entered on the corporation books, is intended for the benefit of the creditors of stockholders, and, therefore, that its effect is to make an unregistered transfer absolutely void, and subject to any attachment or execution against the previous owner.

If this doctrine is correct, the logical result would be that knowledge of the attaching creditor or execution purchaser, at the time of the levy or execution sale, that there had been a prior unregistered transfer for value, would be an immaterial circumstance which would neither protect the holder of the stock, nor vitiate or affect the lien of the attachment, or the title conveyed by the execution sale. If the attempted transfer by indorsement and delivery of the certificate, without entry thereof on the books of the company, is wholly void as to the attaching creditor, the levy would create a lien superior to the title of the indorsee. It would operate as if there had been no previous transfer of the certificate by the record holder, and a registration after the levy, or a subsequent notice, would be of no avail to the indorsee. This rule prevails in the case of a levy on goods, after a sale which is void as against creditors, under section 3440, Civ. Code. Notice to the creditor, or to an intending purchaser, in such a case, that the third person holds the title, whether given before or after the levy, does not affect the attachment, nor invalidate the title of the execution purchaser. The defendant does not contend that this strict rule applies to corporate stock, but is willing to concede that a holder thereof for value, by a previous unregistered transfer in good faith, would prevail against an attaching creditor or execution purchaser with notice of the transfer. The decisions in this state on this point uniformly hold that the law is in accordance with this concession. Weston v. Bear River, etc., Co., 6 Cal. 425; People ex rel. Mead v. Elmore, 35 Cal. 653; Farmers' National Gold Bank v. Wilson, 58 Cal. 600; Blakeman v. Puget S. I. Co., 72 Cal. 321, 13 Pac. 872; Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348.

The defendant relies mainly on a prior decision in Weston v. Bear River, etc., Co., reported at 5 Cal. 186, 63 Am. Dec. 117, and on the decisions in Strout v. Natoma W. Co., 9 Cal. 78, and Naglee v. Pacific Wharf Co., 20 Cal. 529.

The Weston Case was an action by Weston to compel the defendant corporation to transfer certain shares of its stock to him on its books. On the first trial of the case the lower court held the unregistered transfers good, and gave judgment against the plaintiff. On appeal the Supreme Court reversed this judgment. 5 Cal. 186, 63 Am. Dec. 117. Afterwards the case was again tried, and judgment in the lower court was given for the plaintiff. Upon a second appeal this judgment was reversed. 6 Cal. 425. In the report of the first case the facts are not stated, and the plaintiff is described merely as an attaching creditor. It is not stated whether he was or was not a purchaser on execution sale, or whether he had or had not notice of the prior assignment of the certificates. It was apparently regarded as immaterial, and, as above stated, the logic of the decision would make it so. But there is no discussion or mention of the point. The court considered the effect of sections 12 and 144 of the act of April 22, 1850, upon stock transfers. St. 1850, p. 347. Section 12 is identical with section 324, Civ. Code. Section 144 declared that until there was a proper entry thereof on the corporation books, "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company." Holding these provisions imperative and prohibitory, and not intended as a protection to the company alone, the court states the reason for giving the statute effect as a declaration that an unregistered transfer is void as to the creditors of the transferror, as follows: "The Legislature intended to protect the public from the frauds which might be perpetrated by a sale or hypothecation of the certificates passing the legal or equitable title, while the books of the company induced credit to the vendor, *by holding him out to the world as the owner of such stock.*" (The italics are ours.)

In Strout v. Natoma Co., supra, the question was not involved, but the court quotes the above extract from the first Weston decision, saying: "The principle clearly established by this decision is, that the books of the corporation must constitute the test of the rights of third parties. They can look only to the books as their criterion." The citation in the opinion to "6 Cal. 425," as the place where the first Weston Case is reported seems to be a clerical error. The court does not mention the second decision, and was apparently unaware of the fact that it had declared a contrary doctrine. In Naglee v. Pacific Wharf Co., supra, the stock was attached after the transfer from Stebbins to Naglee. Before the execution sale in the attachment suit against Stebbins, Naglee applied to the company to have his transfer entered on its books. The company refused to do so, assigning the attachment as the cause. Shortly afterwards the stock was sold for its market value, on the execution, to a purchaser without notice of the transfer. Naglee sued to compel a transfer to him. The judgment denying this relief was affirmed on the authority of the Weston Cases. As the stock had been sold to an innocent purchaser, it is plain that the soundness of the decision in the first case, to the effect that a mere levy created a lien superior to an unregistered transfer, was not essential to the decision. The court says, however, that the second decision in the Weston Case was not intended to overrule or qualify the first. From this it will be seen that the doctrine of the first Weston decision was not involved in either the Strout Case or the Naglee Case, and hence the expressions in the opinions in these two cases to the effect that that doctrine is settled in this state, are not entitled to great weight, especially in the face of prior and subsequent decisions declaring the contrary rule to be settled.

Upon the second appeal in the Weston Case (6 Cal. 425) it was shown that before the action was begun, Weston, the attaching creditor, had purchased the stock at the sheriff's sale in his attachment suit against Lovell, and that before purchasing it he had notice of the prior unregistered transfers and pledges thereof. Upon this the court says: "A party who purchases at sheriff's sale, stocks of an incorporation, knowing that the certificates of such stock have been previously hypothecated, is chargeable with notice of such fact, and takes subject to the claim of the pledgee. Neither the incorporation law of 1850, or of 1853 (St. 1853, c. 65), was intended to cover a case of this kind, but applied only to transfers and purchases in good faith without notice. In the case of Weston v. Bear River Water & Mining Company, 5 Cal. 186, 63 Am. Dec. 117, this point was not presented to the consideration of the court, and the case went off on a construction of the statute only." The question whether the lien of the levy was, of itself, superior to the right of a holder of the certificate, whose transfer was not entered on the books, was necessary to this decision, for if such lien was superior it would have inured to the benefit of a purchaser even if he had notice, if the case is to be treated as a fraudulent transfer. The ruling that it was so far inferior that a subsequent notice before execution sale would destroy the lien, is directly contrary to the principle upon which the first Weston decision was based, and practically overrules it.

The other decisions heretofore cited contain repeated declarations in approval of the doctrine of the second Weston Case. In People v. Elmore, supra, after referring to the Weston and Naglee decisions, the court says that it was held in those cases that unregistered transfers of stock "are nevertheless valid as against all the world, except subsequent purchasers in good faith, without notice." This was said to be binding under the rule of stare decisis, if for no other reason. Parrott v. Byers, 40 Cal. 614, at page 625, quotes this passage from the Elmore Case, designating it as the principle established in this state. This was reiterated in Winter v. Belmont Co., 53 Cal. 431, Farmers', etc., Bank v. Wilson, supra, Blakeman v. Puget S. I. Co., supra, Spreckels v. Nevada Bank, supra, and in West Coast, etc., Co. v. Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171. In view of these repeated affirmations of the doctrine, we again declare, what has been said so often, that the principle of stare decisis applies, and that it is now too late to change the rule, even if we were not satisfied with it. For many years it has been generally understood that in this state shares of stock in a domestic corporation, thus transferred or pledged, were safe as against a mere levy of an attachment or execution against the person in whose name they stand on the corporation books, and the commercial business of the people has been carried on upon that basis. A rule thus settled and relied on should not be disturbed.

Counsel for defendant contend that the precise question here presented was not involved in any of the cases, except the first Weston Case, and that the declarations in the subsequent decisions, contrary to that case, should be disregarded as obiter dicta. Even if this were so, since the dicta have been accepted and acted upon for so many years as the established law, they should be adhered to, if possible. But, as we have shown, this rule cannot be sustained without overthrowing the principle upon which the first Weston Case rests, and every decision holding that a purchaser for value at an execution sale, with notice of a prior unrecorded transfer, obtains no title against the indorsee and holder of the certificate, in effect, overrules that case. In Farmers', etc., Bank v. Wilson, the effect of a mere levy was involved, and the court very properly stated the rule, so that the parties would understand that a future execution purchaser with notice would take only the pledgee's right of redemption. That case is direct authority for the proposition.

It may be remarked further that the reason given, as above stated, in the first Weston Case, for the rule there adopted had no foundation in the law then in force, and has none under the present law. It was founded on the notion that "the stock and transfer book" of a corporation is made a public record, accessible to all persons, intended to give notice to everybody of the status and ownership of the title to the stock, and that it is therefore available to the creditors of the stockholders and to persons dealing with them with respect to the stock. This is the law of some of the states where the rule contended for by the defendant prevails, but it is not the law of this state. Civ. Code, § 378. It was not the law with respect to mining corporations at the time the Weston Cases were decided. St. 1850, p. 368, § 144; St. 1853, p. 90, § 18. The creditors of the individual stockholders have no such right of access, and the books could not constitute notice to them. Nor could these books hold any person out to the world as the owner of any stock, since the world could not have access thereto. Stockholders and creditors of the corporation are the only persons who have the right to inspect the books. Civ. Code, § 378.

The authorities of other states having similar statutes differ somewhat in their interpretation thereof. The following cases hold that the levy of an attachment or execution is not, of itself, paramount to the right of a holder of the certificate under a prior unregistered transfer from the attachment or execution debtor: Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Lund v. Wheaton, 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623; Thurber v. Crump, 86 Ky. 408, 418, 6 S. W. 145; Mapleton Bank v. Standrod, 8 Idaho, 740, 71 Pac. 119, 67 L. R. A. 656; Port Townsend N. B. v. Port Townsend, etc., Co., 6 Wash. 597, 34 Pac. 155; Van Cise v. Merchants' N. B., 4 Dak. 485, 33 N. W. 897; Newberry v. Detroit, etc., Co. 17 Mich. 157 (per Cooley, J.); Batesville T. Co. v. Meyer-Schmidt, etc., Co., 68 Ark. 115, 56 S. W. 784; Masury v. Farmers' N. B., 93 Fed. 603, 35 C. C. A. 476 (construing statute of Arkansas). The contrary construction is adopted in Lyndonville N. B. v. Folsom, 7 N. M. 611, 38 Pac. 253; Sabin v. Bank, 21 Vt. 353, and Application of Murphy, 51 Wis. 519, 8 N. W. 419; also in Iowa, where the statute is the same as our section 234, but the stock book is open to the public (Ft. Madison Co. v. Bank, 71 Iowa, 270, 32 N. W. 336, 60 Am. Rep. 789; Ottumwa S. Co. v. Stodghill, 103 Iowa, 437, 72 N. W. 669), and in Colorado, where the statute declares that the transfer "shall not be valid for any purpose whatever," until it is entered on the books (First Nat. Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691).

In several of the states, under statutes which do not declare such transfers invalid between the parties, but merely declare that it is transferable only on the books of the corporation, it is held that the mode must be followed in order to pass the title, and that a levy will prevail over a transfer not properly made. In other states the opposite rule is followed. We do not consider it necessary to discuss these cases. The condition of the law is well stated in 2 Cook on Corporations, at the end of section 490, as follows: "It may be added, in regard to this whole subject, that the decisions and statutes of the various states show clearly that public policy and the legitimate demands of trade have gradually caused the courts and Legislatures of the various states to establish a rule that a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the pledgee or purchaser to obtain a registry on the corporation books is not fatal to his interest in the stock." See note 1 to section 488 of Cook for list of states which have changed their statutes to conform to this rule, where the courts had previously adopted the opposite doctrine.

The certificate here in question recited that it was transferable only on the books of the company and on surrender of the certificate. This did not affect the transfer. The right to sell, transfer, or pledge corporation stock is given by statute and it cannot be curtailed by a recital in the certificate. The recital served to give notice of the rights of the corporation under the statute, with respect to transfers, but it did not change the relative rights of the stockholder and third persons, with respect to each other, nor make the unregistered transfer subject to the attachment lien.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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157 Cal. 605

FOX v. CAMPBELL. (L. A. 2,436.)

(Supreme Court of California. April 13, 1910.)

1. Boundaries (§ 37*)—Evidence—Width of Street.

Evidence, in an action to determine boundary between two lots, depending on the width of a street *held* to show it to be of the width shown by the plat, by reference to which the lots were conveyed.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 37.*]

2. Costs (§ 260*)—Frivolous Appeal.

Damages will be awarded for the taking of a frivolous appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 983; Dec. Dig. § 260.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Edwin R. Fox against R. M. Campbell. Judgment for defendant. Plaintiff appeals. Affirmed.

Lucius M. Fall and Webster Davis, for appellant. H. H. Appel, for respondent.

HENSHAW, J. This action was brought to determine conflicting claims to a strip of land 10 feet wide and 165 feet long, alleged by plaintiff to be a portion of his lot 10, and by defendant to be a portion of his lot 9, in block V of the Mott tract, city of Los Angeles.

Plaintiff and defendant both derive title from a common source, and their deeds convey to them their respective lots according to the map of the Mott tract found in Book 14, p. 7, of the Miscellaneous Records of the county. This map was introduced in evidence, from which it appears that lot 9 is situated at the southwesterly corner of block V, and is bounded upon the west by Grasshopper street, now Figueroa street, and on the south by First street; that the lot has a depth of 165 feet on First street, and a frontage of 60 feet on Grasshopper street. Adjacent to this lot 9 and to the north thereof is lot 10, with the same depth and the same frontage upon Grasshopper street. Admittedly plaintiff owns lot 10. Admittedly defendant owns lot 9. The south line of First street and the intersecting corner of this south line of First street with Figueroa street are established upon the ground, and undisputed. Measuring from this corner northerly along the easterly line of Figueroa street plaintiff contends that the southerly boundary line of his lot is 120 feet from that point, while defendant contends that this boundary line between lots 9 and 10 is 128 feet from the southern corner of First and Grasshopper streets. Herein lies the sole contention between the parties. The map of the Mott tract, as has been said, is the recorded plat to which the deeds of both of these parties make reference. That map shows First street to be 68 feet wide running from Grasshopper street easterly to Hope street. Moreover, by the deeds of the predecessors in interest of both these parties, First street is described as being 68 feet wide, and the witness Ward, a clerk in the city engineer's office, testifies that the city found that First street as far as Hope was 60 feet wide and "from Hope street to Figueroa it was 68 feet wide according to the map recorded in Book 14, at page 7, of Miscellaneous Records, and west of Figueroa it was 68 feet wide." Here is abundant evidence that First street is 68 feet wide. Moreover, it is evidence of the strongest character against appellant's contention, since it is evidence of the very map by reference to which his deed to lot 9 is described. The southerly corner of First and Figueroa streets being established on the ground, and it being further established that First street is 68 feet wide, it follows of necessity that the southerly line of plaintiff's lot 10 begins 128 feet from the southerly line of First street. So the court found and decreed, upon evidence so complete and so satisfactory that the shufflings and evasions found in plaintiff's testimony cannot be said to raise even a conflict against it.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order appealed from are therefore affirmed, with damages awarded to respondent against appellant in the sum of $100 for the taking of a frivolous appeal.

We concur: MELVIN, J.; LORIGAN, J.

(157 Cal. 596)

In re COLLEGE HILL LAND ASS'N OF CITY OF SAN DIEGO. (L. A. 2,391.)

(Supreme Court of California. April 9, 1910.)

1. Appeal and Error (§ 356*)—Time—Scope of Review.

Where an appeal is not perfected until more than 60 days after entry of judgment. Code Civ. Proc. § 939, prohibits a review of the evidence, or a consideration of the findings of fact objected to.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 356.*]

2. Corporations (§ 610*) — Dissolution — Statutes—Amendment.

Under Const. art. 12, § 1, providing that all laws concerning corporations may be altered from time to time or repealed, stockholders of a corporation who became such prior to the amendment in 1907 of Code Civ. Proc. § 1228 (St. 1907, c. 254), providing for a dissolution on a two-thirds vote of all stockholders, so as only to require a two-thirds vote of the subscribed capital stock, were not entitled to a dissolution vote in accordance with the law as it existed before amendment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

3. Constitutional Law (§ 126*)—Charter—Repeal — Reserve Power—Stockholders' Contract.

The reserved power of the state to alter or repeal the charter of a corporation is a part of the contract of every stockholder of a corporation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 366–369; Dec. Dig. § 126.*]

4. Corporations (§ 610*)—Dissolution—Application.

Where the stock of objectors to the dissolution of a corporation had been long since sold for delinquent and unpaid assessments, an affidavit for a continuance of the dissolution proceedings to afford time to take objectors' depositions, to prove that they were the parties to whom stock certificates alleged in their objections were issued, charging that they had paid all assessments on the stock on which they ever had or received any notice or knowledge, and that their post office address had been at all times known to the secretary, but without any allegation that they had paid all the assessments levied, or that the assessments under which the stock was sold were illegal and void, was insufficient, and the denial of the continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

In the matter of the dissolution of the College Hill Land Association of the City of San Diego. From a judgment of dissolution, Catherine B. Chase and another appeal. Affirmed.

J. H. McCulloch and C. N. Andrews, for appellants. Sam Ferry Smith, for respondent.

HENSHAW, J. The College Hill Land Association of the City of San Diego was a private corporation, organized for profit. It had a capital stock of $2,000,000, divided into 20,000 shares of the par value of $100 each. Eleven thousand and seven hundred and seventy of these shares were issued and outstanding. At a special meeting of the stockholders called for that purpose on February 1, 1908, at which there were present and represented 10,667 shares of the capital stock, it was unanimously decided to dissolve the corporation and distribute its assets. In conformity with this resolution the directors of the corporation, on the 24th day of February, 1908, filed a petition in due form in the superior court of the county of San Diego, seeking a decree of dissolution. The court set the hearing for Monday, the 6th day of April, and due notice thereof was given, as required by law. On the 7th day of April, Catherine B. Chase and C. W. Chase, appellants herein, claiming to be stockholders of the corporation and owners of about 340 shares of the stock, filed objections to the dissolution, and alleged grave corporate mismanagement on the part of the directors and others connected with the corporation. The hearing of the petition and the objections thereto were set for the 20th day of April, 1908. Upon that day the objectors asked for a continuance of 30 days in which to take their own depositions in New York. This request was denied by the court. The matter proceeded to a hearing, and, after evidence taken, a judgment of dissolution was rendered on that date. The court found that the objectors, Catherine B. Chase and C. W. Chase, were not stockholders of the corporation, and also found against them upon all other material allegations. The court further found that all and singular the allegations and statements in the application for dissolution were true. The judgment was rendered upon April 20, 1908, and entered April 22, 1908. The appeal was taken October 10, 1908, more than 60 days after entry of judgment. It does not permit a review of the evidence. Code Civ. Proc. § 939; Ryland v. Heney, 130 Cal. 426, 62 Pac. 616; Sather Banking Co. v. Briggs

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Co., 138 Cal. 724, 72 Pac. 352; Thomas v. N. W. Mutual Life Ins. Co., 142 Cal. 79, 75 Pac. 665. The same reason forbids the consideration of other findings of fact objected to by appellants.

The objection to want of jurisdiction appearing upon the face of the petition is based upon appellants' contention that, at the time when they became stockholders, the law required a two-thirds vote of all the stockholders (Code Civ. Proc. § 1228), although in 1907 the law was amended to read that dissolution might be had upon a vote "of the holders of two-thirds of the subscribed capital stock." St. 1907, c. 254. The contention of appellants is that the law as it stood at the time when they purchased their stock conferred upon them a legal right of which they could not be deprived by any subsequent legislative enactment. There is no force in this contention. Admittedly the petition for dissolution was in the form prescribed by section 1228 as amended in 1907. Section 1, art. 12, of our Constitution provides that "all laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." And, indeed, it is well settled that this reserve power to alter or repeal the charter of a corporation becomes a part of the contract of every stockholder of the corporation organized thereunder. Venner Co. v. U. S. Steel Corp. (C. C.) 116 Fed. 1012; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; Thompson on Corporations (2d Ed.) §§ 402, 408.

The court did not abuse its discretion in refusing the motion for continuance. The application for a continuance was made upon the ground that it was necessary to take the depositions of the objectors to prove that they were the parties to whom certificates of stock set forth in the objections filed were issued by the company; that they had paid all the assessments upon the stock upon which they ever had or received any notice, or of which they had any knowledge, and that their post office address and their whereabouts have been at all times well known to the secretary and other officers of the corporation. It was shown at the hearing that these objectors were the persons to whom the certificates of stock had been issued. It was also shown that the stock had long since been sold for delinquent and unpaid assessments. The affidavit in support of the motion for a continuance does not state facts which would be a defense upon the merits. It asserts merely that the objectors paid all the assessments of which they had any knowledge, but it is nowhere asserted that they had paid all the assessments levied, or that the assessment under which their stock was sold was illegal or void. It was further made to appear that the sale of their stock had been made many years ago, with ample time accorded to these appellants to have instituted a proper proceeding to set aside the sale upon the ground of its invalidity, if any such invalidity existed. Their failure so to have done exhibits a lack of diligence in itself, justifying the court in refusing the continuance.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

157 Cal. 599

CARY et al. v. LOS ANGELES RY. CO.

(L. A. 2,417.)

(Supreme Court of California. April 13, 1910.)

1. Carriers (§ 303*)—Injury to Passenger—Starting Car—Signal by Another Passenger.

There was no negligence of a street car company in the starting of a car, throwing a passenger who was alighting, the starting signal, two bells, having been given, without authority, by another passenger, neither the motorman nor conductor having any reason to believe it would be so given, the motorman believing it was given by the conductor, the conductor instantly on hearing the signal calling to the motorman not to start, and the motorman then endeavoring to prevent the starting; the company, through its motorman and conductor, not being required to anticipate and take precautions against such an unauthorized signal.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 303.*]

2. Carriers (§ 315*)—Injury to Passenger—Negligence—Pleading and Proof.

The only allegation of negligence in an action for injury to a passenger on a street car being that, while he was alighting, the car was negligently started with a jerk, the fact that the car was crowded, and passengers were standing in the aisle, cannot be considered as a matter of negligence, but only as a part of the conditions existing at the time.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 315.*]

3. Negligence (§ 111*)—Pleading.

While negligence may be charged in general terms, the particular act relied on as negligence must be specified.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182–184; Dec. Dig. § 111.*]

4. Carriers (§ 305*)—Injury to Passenger—Actionable Negligence.

While violation of Civ. Code, §§ 2102, 2184, 2185, providing that a carrier of passengers must not overcrowd or overload his vehicle, must provide a sufficient number of vehicles to accommodate all passengers who can be reasonably expected to require carriage at the time, and must provide every passenger with a seat, will establish negligence, it will not authorize recovery for injury to a passenger, while alighting, from being thrown by the starting of the car, on the unauthorized signal of another passenger; it not being shown to have any direct and causal connection with the injury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 305.*]

5. Carriers (§ 321*)—Duty of Conductor—Instructions.

The collection of fares being part of the duty of the conductor of a street car, though it is equally his duty to look after the safety of his passengers, it is not error to instruct that he was in the performance of his duty while collecting fares; it appearing that he was collecting fares when the car stopped, that before giving his starting signal he would have gone to the platform to see whether all passengers so desiring had alighted, and that before he had done so a starting signal was given by a passenger, resulting in injury to another passenger, who was alighting.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

6. TRIAL (§ 141*)—DIRECTING ANSWERS BY JURY.

It is not an invasion of the province of the jury to direct answers to questions not in dispute and established without contradiction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Sarah P. Cary and another against the Los Angeles Railway Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Hannon & McCormick, for appellants. Gibson, Trask, Dunn & Crutcher, for respondent.

HENSHAW, J. This action was instituted by plaintiffs to recover damages alleged to have been sustained by plaintiff Sarah P. Cary while debarking from one of defendant's cars. The negligence, and the only negligence charged against defendant is found in the following allegation: "And as said Sarah P. Cary was in the act of leaving said electric car, while the same remained stopped, and while in the act of stepping off of said car, the said defendant, through its agents and servants, negligently and carelessly and wantonly caused the said car to start forward with a sudden jerk, and with great force, thereby throwing said Sarah P. Cary violently from said electric car and onto the ground, whereby the said plaintiff sustained serious bodily injuries." The answer denied negligence. The case was tried upon the issue of defendant's negligence, and on that issue the jury returned a general verdict in favor of the defendant, together with a special verdict, by which latter they found that two bells were a signal used by the conductor to the motorman to start the car, and that it was not the duty of the motorman, under the rules of the company, nor was it a custom of the motormen, upon receiving the signal of two bells, to ascertain whether passengers were alighting from the rear steps. That the car stopped at a street for the purpose of allowing plaintiff to alight therefrom. That the conductor was at that time at the front of the car collecting fares. That the signal of two bells was given by some passenger standing at the rear of the car. That the motorman supposed it was given by the conductor, and at once started the car. That instantly upon hearing the two bells the conductor cried out, warning the motorman not to start, but to stop his car. The motorman thereupon endeavored to prevent the starting of the car. That the car moved only from two to six feet. That neither the conductor nor the motorman had any reason to believe that any signal, by bell or otherwise, would be given by any other person than the conductor. That the proximate cause of the injury to plaintiff arose from the unauthorized act of the passenger in giving the signal to the motorman to start the car.

The evidence abundantly supported the special verdict and findings of fact above set forth. The only question upon the verdict is whether or not the facts themselves constitute a defense. Appellants present no authorities against the proposition that the facts found by the jury show an absence of negligence on the part of the defendant, and establish that the accident occurred by the unwarranted intervention of an unauthorized stranger, against whose unexpected act the company was not bound to take precautions. That such is the law governing the conduct of defendants in such cases is abundantly settled. Thus in Krone v. Southwest Mo. E. R. Co., 97 Mo. App. 609, 71 S. W. 712, the trial court refused to give an instruction which declared: "The court instructs the jury that, if they believe from the evidence that the conductor stopped the car at Elizabeth street to let Mrs. Kirksey and plaintiff get off said car, and that Mrs. Kirksey got off, and, before plaintiff could get off, some one, not an employé of the defendant, without the knowledge or authority of the conductor, rang the bell, and gave the motorman the signal to start, and in pursuance of said signal the motorman started the car, and plaintiff fell off, then there was no negligence on the part of defendant, and plaintiff cannot recover in this case, and their finding will be for defendant." The Supreme Court said: "We cannot see upon what theory the court refused said instruction, for if it was true that some person other than the conductor, and not in defendant's employ, gave the signal which started the car while plaintiff was attempting to get off, causing her fall and injury, it was not the result of any negligence on the part of defendant, but that of a careless or mischievous stranger, over whom the defendant had no control." To the same effect are McDonough v. Third Ave. R. Co., 95 App. Div. 311, 88 N. Y. Supp. 609; Fanshaw v. Norfolk & Portsmouth Tr. Co. (Va.) 61 S. E. 790; O'Neil v. Lynn & B. R. Co., 180 Mass. 576, 62 N. E. 983; Ellinger v. Philadelphia R. Co., 153 Pa. 213, 25 Atl. 1132, 34 Am. St. Rep. 697; Gulf,

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C. & S. R. Co. v. Phillips, 32 Tex. Civ. App. 238, 74 S. W. 793.

It was admitted that at the time of the accident the car was crowded, and that passengers were standing in the aisle. Appellants make complaint of the court's rulings and instructions upon this point, which were to the effect that the fact that the car was crowded with passengers would not entitle the plaintiffs to recover, and could not be considered by the jury, except as a part of the conditions existing at the time. The court's rulings and instructions in this regard were correct. The crowded state of the car was permitted to be shown as one of the conditions at the time of the accident. No negligence was alleged by plaintiffs because of the crowded condition of the car, and no causal connection between the crowded condition of the car and the accident was in any way shown. While it is permissible to charge negligence in general terms, it is nevertheless necessary to specify the particular act or acts alleged to have been negligently done. Stevenson v. S. P. Co., 102 Cal. 144, 34 Pac. 618, 36 Pac. 407; Smith v. Buttner, 90 Cal. 95, 27 Pac. 29. If appellants had desired to predicate negligence upon the crowded condition of the car they should have done so by appropriate allegation. But in this case, if they had done so, it is apparent that no different result would have been reached, since the overcrowded condition of the car was in no way the proximate cause of the accident, and it is but a matter of speculation as to whether or not the conductor, at the time actually engaged in taking up fares, would have seen the unauthorized act of the passenger who rang the starting bell if the car had not been crowded. A violation of the provisions of the Civil Code (Civ. Code, §§ 2102, 2184, 2185) will establish negligence, and where injury results from such negligence a recovery may be had. But in every case the particular negligence to avail plaintiff must have some direct and causal connection with the injury complained of. For example, it is negligence if the whistle of a locomotive engine is not sounded and its bell rung at crossings, but if the train were derailed by a misplaced switch, an injured passenger could not base his recovery upon the showing that somewhere along the journey the whistle had not been blown or the bell sounded when these things should have been done. In such a case the employer will not be liable merely because his act constituted a violation of law, but only if it proximately caused the injury complained of. So, although the violation of such a statute is negligence per se, there must be a causal connection between the unlawful act and the injury, which must be shown in the pleading and by the proof, or the action fails. Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Hendricks v. Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561; McVay v. Brooklyn, etc., R. Co., 113 App. Div. 724, 99 N. Y. Supp. 266; Snyder v. Colorado Springs R. Co., 36 Colo. 288, 85 Pac. 686.

It was not error for the court to state, as it did, that the conductor was doing his duty, or was in the performance of his duty, while collecting fares. Unquestionably, and as matter of law, the collection of fares and the issuance of transfers is a part of the duty of the conductor of a street car. It is, of course, equally his duty to look after the safety of his passengers while on the car and embarking and debarking therefrom. In this case it appears that the conductor was actually engaged in taking fares at the time the car stopped, and before giving his starting signal would have proceeded to the platform to see whether all intending passengers had left the car. But before he had done so the starting signal was given.

Answers to certain special questions which the court itself directed were upon matters not in dispute and established without contradiction. In this there was no invasion of the province of the jury. Baumann v. C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

The court did not err in giving its instruction 4. The instruction, in hypothetical form, stated the uncontradicted facts of the accident, saying that: "If some passenger upon the rear of defendant's car, over whom the defendant had no control, gave the signal to start said car, and that the motorman in charge thereof responded to said signal and started his car," etc. It is argued against the instruction that it eliminates from the consideration of the jury the question as to whether the defendant, through its motorman and conductor, should have anticipated the unauthorized giving of the signal. But there is no word of testimony in support of this. The law is to the contrary of appellants' contention. "A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before, and which may not reasonably be anticipated. * * * That which never happened before, and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its happening and guarding against that remote contingency." Holt v. S. W. Mo. E. R. Co., 84 Mo. App. 443. Moreover, the jury specifically found that the motorman believed that the starting signal was given by the conductor.

No other points call for special attention.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

157 Cal. 613

FRANKISH v. GOODRICH et al. (L. A. 2,308.)

(Supreme Court of California. April 15, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 32*)—BOUNDARIES—INCLUSION IN CITY.

Under Pol. Code, § 1576, providing that each city or incorporated town, unless subdivided by the legislative authority thereof, shall constitute a separate school district, outside territory belonging to a school district becomes, on inclusion within the boundaries of a city, part of the latter's school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 52; Dec. Dig. § 32.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 42*)—HIGH SCHOOL DISTRICT—BOUNDARIES—INCLUSION WITHIN CORPORATE LIMITS.

Under Pol. Code, § 1670 (prior to its repeal in 1909), and other related sections, a high school district, so far as its territorial limits are concerned, is not a distinct entity from the school district, and, when the school district loses part of its territory by the inclusion thereof within the corporate limits of a city, the high school district also loses the same part of its territory.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 85; Dec. Dig. § 42.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 102*)—HIGH SCHOOL DISTRICTS—TAXATION.

Territory of a school district, which, by inclusion within city limits, becomes part of a new high school district, is taxable in the latter district only.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 237; Dec. Dig. § 102.*]

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Charles Frankish against J. B. Goodrich and others. From the judgment, defendants appeal. Affirmed.

Byron Waters, for appellants. Goodcell & Goodcell, for respondent.

HENSHAW, J. This is in form an action by a resident taxpayer of the Ontario high school district, on behalf of himself and all other residents and taxpayers of the district, to restrain the school trustees of the Ontario school district and the trustees of the Upland school district, and the county superintendent of schools of the county, from acting as a union high school board of trustees, and from exercising or attempting to exercise any authority or control over the high school or property or the funds of the Ontario high school district; in effect, the action seeks to have defined the boundaries and status of the Ontario high school district, concerning which matters doubt has arisen, growing out of the following state of facts: The Ontario school district came into existence in 1901, and its territory comprised all of the lands of the city of Ontario, a municipal corporation of the sixth class, and certain additional outside territory adjacent to the city. The inhabitants of the Ontario school district, as thus constituted, voted to establish, and in due course did establish and maintain, a high school therein, and thus the Ontario high school district, embracing the same territory as the Ontario school district, came into and continued in existence. In 1906 the city of Upland was incorporated as a city of the sixth class. Its boundaries included a portion of the territory adjacent to the city of Ontario, which territory had formerly been a part of the Ontario school district. They likewise embraced territory which had belonged to still a third school district and which had never been a part of the Ontario district. By virtue of the incorporation of the city of Upland, all of the territory within its corporate boundaries became, by operation of law, a school district known to the law as the "Upland school district." The position of appellants is that, by the annexation to the Upland school district of the outlying territory formerly a part of the territory of the Ontario school district and Ontario high school district, the territory so annexed did not cease to be a part of the territory of the Ontario high school district, but did at once become also a part of the Upland school district; that thus, by operation of law, there was created a union high school district, composed of the Upland School district and the Ontario school district, and the defendants were therefore justified in undertaking, as they did, to control the funds and property of the Ontario high school district while acting as the trustees of the Ontario-Upland Union high school district.

It is unquestioned that the outside territory formerly belonging to the Ontario school district, upon its inclusion within the boundaries of the city of Upland, became a part of the Upland school district. Pol. Code, § 1576; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Bay View School District v. Linscott, 99 Cal. 26, 33 Pac. 781; Kramm v. Bogue, 127 Cal. 122, 59 Pac. 394. But while it is admitted that the outside territory formerly belonging to the Ontario school district ceased to be a part of that school district by its inclusion within the boundaries of the Upland school district and became a part of the Upland school district, nevertheless it is insisted that this territory is not severed from the Ontario high school district, as distinguished from the Ontario school district; that it still remains a part of the Ontario high school district, subject to its burdens and entitled to its rights; and that by virtue of this, through some method not defined in appellants' brief, it is declared that "by operation of law there was thus created the Union high school district composed of Upland school district and Ontario school district."

But a reading of section 1670 of the Political Code and of the other sections bearing upon the question makes it manifest that a high school district, so far as its territorial limits are concerned, is not a distinct entity from the school district. When a school district has resolved to erect and maintain a high school, and has taken proper steps to that end, a so-called "high school district" is created. But it comprises the territory of the school district, its boundaries are the boundaries of the school district, and those boundaries are enlarged or contracted, increased or diminished, as are the boundaries of the school district. As, admittedly, the Ontario school district lost a part of its territory by the inclusion of that territory within the corporate limits of the city of Upland, so, necessarily, the Ontario high school district also lost the same part of its territory. But by that loss neither the existence nor the identity of the Ontario school district nor of the Ontario high school district was affected. It should be here said that we are not unmindful of the fact that section 1670 of the Political Code has been repealed. It is discussed as being in force, because it was in force at the time of these proceedings, and was repealed in 1909 (St. 1909, c. 311, § 3); its place being taken by the similar provisions of section 1720 et seq. of the Political Code. For obvious reasons, a high school district has its own distinct funds, property and government. Chico High School Board v. Board of Supervisors, 118 Cal. 116, 50 Pac. 275; Brown v. City of Visalia, 141 Cal. 372, 74 Pac. 1042. The high school is to be maintained at the expense of the school district, and, if the high school is discontinued, the high school property is to be sold and the proceeds, together with the high school funds on hand, go to the school district. Section 1670, subdivision 21, of the Political Code, declares that a school district cannot lie partly within a high school district of a joint union high school district and partly without; while section 1733 of the Political Code, as it now reads (Code 1910), makes the declaration the more explicit, and in terms provides that "in all cases where the boundaries of a school district comprised within any high school district shall be changed so as to exclude territory therefrom, such excluded territory shall, except as hereinafter provided, be excluded from the high school district." This is not a new declaration of law, but a declaration of the law as it has stood, put in precise words, so as to remove all doubt.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The contention that the portion of the Ontario school district now belonging to the Upland school district is still subject to taxation for the support of the Ontario high school district, and that therefore it must continue to be a part of the Ontario high school district, is without foundation in law. The territory is no longer subject to taxation in the Ontario high school district, but in the Upland school district alone. Hughes v. Ewing, supra; Bates v. Gregory, 89 Cal. 387, 26 Pac. 891.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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157 Cal. 607

BACKMAN et al. v. PARK et al.

(L. A. 2,399.)

(Supreme Court of California. April 14, 1910. Rehearing Denied May 13, 1910.)

1. VENDOR AND PURCHASER (§ 144*)—TITLE OF VENDOR—AFTER-ACQUIRED TITLE.

Though plaintiff did not have title to property when she agreed to convey it, if she procured the execution of a valid deed from the then owner and tendered it as vendor to the purchaser within the required time, she could sue for damages for breach of agreement to purchase on the latter's refusal to accept the deed and recover damages as vendor under Civ. Code, § 3307, making the detriment caused by breach of agreement to purchase realty any excess of the amount which would have been due the seller under the contract over the value of the property to him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 271–275; Dec. Dig. § 144.*]

2. VENDOR AND PURCHASER (§ 143*) — PERFORMANCE OF CONTRACT — TENDER—WAIVER OF IRREGULARITIES.

While the purchaser could have insisted on title deraigned through plaintiff, instead of through the owner of the record title, who executed the deed, failure to object to the deed tendered on that ground waived such irregularity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 267–270, 311; Dec. Dig. § 143.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Mary Backman and others against William Park and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

F. A. Stephenson, for appellants. W. R. Hervey, Newman Jones, and W. W. Butler, for respondents.

HENSHAW, J. This action is by the vendor to recover damages for defendant's breach of agreement to purchase certain real property situate in the city of Redondo Beach. By stipulation, many of the important facts were agreed upon. At the time of the execution of the contract the title to the property stood in the name of Kate Minerva Backman Palmer, a daughter of Mary Backman, plaintiff, and there was nothing of record to disclose that plaintiff had any title to or interest in the property. But, as provided by, and in accordance with, the terms of the agreement, plaintiff immediately procured the execution of a grant, bargain, and sale deed, executed by Kate Minerva Backman Palmer and her husband, and procured from the Title Insurance & Trust Company of Los Angeles an unlimited certificate of title. On the 7th day of August, within the time limited by the contract, plaintiff tendered to the defendants the deed to the property so executed by Kate Minerva Backman Palmer and her husband, and again, on the 16th day of August, made a like tender, offering also the sum of $20 to cover taxes for the fiscal years of 1905 and 1906, the amount of which taxes had not then been determined. The defendants refused to accept the conveyance or to execute any note or mortgage as contemplated by their agreement. It is not questioned here by defendants that the agreement to purchase was in form and substance sufficient to charge them. No objection was made by them to the certificate of title or to the deed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court gave judgment for defendants upon the contention, on which they here rest, that as it appears that plaintiff Mary Backman, at the time of entering into the contract with defendants, did not have any title or interest in or to the property which she agreed to convey, she was not a vendor under section 3307 of the Civil Code. They further insist that their position finds abundant support in Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, and Gray v. Smith, 83 Fed. 828, 28 C. C. A. 168. As to the cases which appellants cite in support of their contention that the contract was valid, and that plaintiff Mary Backman, under that contract, stood in law as a vendor, they answer that the cases are to be read in the light of their facts, and that, so read, it appears that in each instance the purported vendor had some interest or title which he could perfect.

The question is thus presented whether one who, at the time of entering into the contract, has no right or title to the land in question, may make a valid contract for the sale of that land to a vendee. In this state the question has long been settled in favor of the validity of such contracts. In Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320, the first installment had been paid under an executory contract for the purchase of land. No other installments had been paid, and after the time for the payment of the last installment the vendor had conveyed the land for a valuable consideration to a third party; whereupon the vendee brought action to recover the first installment. This court, by Temple, J., first discussed the doctrine of rescission whereby, upon mutual abandonment, either party may recover the consideration paid, but declared that this was not a case for rescission, but was an effort by the purchaser, after his own default, to recover money paid by him when the vendor has not refused to complete the sale. Says the court: "The conveyance by the vendor was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent on him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." It will be noticed that herein the rule is fairly and squarely declared, not as respondents would have it, that one may sell land to which he has an imperfect or inchoate title, but that one may sell land to which he has no title, and the contract will be valid and enforceable if at the time of performance by him he is able to convey good title. Joyce v. Shafer is approved in Shively v. Semi-Tropic, etc., Co., 99 Cal. 261, 33 Pac. 848, in Garberino v. Roberts, 109 Cal. 125, 41 Pac. 857, and finally in Hanson v. Fox, 155 Cal. 106, 99 Pac. 489, where the previous cases are reviewed, and it is said: "Nor does the fact which the court found, namely, that defendant had no title to the lots, afford any reason for the interposition of equity. In a case such as this it is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. Such is and always has been the settled rule in this state." Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, contains no declarations of law at variance with this, and indeed if it did, of necessity it would follow that those declarations were overruled by the above-quoted utterances of this court in later cases. Easton v. Montgomery declares: "We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly, and where transfers are so frequent, it is very common for the purchaser of land to make a transfer of land before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he had himself become clothed with the absolute title. * * * It is not necessary, however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale." In Easton v. Montgomery the vendee sought to justify his refusal to proceed upon the ground of a defect in the vendor's title. The court was not considering the case of a vendor without title at the time of making the contract, and its language is addressed to the situation actually before it. The court lays down the well-established rule that in every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the purchaser by his deed of conveyance a title unincumbered and without defect; but the vendor sufficiently complies with this obligation if he is able to give a good title at the time when, by the terms of his contract of sale, he is required to make the conveyance. Says the court: "It is not necessary that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof." Measured by the rule and language of Easton v. Montgomery, the plaintiffs by the tender of a good and sufficient deed to the property, within the time and under the terms limited by their contract, demonstrated their ability to acquire and transfer the title by the voluntary act of the parties who had formerly held it. Upon this subject, and in support of the doctrine of our court, reference may be made to Dresel v. Jordan, 104 Mass. 407, Daily v. Minnick, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840, and Logan v. Bull, 78 Ky. 607.

Gray v. Smith, 83 Fed. 828, 28 C. C. A. 168, does not express views at variance with those adopted by this court, and, if it did, it would be sufficient to say that those views, not being upon a federal question, would have no weight in overthrowing the deliberate judgments of this court. Gray v. Smith was an effort by a vendor to recover damages for the vendee's withdrawal from an executory contract of sale. But the vendor in that instance had neither title nor means of procuring title, and did not and was not able to tender title, but rested his right of action solely upon the default and refusal of the vendee to proceed. It is in view of these facts that the circuit cour used the following language: "The case presented for our consideration therefore was one in which the plaintiff made a contract to sell real estate of which he was not the owner and in which he had no right, title, nor interest, nor the ability to compel, by the law or otherwise, a conveyance from the owner. * * * One who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated if the purchaser withdraws from the contract." This last declaration is in strict accord with the views of this court, with the proviso added that the time limited by the contract in which the vendor is to procure title has at the time of the vendee's withdrawal expired. Otherwise, and by the very terms of the contract, the vendor who has stipulated to make title by a certain date cannot be in default. Such in effect was the case of Burks v. Davies, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213, where the contract was a mere option, exercisable by the vendee at any time within its life, to purchase lands agreed to be conveyed by the vendor. As to some of these lands the vendor had no title, discovering which the vendee gave notice of rescission. The vendor at the time of the notice had not procured or taken steps to procure title to the lands which he did not own. As the vendee's option could be exercised at any time, it was held by this court that it became the vendee's duty to be ready, at all times within the period of the option during which a conveyance might be demanded by the purchaser, to convey good title to him of all the lands which he had agreed to sell, and his inability and unreadiness so to do justified a rescission of the option.

But the case at bar is radically and essentially different from the two which have last been considered. Here the vendor entered into a contract to make a conveyance within a given time. She made tender of full and complete title, and the tender was refused. True, the title tendered was not her own, and it is recognized that the vendee might have insisted upon title deraigned through the vendor. But their failure to object upon this ground was a waiver of the irregularity. Royal v. Dennison, 109 Cal. 558, 42 Pac. 39. The case then presented, in brief, is one where the vendor within the time limited by the contract has made good and sufficient tender of full and complete title to the land agreed to be sold. No reason in law or in equity exists for defendants' refusal to accept the tender, and for their breach of contract they are responsible in damages.

The judgment appealed from is therefore reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

157 Cal. 617

CANFIELD v. LOS ANGELES COUNTY.

(L. A. 2,432.)

(Supreme Court of California. April 15, 1910.)

1. Taxation (§ 398*)—Corporations—Stock—Taxable in State.

Corporate stock of domestic corporations owned by citizens is taxable at full value, less the value of the corporation's property taxed in the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 673; Dec. Dig. § 398.*]

2. Taxation (§ 169*)—Foreign Corporations—Stock—Taxable in State.

Assessments levied upon stock of foreign corporations and similar credits owned by residents are valid, even when the evidences of ownership are out of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 292; Dec. Dig. § 169.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by C. A. Canfield against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward Chapman, for appellant. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent.

MELVIN, J. Appeals are taken from a judgment and from an order denying plaintiff's motion for a new trial in this case and similar appeals are pending in two other cases which are practically identical with this one. They are Los Angeles Nos. 2,433 and 2,434, and are entitled Doheny v. County of Los Angeles, 108 Pac. 707. The briefs filed are pertinent to the appeals in all three of these cases, and it is agreed that the decision in this one shall apply to the other two. Plaintiffs seek to recover taxes paid under protest upon the ground that an assessment of stock in a domestic corporation to the individual stockholders is unauthorized and prohibited by the laws of the state of California. The superior court found that the Mexican Petroleum Company was on the first Monday in March, 1906, and thereafter, a corporation organized under the laws of this state and having its principal place of business in Los Angeles; that said corporation at that date and ever since has owned a large tract of land in Mexico, upon which many valuable wells producing petroleum are situated; that the corporation carries on its business of marketing and selling petroleum outside of the state of California; that the Mexican Petroleum Company has ever since its incorporation maintained offices in Los Angeles and governed its entire business from that city; that on the first Monday in March, 1906, there were 5,411,000 shares of the capital stock of the corporation outstanding and owned by individuals; that the value of this stock was 75 cents per share; and that the property of the corporation in California did not exceed $10,000 in value. The court concluded that plaintiff Canfield's shares (808,211 in number assessed for the sum of $323,285) had been correctly subjected to valuation by the assessor and to payment of the tax (amounting to $3,572.89). A similar conclusion of law was reached in the two cases in which the respondent Doheny sought return of the taxes paid on his stock for the years 1905 and 1906. In the former year he owned 5,400,000 shares of the stock, found by the court to be worth 15 cents a share, and this was assessed for $50,000; the amount of the tax being $550. In the latter year his holding of stock amounted to 1,729,000 shares, assessed for $691,600; the tax thereon amounting to $7,192.64.

Appellant's counsel seeks to establish the doctrine that the tax here considered is in substance a levy upon property lying outside of California and beyond the jurisdiction of this state, and that, having such extraterritorial application, it deprives the taxpayer of his property without due process of law and is therefore void, being in conflict with the fourteenth amendment of the Constitution of the United States.

These cases are practically identical in principle with Chesebrough v. City and County of San Francisco, 153 Cal. 559, 96 Pac. 288. In that case the assessor deducted the value of the corporation's property in California from the value of that of the stockholder who was assessed for almost the entire amount of the stock of the company. While here there was no such formal deduction, it will be seen that in each case now before us the difference between the actual value of the stock as found by the court and the amount for which it was assessed far exceeded the value as established by the court, of the corporation's property located within the territorial limits of the state of California. Therefore the law announced in the Chesebrough Case applies fully here. In that case this court quoted with approval from Commercial National Bank v. Chambers, 21 Utah, 324, 61 Pac. 560, 50 L. R. A. 346, as follows: "In the case at bar deductions were made from the value of the stock of the value of all real estate owned by the bank which is situate within the limits of the state, but deductions for its real estate without the state were refused by the assessor and board of equalization, but the court below ordered that the value of the real estate situate in other states should also be deducted from the value of the stock. In this we think the court erred. * * * The state has a right to fix its particular situs as to such stock (corporate stock) for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control. The bank, therefore, had no right to have the value of its real estate situate without the state deducted from the value of the stock. 'The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate or other property beyond the jurisdiction of this state, the latter having control over the shares and their value, the peculiar nature and value of the investment of the capital stock of the corporations beyond the limits of the state can form no proper subject for specific deduction or abatement from the true value of the shares of stock when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to real estate of the company situate within this state.' American Coal Co. v. Allegany County, 59 Md. 185; Dwight v. Boston, 12 Allen [Mass.] 316, 90 Am. Dec. 149; Nevada Bank v. Sedgwick, 104 U. S. 111, 26 L. Ed. 703; Kelley v. Rhoades, 7 Wyo. 237, 51 Pac. 592 [39 L. R. A. 594] 75 Am. St. Rep. 904, affirmed in 9 Wyo. 352, 63 Pac. 935, 87 Am. St. Rep. 659. See same cases, 188 U. S. 1, 23 Sup. Ct. 259 [47 L. Ed. 359]; Commercial Nat. Bank v. Chambers, 182 U. S. 556, 21 Sup. Ct. 863 [45 L. Ed. 1227]."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

After some further analysis of the provisions of the Constitution and the Code applicable to the discussion, this court, in Chesebrough v. City and County, used the following language, which, unless we make a radically different rule, is decisive of the point here considered: "Applying this principle to the section in question in connection with the constitutional provisions requiring the taxation of all property, including shares of stock, at its full value, and it must be taken to mean that, when the property of the corporation in the state is taxed directly to the corporation, the shares of stock held here and subject to taxation shall not, to the extent that the property represented by it is taxed, be thus taxed. This exemption can only be extended, however, to deductions from the value of the shares of stock, the corporate property of which is situated in this state, and directly taxed to the corporation. It is the purpose of all revenue laws, as nearly as possible, to impose upon all property its just proportion of taxation, and the construction of the statute should not be had which will permit shares of stock held here, of vast value in domestic corporations whose properties are located beyond the state, to escape their just proportion of such taxation. Under these views the shares of stock of the Tacoma Mill Company held by the estate of Hanson, except to the extent that the property of the corporation in this state was actually assessed and taxed to the company, were taxable to their full value."

But in spite of the opinion just quoted and the provisions of section 1 of article 13 of the Constitution of California, the attorney for appellants quotes the applicable portion of that constitutional provision and comments upon it in part as follows: "Section 1 of article 13 provides that: 'All property in the state shall be taxed in proportion to its value to be ascertained as provided by law. The word "property" as used in this article and section is hereby declared to include stocks,' etc. Here, then, is an express declaration that it is only property in the state that is subject to taxation, and the word 'property' is construed to include stocks only as that word is used in this article and section. It seems to us that this is almost an express declaration that the word 'property' shall not be construed to include any of the things mentioned unless they are within the state. The words 'in this state' certainly do not necessarily mean property which is in fact out of the state and only in this state theoretically by virtue of some legal fiction, and so we say that, accepting the construction most consonant with the justice of the case, we should not extend it to include stocks representing properties which are physically beyond the state's jurisdiction."

When we consider the purpose of taxation, it must be apparent that there should not be a construction at variance with the ordinary meaning of the words of the above-quoted section of the Constitution. Citizens are taxed for the support of the government that protects them and their property. It would be manifestly unfair to tax one citizen for personal property of a tangible, salable kind located in California and omit the imposition of a similar burden on the possessors of equally valuable and vendible personalty, just as difficult to protect, just as much subject to the law of supply and demand in this state, because the value of that property depends in whole or in part upon the holdings of a corporation in a country where they may or may not be taxed. In Bank of Commerce v. Tennessee, 161 U. S. 146, 16 Sup. Ct. 456, 40 L. Ed. 645, it was held that "the capital stock of a corporation and the shares into which such stock may be divided and held by individual stockholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed and it is not double taxation."

The doctrine for which appellants contend would in many cases prevent the assessment in California to residents of this state of valuable stock in foreign corporations. This would be true, at least, in respect to the stock of those corporations having their entire property in other countries. Assessments levied upon such stock and similar credits, however, have been held to be valid even when the evidences of ownership were out of the state. Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145; Estate of Fair, 128 Cal. 613, 61 Pac. 184.

In Ohio this question has come up in practically the same manner in which it is presented here, in a case in which the assessment of stock in a foreign corporation was involved. In that case (Bradley v. Bauder, 36 Ohio St. 34 [38 Am. Rep. 547]) the court said: "But it is said that because the capital of the company is invested in real and fixed property in the state where the corporation is located, and in which state taxes upon the same are regularly levied and paid, a tax here upon the shares of stock of those residing here is a tax upon the same property, and therefore results in double taxation. The argument is: That the capital of the corporation is invested in property which is taxed in the name of the corporation, and that the shares of the capital stock, when owned by individuals, only represent proportions in the ownership of such property, and hence to tax the shares is another mode of taxing the property of the corporation, and that a tax upon both, although the tax upon one is imposed in another state, violates the rule or principle of equality established by the Constitution. This argument, however plausible it seems, has never met with favor from the courts. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the same jurisdiction. Here the property owned by the plaintiffs is not only not the same as that owned by the corporation, but its situs, so far as shares of stock are capable of one, is in a different state. * * * The constitutional power to tax shares of stock, owned by our citizens in corporations located without the state, does not depend on whether the capital of the corporation is or is not taxed in the state where the corporation is created. The power is the same, whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the Constitution would be made to depend upon the operation of laws of a foreign jurisdiction—a proposition so obviously ill founded that the moment it is stated its falsity becomes apparent."

In the matter of taxing the shares of stock in a domestic corporation owning property without the state, that court has gone even beyond the doctrine in the Chesebrough Case, because it sanctions assessment of the stock without deduction for the value of the corporation's property in the state. Lander v. Burke, 65 Ohio St. 532, 63 N. E. 69.

After a careful examination of all the authorities presented, we see no reason to change the rule expressed in Chesebrough v. City and County of San Francisco, supra, and the other cases to which reference has been made herein.

The judgment and orders from which appeals are taken are therefore affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J. SHAW, J., did not sit in the foregoing cause.

157 Cal. 624

DOHENY v. LOS ANGELES COUNTY (two cases). (L. A. 2,433, 2,434.)

(Supreme Court of California. April 15, 1910.)

In Bank. Appeals from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Two actions by E. L. Doheny against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward Chapman, for appellant. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent.

PER CURIAM. For the reasons expressed in the opinion of this court in Canfield v. County of Los Angeles, (L. A. 2,432) 108 Pac. 705, the judgments and orders from which appeals are taken are affirmed.

157 Cal. 634

LOUSTALOT v. McKEEL. (L. A. 2,460.)

(Supreme Court of California. April 19, 1910.)

1. APPEAL AND ERROR (§ 843*)—REVIEW—MATTERS NOT NECESSARY TO DECISION.

Where, in ejectment for a strip of land along the boundary line between plaintiff and defendant, the court found that defendant was the owner in fee of the strip, and that plaintiff was estopped to assert any claim thereto, and the finding of estoppel is supported by the evidence, and is sufficient to sustain the judgment for defendant, it is immaterial on appeal whether the additional finding of title in fee is supported, and that question will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. § 843.*]

2. BOUNDARIES (§ 37*)—SUFFICIENCY OF EVIDENCE.

Evidence *held* to support a finding that an agreement between plaintiff's predecessor in title and defendant recognized the line claimed by defendant as the true line, and that plaintiff, by acquiescence in it as the established line for almost seven years, was estopped from asserting title to the strip of land in controversy.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 189-193; Dec. Dig. § 37.*]

3. BOUNDARIES (§ 46*)—ESTABLISHMENT BY AGREEMENT.

Where a boundary line is uncertain, and the contiguous owners, with equal knowledge of the facts, by parol agreement fixed a dividing line, and such line is marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter they occupied their respective lands to the boundary as agreed on, the accuracy of such line cannot be subsequently questioned by the parties establishing it or those claiming under them; no deception being practiced in locating it.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

4. BOUNDARIES (§ 37*)—EVIDENCE AS TO LOCATION.

Evidence in ejectment *held* to show that the location of a boundary line was uncertain prior to an agreement between defendant and plaintiff's predecessor fixing the location of the line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

5. BOUNDARIES (§ 46*)—ESTOPPEL TO QUESTION LOCATION.

Where persons owning contiguous tracts of land establish a common boundary line, which may not be in fact the true line according to the call of their deeds, in which they acquiesce, and according to which they occupy their respective lands for a time equal to that prescribed by the statute of limitations, they and their successors in interest are conclusively estopped from questioning it as the true line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

6. FRAUDS, STATUTE OF (§ 70*)—REAL PROPERTY—AGREEMENTS FIXING BOUNDARY.

An agreement by the owner of contiguous tracts of land fixing the boundary line between them is not a contract for the sale or conveyance of land, and is not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 112; Dec. Dig. § 70.*]

In Bank. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Frank Loustalot against J. J. McKeel. Judgment for defendant, and plaintiff appeals. Affirmed.

William G. Griffith, for appellant. C. A. Storke, for respondent.

LORIGAN, J. Plaintiff, alleging ownership in fee thereto, brought this action in ejectment to recover of defendant a strip of land 86 feet long and 9.8 feet wide at one end, and 4.6 feet wide at the other, lying along the common boundary line of the lands of the parties located in the city of Santa Barbara. The complaint was filed September 17, 1907. In his answer defendant denied title in plaintiff, asserted title in himself, and set up an affirmative defense of estoppel, based upon the claim that in 1897 the common boundary line being in dispute between himself and the predecessor in title of plaintiff—one Mary A. Ashley—they agreed upon a boundary line which fixed the strip of land in dispute to be on the defendant's side of the line, and that the line so agreed on was acquiesced in by the predecessor of plaintiff thereafter and up to 1906 when plaintiff succeeded to her interest in part of the adjacent property. The court found that the defendant was the owner in fee of the strip in dispute, and also that plaintiff was estopped from asserting any claim to the property against defendant by virtue of the agreement between his predecessor in title and defendant establishing a common boundary line between their lands. Plaintiff appeals from the judgment accompanied by a bill of exceptions under which he attacks the sufficiency of the findings of title in defendant and the claim of estoppel.

We shall not discuss the finding as to title because we are satisfied that the finding of estoppel was supported by the evidence, and, being sufficient of itself to sustain the judgment, it is immaterial whether the additional finding of title in fee is supported or not.

Addressing ourselves to the evidence on the finding of estoppel, it appears that in 1869 one George Hartley purchased a lot fronting on State street, being a part of block 229, in the city of Santa Barbara. The lot was rather indefinitely described in the deed, but along its southeasterly line ran a board fence, referred to in the deed as the southeasterly boundary thereof, and which divided the property he took possession of from an adjacent lot to the southeast then owned by one Mary B. Lake. The lots in the block, including those immediately referred to, were fenced off from each other. Hartley, on going into possession of the lot purchased by him, immediately built a stable upon it known as the "Dexter Stables," the building fronting on State street and running back nearly 186 feet to the rear line of the lot. The southeasterly side of the stable, and subsequently a barn, were built along and upon the board dividing fence referred to in his deed as the southeasterly boundary line of his lot, and, as constructed, embraced within their inclosure, as part of the land described in his deed, the strip in dispute except a few feet at the rear. In 1879 one Mary A. Ashley purchased from Mary B. Lake, above referred to, the lot to the southeast and adjacent to the Hartley stables. The deed to Mary A. Ashley, as did all of the deeds from her predecessors in title, called for a frontage on State street of 195 feet running northwesterly along that street from its intersection with Haley street (being the south corner of block 229) with a uniform depth northerly through the block of 450 feet. The northwesterly line of the lot (the boundary line between it and the lot of Hartley) ran at right angles to State street. We mention this particular call for the frontage on State street to refer to it again presently. In 1893 one McPhail, successor in interest of Hartley, conveyed the lot on which the Dexter stables were located to defendant. Now, while the description in the deed to Hartley included the strip in question by reference to the board fence on the southeasterly line of the lot, and the deed from him to McPhail described the land conveyed explicitly by courses and distances, and generally as the "premises known as the Hartley stable and corral," the deed to the defendant did not in terms include this strip. The deed to him was for 90 feet frontage on State street running northerly along that street from a point 137 feet northerly from the intersection of State and Haley streets (being the southern corner of block 229), with the southeasterly line running in depth 186 feet at right angles with State street. As the board fence referred to in the Hartley deed, and along and upon which the southeast wall of the stable and barn was built, did not run at right angles with State street, the strip was not included in the deed to defendant calling for the southeasterly line of his lot as being one run at right angles to State street. However, the defendant went into possession of the premises under his deed assuming that it embraced the strip in controversy upon which the stables partially stood.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the early part of the year 1897, while Mary A. Ashley and the defendant were so in possession of their adjacent lots, physically divided by the southeast wall of the stable and barn, the former had a survey made of the land called for in her deed, and thereafter wrote to the defendant stating that his barn was on part of her property, and that, while she did not wish to sell the land, she was willing to rent it to him. Defendant called to see her about the matter, taking with him his abstract of title, and she and her attorney and defendant went over it together and discussed the matter of the accuracy of the line. At first, she claimed all that her deed called for. In this connection it will be observed that, eliminating for the moment this strip in question, there was a marked and decided conflict between the calls in the deeds of Mrs. Ashley and the defendant as to the dividing line between their lots. It is not pretended that Mrs. Ashley, or her predecessors in interest, ever had any valid claim of title to any portion of the lot actually described in the deed to defendant, or to any part of the land enclosed by the southeast wall of the stable and barn, except a narrow piece of which the strip in controversy is a part, extending from State street northeasterly to the rear of defendant's lot. Yet it will be observed from the calls in the respective deeds of Mrs. Ashley and the defendant that the deeds largely overlapped each other. The deed to Mrs. Ashley called for a frontage of 195 feet running along State street from the south corner of block 229. The deed to defendant called for a frontage of 90 feet running along State street from a point on that street 137 feet distant from the same south corner of the block. The deeds overlapped each other in frontage on State street and in depth the difference between 137 and 195 feet, or 58 feet. Mrs. Ashley under her deed could claim 195 feet along State street, while the deed of defendant called for 58 feet of this same frontage. The strip ran all through the land of the defendant and the calls of the respective deeds clearly left the true dividing line between their lands in uncertainty and doubt. But, while at first Mrs. Ashley claimed all that her deed called for, the dispute between herself and the defendant settled down to the narrow strip along their line and upon which the stables and barn were built. Mrs. Ashley insisted that under the deed to her the dividing line should run at right angles to State street, which would entitle her to the strip. The position of defendant was that the barn "had to follow the board fence" (referred to in the deed to Hartley) and had in fact followed it. After examining the abstract and discussing the matter between them, Mrs. Ashley conceded that the claim of defendant was correct, and that the line upon which the barn was built was the true line between their respective properties. At the time of this conference and adjustment as to the boundary line, there was a small piece of the strip extending from the barn to the rear of the lot which had not been built on or inclosed by defendant or his predecessors. A few days afterwards Mrs. Ashley of her own volition, and at her own expense, had a fence built extending from the barn to the end of defendant's lot along the same line of the strip on which the stable and barn were built prolonged northeasterly so as to make an actual southeasterly line between the properties of both parties. After this agreement as to the true boundary line and the building of the fence, the line of the stable and fence as built by Mrs. Ashley were recognized by both parties as the true line dividing their property. Neither Mrs. Ashley nor any of her predecessors in title were ever in possession of the strip of land in dispute. No question was ever subsequently made between Mrs. Ashley and the defendant about the dividing line. As agreed to it was acquiesced in as the true dividing line between their properties for some seven years thereafter and up to the time of the death of Mrs. Ashley in 1904 and until plaintiff purchased a portion of the adjacent lot from her estate. This was some two years subsequent to her death, and the deed from her executors included the portion of the strip for which this action was brought. Upon this evidence the court was warranted in finding that by the agreement between Mrs. Ashley and the defendant, recognizing and establishing the line along which the stable, and thereafter the fence, was built, as the true dividing line, and also by acquiescence in it as so established for almost seven years, the plaintiff as the successor in interest of Mrs. Ashley was estopped from asserting title to the strip in controversy.

The rule universally sustained by the authorities is that where the boundary line between the lands of contiguous owners is doubtful or uncertain, and they by parol agreement fix and determine a dividing line between their respective tracts, said line being marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them. Cavanaugh v. Jackson, 91 Cal. 580, 583, 27 Pac. 931; Dierssen v. Nelson, 138 Cal. 394, 398, 71 Pac. 456; Young v. Blakeman, 153 Cal. 481, 95 Pac. 888, and other authorities cited in those cases.

That there was an uncertainty as to the line between their lots according to the calls of their deeds when Mrs. Ashley and the defendant agreed upon and established a dividing line is hardly open to serious question. The calls of their deeds were widely divergent as to it. The deeds overlapped each other to an extent of 58 feet, and, while no claim was insisted upon by Mrs. Ashley that the northwesterly line of her lot extended into the land of defendant as far as her deed called for it, still if it did not extend there it was uncertain where it was to be located, and while in the end the dispute between them was brought down to whether the true line should run along the old board fence, which physically divided for many years the lands of which she and defendant were actually in possession, or at right angles to State street, there was nothing in her deed which specifically called for its location along the line which she claimed controlled. The northwesterly line of her lot was 58 feet beyond the line which she was contending for, according to the call of her deed, and embraced to that extent land of the defendant to which she did not insist that she had any claim, and to which it must be conceded she had none. It is true that the deed to the defendant did not fix his line along the board fence, upon which the stables and barn were built, which was the actually disputed line, but he was in possession of it and of the strip in controversy as included within that line, as his predecessors had also been for a great many years. Had a controversy arisen between Hartley and Mrs. Ashley there can be no question but that under the calls of their respective deeds the boundary line was uncertain, and we do not perceive how it could be considered the less uncertain, as far as the calls of the deed of Mrs. Ashley are concerned, when the dispute as to it arose between her and the defendant.

But if it be conceded that according to the calls of Mrs. Ashley's deed there could be no question of the true location of the dividing line; that, as claimed by counsel for appellant, it was and is capable of ready ascertainment and location as running at right angles to State street, so as to include the strip in question; and that the parties were mistaken in believing what they established to be the true line—still the rule of law is that where parties in good faith establish a boundary line which may not be in fact the true line according to the calls of their deeds, in which they acquiesce and according to which they occupy their respective lands for a period of time equal to that prescribed by the statute of limitations, both parties and their successors in interest are conclusively estopped from questioning it as the true line.

As said in the early case of Sneed v. Osborn, 25 Cal. 619, 626: "The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of the division line between their lands, although it may not be the true line according to the calls of their deeds they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must at least equal the length of time prescribed by the statute of limitations to bar a right of entry." Columbet v. Pacheco, 48 Cal. 395; Cooper v. Vierra, 59 Cal. 282; Johnson v. Brown, 63 Cal. 391; White v. Spreckels, 75 Cal. 610, 17 Pac. 715; Helm v. Wilson, 76 Cal. 476, 18 Pac. 604; Cavanaugh v. Jackson, 91 Cal. 580, 27 Pac. 931; Dierssen v. Nelson, 138 Cal. 394, 71 Pac. 456; Lewis v. Ogram, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151.

There can be no question under the evidence but that Mrs. Ashley and the defendant deemed the matter of the location of the true line uncertain. It may be that they were in error in this respect and that a careful examination of their respective titles by an attorney, and accurate surveys of their lots according to the calls of their several deeds, would have fixed an absolutely correct boundary line between them. But, whatever might have been possible in this respect, the fact is that the true location of the line was considered uncertain and was definitely fixed between them, acquiesced in without question for years, and each occupied their lands thereafter according to the agreed line. When they entered into the agreement, both had equal knowledge of the facts, and no deception or fraud was practiced. Under these circumstances, it is entirely immaterial whether the parties were right or wrong in believing that the true line was exactly where it should be as they established it. They were certainly in doubt as to where it should run, and adjusted the matter by making a practical location of the line where they thought it ought to be, and having acquiesced in it as so established, and having occupied their lands under the location for almost seven years—a longer period than prescribed by the statute of limitations to bar a right of entry—the line they established is conclusively determined to be the true divisional line. Courts have always looked with favor on the settlement of questions of this character by the parties in interest themselves, and when it appears that an agreement adjusting a disputed boundary line has been fairly and definitely made between them, and they have occupied their lands accordingly for a period longer than the statutory period of limitation, such agreement is conclusive, no matter whether they were mistaken or not in their belief that they were locating it along the true line. It is quite obvious that, if the fact merely that the parties were mistaken as to where the true line lay could invalidate their agreement, there never could be any stability attached to such an agreement unless the line agreed on was in truth the exact line. The policy of the law, however, is to give stability to such an agreement as a method adopted in good faith by the parties themselves to settle the controversy, and because it is the most satisfactory way whereby a true boundary line may be determined, and tends to prevent litigation. Cavanaugh v. Jackson, supra, 91 Cal. 583, 27 Pac. 931.

There is nothing in appellant's point that the agreement being in parol was within the statute of frauds. The agreement was not a contract for the sale or conveyance of land. Its only object was to settle a disputed question of boundary, and, as said in White v. Spreckels, supra, 75 Cal. 616, 17 Pac. 717: "Agreements of this character are not subject to the objection that they are within the statute of frauds, because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to another, but they proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such cases the agreement serves to fix the line to which the title of each extends."

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

(157 Cal. 625)

PERKINS v. COWLES et al. (L. A. 2,427.)

(Supreme Court of California. April 18, 1910. Rehearing Denied May 18, 1910.)

1. Corporations (§ 145*)—Stock—Transfer—Effect—Liability on Unpaid Subscriptions.

Upon the transfer of stock by the original subscribers and entry thereof by the transferees upon the corporate books, the original subscribers were released from payment of the unpaid subscription, and the transferees became liable to the corporation or its receiver in bankruptcy for payment of calls on the original subscription without an expressed promise to do so, though they believed in good faith when purchasing that the subscriptions were fully paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 530, 531; Dec. Dig. § 145.*]

2. Corporations (§ 144*)—Stock—Transfer—Liability of Unpaid Subscriptions.

That the president of the corporation, who was also an original subscriber, represented in good faith to the transferees of his own and other stock that the subscriptions were fully paid in order to induce the latter to purchase, would not estop the corporation nor its receiver in bankruptcy from collecting the unpaid subscriptions from the transferees, he not acting for the corporation in making such representation, nor would representations to the same effect by original stockholders prevent the collection of unpaid subscriptions from the transferees.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 144.*]

3. Corporations (§ 112*)—Stock—Effect of Transfer—Bona Fide Purchasers.

Stock certificates are not negotiable instruments, and the purchaser thereof stands on the same basis as the purchaser of any other nonnegotiable instrument.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 464, 465; Dec. Dig. § 112.*]

4. Corporations (§ 144*)—Stock—Issues—Estoppel.

The issuance of stock certificates to a transferee without a statement that it is not fully paid is not equivalent to a representation that it is fully paid so as to prevent the corporation from collecting the remainder of unpaid subscriptions.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 144.*]

5. Bankruptcy (§ 145*)—Collection of Unpaid Subscriptions — Right to Enforce Liability.

The amount due on subscriptions to corporate stock is a trust fund for corporate creditors, and unpaid subscriptions are a part of its assets in bankruptcy, and may be collected by the receiver in bankruptcy for creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 145.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Gregory Perkins, Jr., trustee in bankruptcy of the Golden Gate Laundry, Incorporated, against J. E. Cowles and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

Lawler, Allen, Van Dyke & Jutten, for appellant. Lloyd W. Moultrie, for respondents.

LORIGAN, J. This case was submitted to the trial court on an agreed statement of facts. It appears therefrom that the Golden Gate Laundry, Incorporated, was organized under the laws of this state in January, 1902, with a capital stock of $33,000, represented by 330 shares of the par value of $100 each. All the stock was subscribed for by the six original incorporators. Certain of these, being the owners of a business plant known as the Golden Gate Laundry, transferred it to the Golden Gate Laundry, Incorporated, at a valuation of $5,500. It was accepted by the latter corporation at that figure, and 165 shares of the capital stock of the corporation subscribed for by said parties was credited thereby with a payment of 33⅓ cents on each dollar per share of the capital stock subscribed for by them. Subsequently the subscribers to the remaining 165 shares of the capital stock paid into the treasury of the corporation 33⅓ cents on the dollar per share of the stock subscribed for by them. Thereupon all the stock of the corporation was issued to the original subscribers, the certificates being in the usual and ordinary form, reciting that the person named therein was the owner of a given number of shares of $100 each of the capital stock of the corporation, transferable on its books on surrender of the certificate. Some months thereafter these defendants purchased certain shares under the following circumstances: Three of the original subscribers—Rogers, McCoy, and Hedderly—being desirous of securing patronage for the business of the corporation and extending its influence, arranged with the defendants and others to purchase part of the shares held by them for 40 cents on the dollar per share. Hedderly was one of the original subscribers and president of the corporation. He and the others stated to the defendants, when soliciting a purchase of the stock by them, that the stock was fully paid up at its face or par value, and that there were no unpaid subscriptions thereon. In making this statement Hedderly acted in good faith, believing that the stock was fully paid up by the transfer of the property to the corporation from the Golden Gate Laundry. The defendants had no notice to the contrary, believed the representations as made, and stated to Hedderly and those from whom they purchased that they would not buy the stock unless it was fully paid up. Under the assurances given, the defendants then purchased a large number of the shares of the stock, which were transferred to them by the original subscribers, and such transfers entered upon the books of the corporation. The defendants ever since said transfers have been, and now are, the owners and holders of said stock. In 1904, on an involuntary petition in bankruptcy filed in the United States District Court for the Southern District of California, the corporation was adjudged a bankrupt and plaintiff was elected and duly qualified as its trustee. The bankrupt corporation, being without sufficient property to pay the debts of the corporation in full, on petition of plaintiff, as such trustee, the said United States District Court in September, 1904, ordered that a call be made of 50 per cent. of all unpaid subscriptions or balance due on the capital stock. In January, 1906, a second call for a like amount of the balance of unpaid subscriptions was made, and, the defendants having failed to make payment to the trustee of either of said calls, the plaintiff brought this action against them. The corporation itself never made any calls on account of any unpaid subscription to its capital stock. The trial court rendered judgment in favor of defendants, adopting the agreed statement of facts as the findings of the court, and this appeal is taken by plaintiff from the judgment.

It will be readily observed under the agreed statement of facts that the main question presented on this appeal is whether a stockholder who has purchased the stock of a corporation in good faith and for a valuable consideration from an original subscriber, who has not paid the full subscription price thereof, can be held liable for the unpaid subscription of which nonpayment he has no actual notice or knowledge; it in fact being represented to him by the president of the corporation, as well as the other sellers of the stock, at the time of his purchase, that the stock was fully paid for, although from the books of the corporation it appears that the stock had not been fully paid. The trial court held that under these circumstances the defendants, as transferees of the stock were not liable. But we cannot agree with that conclusion. As far as the question is affected by the representations of the president of the corporation that the stock was fully paid, that is a false quantity. We are not referred to any authority where it has been held that even a corporation itself, let alone its creditors, would be bound by any such statement of the president of the corporation. As a matter of fact the stock had not been fully paid, and, when the president stated that it was, he was not representing the corporation, and did not pretend to. Himself a stockholder by virtue of his original subscription, he was simply acting with Rogers and McCoy in an endeavor to make a sale of a portion of their stock to the defendants, in order to extend the influence and increase the patronage of the corporation by having the stock of the company distributed among a large number of stockholders. He was acting in his own behalf in an effort, with the others, to dispose of a portion of his and their stock. While it is true that he made the representations in good faith, and doubtless the others did also, it is equally true that he had no authority from the corporation to do so. At least it does not appear that he had any. He was not acting in behalf of the corporation in the sale of any stock belonging to it, but simply in the personal interest of himself and the others. His conduct could not have estopped the corporation in its right to require, if necessary and while a going concern, the full payment of the subscription price, and certainly could not estop the receiver in bankruptcy, acting in behalf of the creditors, after the corporation had become insolvent, from making a call for such payment of it, if otherwise the transferees of the original subscribers were liable therefor. Neither is it of any moment that representations that the stock was fully paid (independent of those made by the president) were made by the other original subscribers when selling the stock to defendants. There can be no question but that the original subscribers were liable to the corporation for the full subscription price, and, under the law of this state, when they transferred their stock to the defendants, and the latter caused the transfer to be entered on the books of the corporation, the former were released from liability for such payment, and the defendants in law as transferees assumed it, as far as any action by the corporation to compel its payment is concerned. No express promise on their part to assume or pay the balance of the subscription price was necessary. The corporation could, after the transfer of the stock to defendants and entry thereof on its books, look only to the defendants as its recorded stockholders to compel payment of either calls for the original subscription to its stock or for assessments thereon. Visalia, etc., Ry. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136; People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858; People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1. In view of this exclusive legal liability to the corporation for the payment of the subscription price which the transferees of stock assume by having themselves entered on the corporate books as stockholders, it would seem to be but a waste of time to give serious consideration to the proposition that a representation by a stockholder, who is an original subscriber of corporate stock, when selling his stock, that it is fully paid, would absolve both of them—the original subscriber by transfer and the transferee by the representation—from all liability to the corporation or its creditors for payment of such subscription price. A mere statement of the proposition negatives its soundness. The only right which the defendants had arising from the misrepresentation of the fact of payment was a right of action against the parties making it personally for damages and for rescission of the sale of the stock.

So that the matter of representation, either by the president of the corporation, or by him and the other stockholders, being eliminated as obviously unimportant factors in the present controversy, we are brought to the broad proposition, and the one for which in the end respondents really contend, namely, that a purchaser of certificates of stock in the open market in good faith and for value, without anything on the face of the certificates indicating that the stock has not been fully paid, takes them free from any liability for calls for unpaid subscription, either at the instance of the corporation or its creditors, although the shares are in fact not fully paid for. Whatever may be the rule in sister jurisdictions, and we are referred to cases therefrom so holding, this is not the rule obtaining in this state. In O'Dea v. Hollywood, etc., 154 Cal. 71, 97 Pac. 8, this same proposition was urged, and in answer to it this court said: "But independent of this claim of representation, the broad proposition of appellants is that, because they purchased their certificates of stock in good faith and without notice in the open market, such stock is to be deemed fully paid up, and they are protected as bona fide purchasers, even though upon the face of the certificates there was nothing to indicate that the stock had been fully paid. In effect, their claim is that certificates of stock are negotiable securities and subject to the same rules governing the transfer of such instruments. But this position under the law of this state is untenable. Whatever the rule may be in other jurisdictions (and some authorities therefrom are cited by appellants in support of their claim), it is well established in this state that certificates of stock are not negotiable instruments, either in the commercial sense or within the definition of the Civil Code, and that the stock represented by them is subject to assessment for subscription calls, no matter to whom it may be transferred. The rule in this state is that certificates of stock in a corporation are but mere evidences of the holder's right to a given share in the franchises and property of the corporation, and are not negotiable instruments. Barstow v. Savage M. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; Graves v. Mono Lake Min. Co., 81 Cal. 304, 22 Pac. 665; Craig v. Hesperia L. & W. Co., 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316. Such certificates of shares not being negotiable instruments, the rule analogous to other nonnegotiable instruments applies, and a purchaser takes them subject to all equities in favor of the corporation. The transfer relieves him from no liability to the corporation which his transferror was under, so that, when one purchases stock and causes the transfer to be entered upon the books of the corporation, he thereafter holds his shares on the same conditions as did the stockholder from whom he purchased, he acquires under them all his rights, and is subject to all his liabilities and obligations respecting them. Visalia, etc., R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136; Craig v. Hesperia L. & W. Co., 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; People's Home Savings Bank v. Rickard, 139 Cal. 285, 73 Pac. 858. Many authorities from other states might be cited to the same effect, but these from our own state declare the rule here." In that case we had occasion to examine the authorities relied on as establishing the rule for which respondents contend. 1 Cook on Corp. § 50; Clark & Marshall, p. 1741; Helliwell on Stock and Stockholders, p. 911. It will be noted, however, when these authorities are looked to and the cases they cite examined, that (with a few exceptions in the latter) the rule promulgated or declared proceeded upon the theory that certificates of stock are negotiable or quasi negotiable instruments, or at least should be so treated. In this state, however, as certificates of stock are not negotiable instruments and the purchaser of stock is no more protected than the purchaser of any other nonnegotiable instrument, the rule of the authorities cited, based on the negotiability or quasi negotiability of stock certificates, has no force here. In fact, in those jurisdictions, where the rule of nonnegotiability of certificates of stock obtains, the rule as to the liability of transferees of stock is the same as in this state. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Merrimac Mining Co. v. Levy, 54 Pa. 227, 93 Am. Dec. 697. See notes to Thompson v. Reno Bank, 3 Am. St. Rep. 829.

As far as it is insisted that the issuance of the certificates of stock without any statement that the stock had not been fully paid for, was equivalent to a representation that it had been so paid, this point is fully discussed and decided adversely to the respondent in O'Day v. Hollywood, heretofore quoted from. The certificates here involved, like the certificates involved in that case, were issued long before section 323 of the Civil Code was amended so as to require certificates issued prior to the payment of the full amount due to state the amount actually paid.

Some question is raised by respondents as to whether the unpaid subscription of the stock owned by defendants constitutes assets in bankruptcy. We think there can be no doubt about it. In Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440, the rule is correctly laid down as to the liability of the original subscribers. It is there said: "The amount due from the stockholders for the subscribed stock of the corporation is a trust fund for the creditors of the corporation, and such unpaid subscriptions to its stock are a part of its assets and may be collected for its creditors. Vermont, etc., Co. v. Declez, etc., Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Walter v. Merced Academy Ass'n, 126 Cal. 583, 59 Pac. 136; Visalia, etc., R. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136. Such liability arises by virtue of the stockholders' contract of membership in the corporation, evidenced by the certificates of shares. Morawetz on Private Corporations (2d Ed.) § 128; Union Sav. Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098." But the same liability attaches to transferees on becoming stockholders of record on the books of the corporation as bound the transferrors as original subscribers. By purchasing from the original subscribers the transferees assumed, as a matter of law, all the liabilities that the transferrors of the stock to them were under, and took it subject to all their obligations. Visalia, etc., R. R. Co. v. Hyde, supra, 110 Cal. 630, 43 Pac. 10, 52 Am. St. Rep. 136; O'Day v. Hollywood, supra. Hence the defendants were liable to a call for payment of the unpaid subscriptions in the bankruptcy proceedings, and the trustee had the right to maintain this action to recover on the calls.

The judgment appealed from is reversed, with directions to the trial court to enter judgment in favor of plaintiff against each of the defendants for the amount due on the unpaid subscriptions to the capital stock of the corporation held by him when this action was commenced. The agreed statement of facts which has been adopted by the court as its finding in the case furnishes the data upon which the computation may be made and the judgment rendered.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

SHAW, J. I concur because the previous decisions of this court settle the question that in this state the issuance of a certificate of corporate stock, which upon its face does not show that it is not full-paid stock, is not a representation by the corporation that it has received the par value of the stock. If it were a new proposition, I would hold the contrary.

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157 Cal. 643

BALDWIN et al. v. FOSTER et al.

(L. A. 2,401.)

(Supreme Court of California. April 21, 1910.)

1. Judgment (§§ 470, 501*)—Collateral Attack.

On collateral attack, every intendment is in favor of the judgment, and mere errors and irregularities will not be considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 907, 941; Dec. Dig. §§ 470, 501.*]

2. Judgment (§ 486*)—Collateral Attack—Grounds.

On collateral atttack, a judgment will be set aside, generally speaking, for but one of three reasons: Lack of jurisdiction of the person; lack of jurisdiction of the subject-matter; or an absolute lack of jurisdiction to render such a judgment as the one given.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 920; Dec. Dig. § 486.*]

3. Judgment (§ 503*)—Collateral Attack—Sufficiency of Complaint.

In a collateral attack on a judgment, the sufficiency of the complaint on which the judgment was based may not be attacked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. § 503.*]

4. Process (§ 163*)—Amendment—Issuance—Discretion of Court.

Under the express provisions of Code Civ. Proc. § 128, subd. 8, the court has full power to amend its process pending its service.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 163.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. JUDGMENT (§ 495*)—COLLATERAL ATTACK—PRESUMPTIONS.

Where nothing to the contrary appears, the existence of an order for the issuance of an amended summons will be presumed in support of a judgment on collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

6. PROCESS (§ 21*) — SUMMONS — ISSUANCE — DISCRETION OF COURT.

Under the statute, the court may in its discretion direct issuance of summons after the expiration of the prescribed period.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 16; Dec. Dig. § 21.*]

7. PARTITION (§ 91*)—APPOINTMENT OF REFEREES—COLLATERAL ATTACK.

Error in appointing in partition proceedings one referee instead of three, as required by Code Civ. Proc. § 797, cannot be taken advantage of or inquired into collaterally.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 91.*]

8. PARTITION (§ 95*) — ALLOTMENT IN SEVERALTY.

A party in partition suit has the right, on demand, to secure from the court a segregated allotment to him in severalty of the land which may be found to be his.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 95.*]

9. PARTITION (§ 95*)—JUDGMENT—ALLOTMENT IN SEVERALTY—COLLATERAL ATTACK.

Under Code Civ. Proc. § 760, making provision for cases in partition, where, because of the impracticability or inconvenience of doing otherwise, the court may set apart portions or parcels to co-tenants, subsequently segregating the interests of such co-tenants, where this was done, while certain co-tenants might have insisted on further proceedings to have their several interests delimited, the judgment was not void, and could not be attacked collaterally.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 307–309; Dec. Dig. § 95.*]

10. JUDGMENT (§ 501*)—COLLATERAL ATTACK—GROUNDS—ERROR IN AWARD OF COSTS.

An error of the court within its jurisdiction in awarding costs in a partition suit does not render the judgment void, and the same may not be collaterally attacked.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 501.*]

Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by C. H. Baldwin, as administrator with the will annexed of Anderson W. Todd, deceased, and others against Joseph Foster and others. From the judgment, and from an order denying a new trial, defendants appeal. Reversed and remanded.

Luce, Sloane & Luce, for appellants. C. N. Andrews, for respondents.

HENSHAW, J. This appeal is from the judgment and order denying defendants' motion for a new trial. The action was to quiet title to certain real estate in the city of San Diego. The real estate consists of certain town lots in the subdivision of a 5-acre tract in the west half of Pueblo lot 1128. Pueblo lot 1128 was a large tract of land containing more than 160 acres, the title to which was originally in the city of San Diego. The city made deeds to certain portions of this lot, one to Wallace of the west half; one to Porter, conveying 80 acres of the easterly portion, and one to Norton of "80 acres in lot 1128." The area of the Pueblo lot was uncertain, owing to the indeterminate easterly boundary line, according to the map. The 80 acres conveyed to Norton was unlocated, wherefore an action in partition was brought for the determination and allotment of the interests of those holding under the city's deeds. In this action in partition, entitled Norton v. Mayhew et al., interlocutory and final decrees were entered. By them a certain 5-acre tract described as lot 14, containing the lots in controversy, was set apart in common to Anderson W. Todd and eight other co-tenants. It is sufficient for the purposes of this consideration to say that plaintiffs derived title by mesne conveyances through Anderson W. Todd. Defendants claim title by virtue of sheriff's sale and deed of Todd's interest, growing out of the decree of distribution in the partition suit. The facts in this connection are, as has been said, that a five-acre tract containing the lots in controversy was set apart to Anderson W. Todd and eight others as tenants in common. The court in awarding costs decreed that the nine tenants in common to whom the five-acre tract had been awarded in severalty should "pay the sum of $21.85, the portion for which each party is liable being hereby decreed to be a first lien upon the tract of land so allotted to each of said defendants respectively." Upon failure of payment of these costs the land was sold, and it is conceded that whatever title passed by that sale vested in these defendants, and it is not disputed that if the effect of the sale was to deprive Anderson W. Todd of his interest in the land, defendants should prevail in this action.

Manifestly, then, the question of the validity or invalidity of the judgment in Norton v. Mayhew et al. is the all-important one in this case. It is made to appear that the trial court took the view that the judgment was void as to the nine tenants in common to whom this five-acre tract was partitioned, first, because it did not award them their interests in severalty; and, second, because it did not apportion the costs in severalty, but in effect made the total costs of $21.85 awarded against the five acres a lien upon the interest of each of the co-tenants, and that the sale under such judgment was therefore void. But respondent urges other objections against the validity of the judgment which demand notice. Throughout this consideration the fact is to be borne in mind that we are not reviewing this judgment under attack made on direct appeal where errors prejudicial to those appealing would call for a reversal, but we are considering it upon collateral attack, where every intendment is in favor of the judgment, and where mere errors and irregularities will not be considered. Upon collateral attack the judgment will be set aside, generally speaking, for but one of three reasons: Lack of jurisdiction of the person; lack of jurisdiction of the subject-matter of the action; or an absolute lack of jurisdiction to render such a judgment as the one given. Moore v. Martin, 38 Cal. 428; Mayo v. Foley, 40 Cal. 281; In re James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Wood v. Jordan, 125 Cal. 261, 57 Pac. 997.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. The complaint stated a cause of action. The objection to it is that plaintiff Norton is not shown to be a tenant in common with the various defendants in the Pueblo lot, for the assigned reason that the complaint shows that plaintiff Norton's deed to a floating 80 acres was void for uncertainty. Such, however, is not the law. Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222. The complaint expressly alleged that Norton was the owner of an undivided 80 acres in said Pueblo lot, and that the defendants claim an interest in the same premises. The court in its interlocutory decree found that the defendants were tenants in common. Moreover, the sufficiency of the complaint may not thus be called in question upon such collateral attack. In re James, 99 Cal. 376, 33 Pac. 1122, 37 Am. St. Rep. 60.

2. Summons in the action was not issued until after the expiration of a year. It appears that summons was issued within a year after the filing of the complaint; that subsequently after the expiration of a year, but while the summons was in full force and effect, an amended complaint was filed, bringing in new parties and process, designated "Summons as Amended," was issued, and thereafter served upon the defendants. Return of service was made within the statutory three years after the filing of the original complaint. The only change in the complaint or summons was the bringing in of new parties. The defendant Todd was a party to the original complaint and summons, and the summons as amended and served upon him was identical with the original. The court has full power to amend its process pending its service. Code Civ. Proc. § 128, subd. 8. It is contended that an order of court was necessary for the issuance of such an amended summons, and that no such order is shown. But nothing to the contrary is shown; and, where nothing to the contrary is shown, the existence of such order will be presumed in support of the judgment upon collateral attack. Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853. Moreover, no authority is cited to show that summons issued after one year would be held void upon collateral attack, while in Steves v. Carson, 21 Colo. 280, 40 Pac. 569, the superior court of Colorado, under a statute similar to ours, holds it to be within the discretion of the court to direct issuance of summons after the expiration of the prescribed period.

3. Objection is made that but one referee was appointed instead of three. Section 797, Code Civ. Proc. provides that with the consent of the parties one referee may be appointed instead of three. The interlocutory decree recites that the appointment of one referee was made on consent of all parties, but the effect of the appointment of but one referee, even if it were irregular, would not be to avoid the judgment. It is an error that could not be taken advantage of or inquired into collaterally. Jack v. Cassin, 9 Tex. Civ. App. 228, 28 S. W. 832; Morrill v. Morrill, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95.

4. Coming thus to the principal objection urged against the validity of this judgment, it is unquestionably true that a party in a partition suit has the right, upon demand, to secure from the court a segregated allotment to him in severalty of the land which may be found to be his. Such was the holding of the court in Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418, where the question arose upon direct appeal. Nevertheless section 760, Code Civ. Proc., makes provision for cases where, by reason of the impracticability or inconvenience of doing otherwise, the court may set apart portions or parcels to co-tenants, subsequently segregating the interests of such co-tenants. Such was the method adopted here; and, while the nine co-tenants of the five-acre tract would have had the unquestioned right, upon demand to the trial court, or upon direct appeal to this court, to have insisted on further proceedings whereby their several interests should be delimited and set over to them, the judgment in this case is in no sense void because it has assigned to them a designated tract as tenants in common. This was precisely what was done in Grant v. Murphy, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188, and the decree in partition was upheld as being proper upon direct attack, while in Linehan v. Hathaway, 54 Cal. 251, where a similar decree awarding lands to tenants in common was under review upon collateral attack, and where the contention was that the judgment was void, this court said: "We cannot so regard it. The court had jurisdiction of the parties and of the subject-matter of the action, and the judgment, if erroneous, cannot be attacked in a collateral proceeding."

5. As to the award of costs covered by sections 768 and 796 of the Code of Civil Procedure, it would seem to be proper, where a share has been set off to co-tenants, that the proportion of the costs should be made a lien upon the share without attempted segregation as to the portion of the costs which each of the co-tenants within that share should be called upon to bear. But however this may be, the award of costs as made certainly has not rendered the judgment void. The most for which respondents here could successfully contend is that the court erred in the exercise of the jurisdiction to award costs, which

unquestionably it possessed, but this error within its jurisdiction cannot avail defendants upon this attack, and would not render the judgment void.

No serious question is made as to the validity of the proceedings concerning the sheriff's sale and deed. Such objections as are made are fully covered by what has been said concerning the judgment. Freeman on Execution, §§ 43, 334, 339; Boles v. Johnson, 23 Cal. 226, 83 Am. Dec. 111; Newmark v. Chapman, 53 Cal. 558; Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816.

It follows herefrom that the court erred in holding the judgment in Norton v. Mayhew et al. to be invalid and void, for which reason the judgment and order here appealed from are reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

12 Cal. App. 749

VAN LUE v. WAHRLICH-CORNETT CO.

(Civ. 737.)

(Court of Appeal, First District, California. March 9, 1910.)

1. **Exemptions (§ 36*)—Extent—Double Exemptions.**

A debtor may not claim the exemption given by Code Civ. Proc. § 690, subd. 3, to farmers, and also the exemption given by subdivision 6 to teamsters.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 36.*]

2. **Exemptions (§ 126*)—Extent of Exemptions—Election.**

Where a debtor suing for the conversion of property claimed as exempt set forth his exemptions as a farmer and as a teamster, and he entertained a reasonable doubt as to which of the two exemptions he was entitled, the court at the close of plaintiff's case erred in requiring him to elect on which exemption he would stand; he being entitled under the circumstances to plead both exemptions, though he could only have one.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 126.*]

3. **Trial (§ 165*)—Nonsuit—Evidence.**

A motion for a nonsuit admits the truth of plaintiff's evidence and of every favorable construction, inference, or presumption fairly deducible therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

4. **Exemptions (§ 150*)—Extent of Right—Evidence—Questions for Jury.**

A debtor suing for the conversion of exempt property seized under an execution on a judgment obtained in October, 1908, claimed exemptions as a farmer and also as a teamster, and showed that for about 10 years he farmed until the spring of 1907, when his crop was destroyed by floods. He retained his horses and some of his implements, intending to resume farming and he made reasonable but unsuccessful efforts to do so. During the interval he earned his living by teaming. On the day of the seizure of the property under execution he had all but concluded arrangements to lease a small farm. *Held*, that the question whether his former occupation as a farmer had been abandoned, so that his right to exemptions as a farmer had been forfeited, was for the jury.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 150.*]

5. **Exemptions (§ 13*) — Abandonment — Change of Calling.**

A person does not forfeit his right of exemptions as a member of a given calling because, while seeking in good faith an opportunity to engage therein, he accepts some other employment to earn a living for himself and family.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 13.*]

6. **Exemptions (§ 13*)—Forfeiture—Change of Calling.**

The length of time which has elapsed since a person actively pursued a given calling is an element to be considered in ascertaining whether he has abandoned the calling, and has thereby forfeited his exemptions as a member thereof.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 13.*]

7. **Exemptions (§ 4*)—Statutes—Construction.**

Statutes exempting property from execution should be fairly and liberally construed, and, as far as practicable, beneficially to the debtor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by D. T. Van Lue against the Wahrlich-Cornett Company. From a judgment for defendant, plaintiff appeals. Reversed.

Daugherty & Lacey, for appellant. Sargent & Bardin and P. E. Zabala, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the defendant taken within 60 days after the entry thereof, in an action to recover damages for the conversion of property claimed by plaintiff as exempt from execution.

Plaintiff had been engaged as a farmer for about 10 years, when in March, 1907, a farm comprising 80 acres, which he held under a lease, and upon which he had been raising beets for about two years, was flooded and his crop of beets destroyed. From that time until October, 1908, when the personal property in question was attached, plaintiff engaged in the business of a teamster. During this time, however, he had retained his horses and some farming implements, intending to return to the farming business, and made various efforts to do so, but without success. In October, 1908, the defendant obtained a judgment against plaintiff in the superior court, upon which an execution was issued, and the personal property in question sold. After the property had been seized plaintiff demanded its return from the sheriff, upon the ground that he was a farmer and teamster, and that, therefore, the property was exempt from execution. Its return being refused, he commenced the present action.

The plaintiff in his complaint claims exemptions both as a farmer and a teamster. The case went to trial, and at the conclusion of plaintiff's case the court, upon motion of defendant, required plaintiff to elect whether he would claim exemption as a teamster or as a farmer. After excepting to the order, he elected to rely on his claim as a farmer, whereupon the defendant moved for a nonsuit on the ground that there was no evidence showing that at the time of the taking of the property plaintiff was a farmer. This motion was granted by the court, to which ruling the plaintiff also duly excepted. The result is that, while it is admitted in the brief of defendant that plaintiff was entitled to a teamster's exemption, he stands deprived of all exemption.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff was not entitled to both exemptions. Subdivision, 3, § 690, Code Civ. Proc., relates exclusively to exemptions in favor of judgment debtors who are farmers (Robert v. Adams, 38 Cal. 384, 99 Am. Dec. 413; Murphy v. Harris, 77 Cal. 195, 19 Pac. 377); and subdivision 6 of the same section exempts two horses and their harness, and one cart or wagon, dray, or truck by which a teamster or other laborer habitually earns his living (Dove v. Nunan, 62 Cal. 400). While subdivisions 1, 2, and 10 of section 690 of said Code exempt certain furniture, etc., and earnings of judgment debtors, and probably apply to all vocations mentioned in the section (Robert v. Adams, supra), still we think that a comparison of subdivisions 3 and 6, and a consideration of the scope and spirit of the whole section, force the conclusion that a person cannot claim both the farmer's and the teamster's exemption. Brusie v. Griffith, 34 Cal. 302, 91 Am. Dec. 695; Harlow on Sheriffs and Constables (3d Ed.) p. 463; Morrill v. Seymour, 3 Mich. 65. But we think it was competent for the plaintiff, being in doubt as to which exemption he was entitled to, to set forth both in his complaint, as was done in this case.

In the case of Wilson v. Smith, 61 Cal. 209, the plaintiff in an action for work and labor set forth his cause of action in two counts, one upon an agreement to pay a stipulated price, and the other upon a quantum meruit; and the court held that plaintiff might state his cause of action in two forms where there was a fair and reasonable doubt of his ability to plead them in one mode only. In Remy v. Olds, 99 Cal. xix, 34 Pac. 216, 21 L. R. A. 645, the complaint contained two counts, one for damages on a contract, and the other to recover for materials furnished, etc. The defendant requested the court to require the plaintiff to elect upon which count he would rely. This the court refused to do, and the ruling was assigned as error. The court said: "Conceding that this is an action in which the same cause of action is differently stated in two separate counts, still I think the ruling correct. The right to so plead is well established here [citing cases]. Since it is allowable to state the cause of action in the alternative, using different counts in order to meet any possible phase of the evidence, a party cannot be deprived of the privilege by being compelled to strike out all causes of action save one before the trial commences. It would render the privilege a barren one." See, also, Pomeroy's Code Remedies, § 467; Rucker v. Hall, 105 Cal. 425, 428, 38 Pac. 962; Cowan v. Abbott, 92 Cal. 100, 28 Pac. 213; Stockton, etc., v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Willard v. Carrigan, 8 Ariz. 70, 68 Pac. 538; Woodman v. Davis, 32 Kan. 344, 4 Pac. 262; Pittsburg v. Hedges, 41 Ohio St. 233; 31 Cyc. 117, 121. We think it was error for the trial court, after the plaintiff's case was all in, to require him to elect on which exemption he would stand, as the effect of the court's order was merely to require him to hazard a guess as to the case he had made out. The plaintiff was entitled to one exemption, and from the record it is plain that he entertained a fair and reasonable doubt as to which of the two exemptions he was entitled, and, in order to protect his rights he was warranted in setting forth both exemptions.

We are also of opinion that the action of the court in granting defendant's motion for a nonsuit was erroneous. A motion for a nonsuit admits the truth of plaintiff's evidence, and of every fair construction, inference, or presumption favorable to him deducible therefrom. Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Estate of Welch, 6 Cal. App. 44, 91 Pac. 336. The evidence introduced by plaintiff tended to prove all the material allegations of the complaint, including the allegation that he was a farmer; and the question of whether or not he was entitled to a farmer's or a teamster's exemption should, with proper instructions, have been left to the jury. There was evidence that up to the time his crop was destroyed in the spring of 1907 he had farmed for 10 years; that after he was flooded out he retained his horses and some of his agricultural implements intending to resume the business of a farmer; and that he made every reasonable effort to do so. Indeed, upon the very day of the attachment he had all but concluded arrangements to lease a small farm. The only feature of his case which supports the theory of defendant that he was not a farmer is that he was not thus occupied for a period of about 18 months prior to the levy of the attachment, and that during this period he had earned his living by teaming. Giving the plaintiff, however, the benefit of every reasonable inference and construction deducible from the evidence, we are bound to conclude that he not only in good faith intended to resume farming, but that during the entire 18 months he made every reasonable effort to accomplish this end. We assume that farms cannot be readily rented at all seasons of the year. There can be no doubt that a person does not forfeit his right of exemption as a member of a given calling, because, while seeking in good faith an opportunity to engage therein, he accepts some other employment in order to earn a living for himself and family. No doubt the length of time elapsed since actively pursuing that calling is an element to be considered in ascertaining whether or not it has been abandoned; and while, if the question of whether the plaintiff's former occupation had been abandoned were submitted to us as a question of fact, we might hold that it had, still we think that the lapse of 18 months under the circumstances of this case did not authorize the trial court to take the question from the jury. Before citing cases to support this view, it may not be amiss to call to mind that statutes exempting property from execution should be fairly and liberally construed and, as far as practicable, beneficially to the debtor. Matter of McManus, 87 Cal. 292, 25 Pac. 413, 10 L. R. A. 567, 22 Am. St. Rep. 250; 12 Am. & Eng. Ency. of Law (2d Ed.) p. 75.

In Caswell v. Keith, 12 Gray (Mass.) 351, it is said: "The distinction between withdrawing from the pursuit of a particular trade or occupation, with a determination never to resume it, and a temporary diversion from its prosecution while engaged in conducting some other business or enterprise not intended to be of permanent or durable continuance, is clear and definite. * * * To secure to himself the privileges and benefits intended to be conferred by the provisions of the statute, an artisan is not required to ply his trade without any possible intermission or the occurrence of any interruption in its pursuit. If, for instance, owing to the general stagnation of business, he cannot for a season find remunerative employment in carrying it on, or if, from personal infirmity or other intervening impediment, it becomes necessary or expedient that he should resort temporarily to some other department of industry to obtain means of supporting himself and his family, he cannot, so long as he entertains an intention to return, as soon as circumstances will permit, to occupation and employment in his trade, be said to have given up or abandoned it."

Another case holding that one does not lose his right of exemption by reason of having temporarily suspended his occupation, if he intends to return to it when he has an opportunity, is Harris v. Haynes, 30 Mich. 140. See, also, generally, 18 Cyc. 1416 et seq.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

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12 Cal. App. 697

REED & CO. v. HARSHALL. (Civ. 668.)

(Court of Appeal, Third District, California.
March 5, 1910.)

1. APPEAL AND ERROR (§§ 694, 704*)—QUESTIONS REVIEWABLE—RECORD.

The assignments that the evidence does not sustain the findings, and that the court erred in failing to find on a material issue, are not reviewable where neither the evidence nor the substance thereof is brought up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910-2915, 2939-2941; Dec. Dig. §§ 694, 704.*]

2. APPEAL AND ERROR (§ 925*) — REVIEW — PRESUMPTIONS—ABANDONMENT OF COUNTERCLAIM.

Where the record on appeal does not disclose any evidence in support of the counterclaim interposed, and the trial court failed to make a finding on the counterclaim, the court on appeal will presume that there was no evidence on that issue, and that defendant abandoned the counterclaim at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 925.*]

3. APPEAL AND ERROR (§§ 713, 714*)—RECORD—BRIEFS—SPECIFICATIONS IN TRANSCRIPT—EFFECT.

A statement by counsel for appellant in his brief, and specifications in the transcript, unsupported by either a bill of exceptions or statement of the case, are mere extrajudicial declarations, of which the court on appeal cannot take notice.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §§ 713, 714.*]

4. NEW TRIAL (§ 131*)—RECORD—STATEMENT OF FACTS—AMENDMENTS.

The rule that, where the defeated party's proposed statement on motion for a new trial is incorrect, the attorney of the successful party must propose amendments to correct it does not apply where no such statement was proposed by the defeated party in the first instance.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 131.*]

5. PLEADING (§ 236*)—AMENDMENT OF COMPLAINT—DISCRETION OF TRIAL COURT.

Where an action by a foreign corporation, which had not designated, as required by Civ. Code, § 405, a resident on whom process might be served, and hence was not entitled under section 406 to sue, was tried on the merits and submitted for decision, the refusal to permit an amendment and supplemental answer alleging the failure of the corporation to comply with the statute was a proper exercise of the court's discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

6. CORPORATIONS (§ 672*)—FOREIGN CORPORATIONS—RIGHT TO SUE—WAIVER.

The fact that the disability of a foreign corporation to sue because of its failure to designate a resident, as required by Civ. Code, § 405, on whom process might be served was not pleaded before the cause came to issue and trial might be taken as a waiver on the part of defendant of such disability.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 672.*]

7. PLEADING (§ 261*)—AMENDMENTS—ALLOWANCES.

It is not sufficient that a new defense proposed by an amended answer is a legal defense, but it should also be an equitable defense, before it is error to refuse to allow it.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 261.*]

8. PLEADING (§ 106*)—DILATORY PLEAS—CONSTRUCTION.

A plea in abatement, or a dilatory plea, is not favored, and must be strictly construed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 219; Dec. Dig. § 106.*]

9. CORPORATIONS (§ 667½*)—FOREIGN CORPORATIONS—ACTIONS—PARTIES.

Where an action by a foreign corporation had been tried on the merits, before the question of whether the corporation had paid the license tax imposed by St. 1905, c. 386, as amended by St. 1907, c. 403, requiring payment by corporations of an annual license tax, and providing that the directors in office of a foreign corporation, whose right to do business is forfeited because of failure to pay the tax, shall be the trustees of the corporation, the court, on the testimony of the directors that they were directors, was authorized to substitute the directors of the corporation as plaintiffs in lieu of the corporation, though, strictly speaking, the books of the corporation furnished the best evidence.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 667½.*]

10. APPEAL AND ERROR (§ 882*)—INVITED ERROR—RIGHT TO COMPLAIN.

A defendant, in an action by a foreign corporation, who introduced the depositions of directors of the corporation on the motion for leave to file a supplemental answer, alleging that the corporation had not paid the statutory license tax, may not complain because the court considered the same depositions on a motion to substitute the directors as plaintiffs, over the objection that the fact that the deponents were directors should be proved by the corporate books.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

Appeal from Superior Court, City and County of San Francisco; James M. Trout, Judge.

Action by Reed & Co., by trustees, against Abraham Harshall. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph Hutchinson, for appellant. Gavin McNab, F. H. Gould, and R. V. Whiting, for respondent.

HART, J. This action was instituted for the purpose of recovering judgment for the sum of $403, alleged to be due for personal services rendered by plaintiff for defendant. The answer, in addition to denying the validity of the claim set out in the complaint, pleads a counterclaim, alleging that the plaintiff is indebted to defendant in the sum of $427.65 for services alleged to have been performed by defendant for plaintiff at the latter's "special instance and request." The cause was tried by the court, and the plaintiff given judgment, from which and the order denying defendant a new trial this appeal is brought to this court.

From the court's findings it is learned that the sum sued for is an alleged balance remaining unpaid for certain work done under a written contract by the plaintiff for defendant, and for which the plaintiff was to receive the sum of $4,403, payable as follows: Two thousand dollars when "one-half the work herein agreed to be done by said contractor shall have been fully completed," $2,000 when all of said work shall have been fully completed, and $403 "35 days after the final completion and acceptance of said work and the filing, in the office of the recorder of said city and county of San Francisco, state of California, of the notice of completion of said work." The court found that the services had been performed as alleged in the complaint, and that there was due plaintiff the sum of $403, for which it was entitled to judgment. The court further found that, about the 1st day of November, 1906, the contract was so modified by agreement of the parties that certain of the excavations provided for by said contract might be left unperformed by the plaintiff, and that "certain other excavations on the lot described in the said contract should be made to a greater depth than those provided for in the said contract, which said modifications of contract were subsequently performed in accordance therewith by the said plaintiff;" that on the 9th day of November, 1906, the performance of the said contract was accepted by the said defendant, with the proviso that a certain small amount of work remaining undone should be completed by said plaintiff; "that thereafter, and prior to the commencement of this action, the said work so provided in said modification of said contract was completed in accordance with the terms of said modification of said contract; and that all the terms and provisions of the original contract as modified by said subsequent agreement have been performed by plaintiff." The propositions presented in appellant's briefs, and upon which a reversal of the judgment and order is urged, are: (1) That the findings are not supported by the evidence; (2) that the action was prematurely brought; (3) that the court omitted to make a finding on the counterclaim pleaded in the answer; (4) that the court erred in making several orders granting and refusing to grant certain motions made after the case had been tried, and while it was yet under submission.

With the exception of a bill embodying exceptions to the orders referred to as having been made by the court after the trial and submission of the issues involved, the record does not present any bill of exceptions or statement on motion for a new trial. In other words, neither the evidence nor the substance thereof, as taken at the trial on the merits, is brought up either through a bill of exceptions or a statement, and the appeal here, so far as the proceedings had at the actual trial of the cause are concerned, in effect amounts to nothing more than an appeal from the judgment on the judgment roll alone. Therefore there is nothing before us upon which we can review the assignment that the evidence does not sustain the findings and the alleged error of the court in failing to find upon a material issue. As to the last-mentioned point—the failure of the court to make a finding on defendant's counterclaim—no evidence being disclosed by the record, the presumption is that no evidence upon that issue was presented by the defendant, and that he abandoned the counterclaim at the trial. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Dolliver v. Dolliver, 94 Cal. 646, 30 Pac. 4; Roebling's Sons Co. v. Gray, 139 Cal. 608, 73 Pac. 422; Cutting Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The appellant, in his brief, refers for verification of his declaration that a large amount of evidence was received in support of his counterclaim to folios 168, 169 of the transcript, but we find upon an examination of those folios that the reference is to the recitals involved in one of his specifications of particulars, in which it is alleged that the evidence does not justify the decision. Both the statement of counsel for appellant in his briefs and the specifications in the transcript, being unsupported by either a bill of exceptions or statement of the case, are mere extrajudicial declarations, of which we are not, of course, authorized to take notice.

What is said in the foregoing applies with equal force to the contention that the action was prematurely instituted. This claim is based upon the provision of the contract that the payment of the sum alleged in the complaint to be due plaintiff was to be postponed until after 35 days after the final completion and acceptance of the work and the filing of the notice of completion in the office of the county recorder. Counsel declares that the evidence discloses that "no such notice was ever filed," referring for support of the declaration to the folios of the transcript, at which are found specifications of the insufficiency of the evidence to justify the findings, apart from which the transcript is silent as to any evidence having been introduced upon the subject.

The authorities cited by counsel for appellant to the effect that, "if defendant's proposed statement on motion for a new trial was incorrect, the respondent's attorney should have proposed amendments to it, so as to have it correct," can, of course, have no application where, as here, no such statement was proposed by the losing party in the first instance.

The defendant excepted to the orders made on the following motions, all said motions having been made, as stated, after the case had been tried and submitted: (1) Defendant's motion for an order directing commission to issue to take the deposition of Charles H. Ingraham, at Santa Fé, N. M.; (2) defendant's motion for an order permitting him to file a supplemental answer; (3) plaintiff's motion to substitute as plaintiffs certain parties as trustees for the stockholders of said plaintiff corporation; (4) plaintiff's motion for settlement of findings; (5) defendant's motion for an order permitting him to file amended and supplemental answer.

The first and fifth of the motions in the order in which they are above presented were denied and the others granted by the court.

The order refusing to grant defendant's motion for permission to file an amended and supplemental answer, alleging plaintiff's failure to file in the office of the Secretary of State a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served, constituted the exercise of a judicial discretion with which, under the circumstances of this case, we are not justified in interfering. The plaintiff is a foreign corporation organized and existing under the laws of Arizona. Section 405 of the Civil Code provides that the above-mentioned designation shall be filed with the Secretary of State, and section 406 of the same Code provides, as a penalty for noncompliance with the requirement of the preceding section, that "no corporation not created by or under the laws of this state is entitled to the benefit thereof, nor can any such corporation maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions of the preceding section." It was, as stated, entirely within the discretion of the trial court to allow or disallow the proposed amended answer; but, as the defense sought to be interposed by the proposed supplemental answer involved a mere dilatory plea—a plea in abatement of the action and not to the merits—we doubt not that had the motion been granted, the court would thereby have been guilty of a clear abuse of its discretion. The motion was made *after* the case had been tried upon its merits and submitted for decision, and the fact that the disability of plaintiff to maintain the action was not pleaded before the cause had come to issue and trial may be taken as a waiver on the part of the defendant of such disability. Cal. Sav. & L. Soc. v. Harris, 111 Cal. 136, 43 Pac. 525; Bernheim Distilling Co. v. Elmore (Cal. App.) 106 Pac. 720; Parmele Co. v. Haas, 171 N. Y. 583, 64 N. E. 440.

Referring to the law of the state of New York similar in effect to the provisions of our law requiring all corporations to pay an annual license tax to the state, and prescribing as a penalty for failure so to do the forfeiture of the right of such corporations to do business in this state, the court in its opinion in the last-mentioned case, at page 583 of 171 N. Y., at page 440 of 64 N. E., says: "The statutes in themselves give no right of action, and are not essential elements of the cause of action stated in the complaint. They are mere revenue regulations, compliance with which is made necessary in order to acquire the right to do business here and to enforce causes of action in our courts. * * * In this case the defendant may waive the provisions of this statute and defend the action brought against him upon the merits, and unless he elects to defend or raise some question under this statute by some affirmative act or pleading, the court will simply look at the cause of action as stated—citing Crane v. Powell, 139 N. Y. 379 [34 N. E. 911]; Rowell v. Janvrin, 151 N. Y. 60 [45 N. E. 398]; Rima v. Rossie Iron Works, 120 N. Y. 483 [24 N. E. 940]. * * * In this case it appears that the defendant has answered, and the answer contains merely a general denial. It would seem to be clear, therefore, that he has waived the right to raise any question based upon the statutes referred to." Besides, "it is not sufficient," says the Supreme Court, in Bank of Woodland v. Heron, 122 Cal. 109, 54 Pac. 538, "that the new defense proposed be a legal defense; it should also be an equitable defense." See, also, Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134; Harding v. Minear, 54 Cal. 502, 506. Moreover, "pleas in abatement, or dilatory pleas, have never been favored, and are to be strictly construed." Cal. Sav. & L. Soc. v. Harris, supra; Tooms v. Randall, 3 Cal. 438; Larco v. Clements, 36 Cal. 132. In Cooke v. Spears, 2 Cal. 409, 56 Am. Dec. 348, the Supreme Court, upholding the court below in its disallowance of an amendment setting up the statute of limitations, uniquely and forcefully said: "It was claimed solely as a legal advantage, to which at one time he would have been entitled; but it is a wise conservation that it should have but its day in pleading, and no grace of right after, beyond the extent of justice."

Nor did the court abuse its discretion in allowing the substitution of the directors of the plaintiff corporation, as trustees thereof, as plaintiffs in lieu of the corporation itself. By section 10a of an act of the Legislature of 1907 (St. 1907, pp. 746, 747) amendatory of the act of 1905 (St. 1905, pp. 493, 494), requiring the payment by corporations of an annual license tax to the state, it is provided that the directors or managers in office of a domestic corporation, whose charter is forfeited, or of a foreign corporation whose right to do business in this state is forfeited, because of failure to pay such tax, are deemed to be the trustees of such corporation and the stockholders and members of such corporation, and have full power, as such trustees, to settle the affairs of the corporation, and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, etc. The court, upon motion of counsel for plaintiff, allowed the substitution mentioned in obedience to the provisions of the act of 1907 above referred to, it appearing from a supplemental answer which defendant, by leave of the court, had previously filed that the plaintiff corporation had not paid to the Secretary of State the required license tax.

It is not pretended by counsel for appellant that, if the corporation had not paid the license tax prescribed by the law, it was not necessary to substitute as plaintiffs the directors of said corporation as the trustees thereof and of the stockholders and members of said corporation. It is the contention, however, that there was not adduced before the court competent evidence from which it could be determined who were the directors of said corporation, and therefore the proper parties to be substituted for the corporation as plaintiffs. The record contains a stipulation entered into on June 12, 1908, by the attorneys for the plaintiff and the attorney for the defendant, by which it was mutually agreed that the depositions of Walter G. Hopkins, Charles H. Ingraham, and Howard S. Reed (the substituted plaintiffs) might be taken in the city of Los Angeles, and, in pursuance of said stipulation, the depositions of Reed and Hopkins were taken before a notary public in said city, and returned to the court. Later, by agreement of the parties, another and further deposition by Reed was taken in the city of San Francisco. These depositions were introduced into the record here on motion of counsel for the defendant himself. The depositions of Reed and Hopkins, in substance, show that the corporation was created and organized under the laws of Arizona, but that its principal office is at Santa Fé, N. M.; that they and said Charles H. Ingraham are the directors of said corporation, the latter being secretary thereof and a resident of Santa Fé. It also appears from these depositions that Hopkins had, on the 30th day of December, 1906, tendered his resignation as a director and manager of the corporation, and that his resignation as manager, but not his resignation as a director, had been accepted. The deposition of Ingraham was not taken, as he was not in Los Angeles when the other depositions were taken, being then, as seen, a resident of New Mexico. The claim of counsel for appellant is that parol testimony is incompetent to prove who the directors or officers of a corporation are; that the books of such corporation constitute the best evidence of the fact. In connection with the point now under consideration, it is further argued that the court erred in its refusal to cause a commission to be issued to take the deposition of Ingraham at Santa Fé, N. M.; the contention being that, as secretary of the corporation, he had in his custody and under his control the corporation's books, from which the only competent proof of the directorate could have been obtained.

As stated in the outset, these motions were initiated and pressed to the attention of the court after the cause had been tried upon the merits of the issue, and while, strictly speaking, the books of the corporation would have furnished the highest and best evidence, in law, upon the question of who were the de jure directors of said corporation, the testimony of Reed and Hopkins was sufficient to establish at least their de facto capacity as directors, and, we think, was sufficient for the purposes of the motion to substitute them as plaintiffs and to justify the court in granting said motion. These witnesses knew whether they were acting as directors, and even if, in truth, they were only de facto directors, they were, according to their testimony, "the directors in office of the affairs of the corporation" at the time of the substitution, and, under the provisions of section 10a of the act of 1907, were to be deemed to be the trustees of the corporation for the purpose of maintaining this action. Furthermore, the depositions were introduced into the record here on the motion of counsel for the appellant himself; and, if the court erred in considering them for the purpose of the motion to substitute the directors as plaintiffs, the error is one of which obviously appellant cannot claim any advantage. Necessarily the foregoing disposes of the point against the contention of appellant that the court erred in refusing to issue a commission for the taking of the deposition of Ingraham at Santa Fé, N. M., and of necessity it follows, from the views we have expressed upon the rulings of the court with regard to the depositions that the court did only what it had to do in settling the findings.

No error appearing in the record, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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12 Cal. App. 733

TOGNI et al. v. SLOCOMB. (Civ. 680.)

(Court of Appeal, Third District, California. March 8, 1910.)

1. BOUNDARIES (§ 37*)—EVIDENCE.

Evidence in an action to determine the boundary between two city lots, depending on the location of the southern line of the block containing the lots, *held* to show such southern line was marked by a fence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 191; Dec. Dig. § 37.*]

2. BOUNDARIES (§ 48*) — MISTAKE—ACQUIESCENCE.

The question of boundary between two city lots, depending on the location of the southern line of the block containing them, such boundary being fixed by the deeds conveying them as a certain distance above such southern line, is not affected by the fact that the location of the southern line, which at the time of the survey was marked on the ground and remained identified and unquestioned for 50 years, was induced by a mistake as to the northern and southern limits of the land of the one platting the block, and that the northern boundary as so located was without his lands.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 241; Dec. Dig. § 48.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission of a declaration of a decedent as to a mistake in locating a line, even if not admissible as against interest, as apparently considered when made, was harmless, the mistake otherwise clearly appearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

4. EVIDENCE (§ 201*) — ADMISSION AGAINST INTEREST.

As an admission against interest, and as indicating a purchaser understood what property he was buying, the statement in his bid therefor that he was aware the northern line of the property might be in dispute, but that he would be satisfied if he got a certain amount, is admissible in an action to determine boundary.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 201.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Chas. Togni and another against Henry Slocomb. Judgment for plaintiffs. Defendant appeals. Affirmed.

Larkins & Feemster, for appellant. Edwards & Smith, for respondents.

BURNETT, J. The controversy is over a small strip of land in the city of Visalia, county of Tulare. At the trial it was stipulated "that the title to the property involved was formerly in A. B. Atwell, a common grantor; that he owned the property at the time of his death; and that both parties got deeds from the administrator of his estate, and that said administrator had a right to make those deeds."

The deed to plaintiffs calls for the following tract of land: "Beginning at the southwest corner of block No. 1 of Matthew's First addition to the town of Visalia, county of Tulare, state of California, as per the official map now on file in the office of the county recorder of the county of Tulare, state of California, thence running east 264 feet to the east line of said block; thence north 120 feet; thence west 264 feet to the west line of said block; thence south 120 feet to the place of beginning." The conveyance to defendant contained the following description: "Beginning at a point 120 feet north of the southwest corner of block No. 1 of Matthew's First addition to the town of Visalia, as per official map thereof on file in the office of the county recorder of said county; thence running east 264 feet, to east line of said block; thence north 74 feet more or less; thence west 264 feet to the west line of said block; thence south 74 feet more or less to the place of beginning." As seen, defendant's land lies north of that belonging to plaintiffs, and the strip in question extends across the block from east to west and is 35 feet in width from north to south.

The settlement of the controversy depends upon the location of the southern boundary line of said block No. 1, it being the contention of respondents that said line is marked by a fence, which, renewed from time to time, has been on the ground for nearly 50 years. On the other hand, it is insisted by appellant that the true line is some 35 feet further south, and hence the northern line of respondents' property must be located the same distance south from what they claim, leaving the disputed strip covered by appellant's deed. The court found "that along the southerly boundary line as described in plaintiff's complaint, thereinbefore mentioned and forming the actual boundary line of said lot No. 1, is a fence which bounds said block on the south, and which said fence is at the point of beginning as aforesaid and the commencement of plaintiffs' lands hereinbefore mentioned, and said fence extends along the south boundary line of said block No. 1 the entire length of said block from west to east and forms the actual boundary line of said block on the south." It is conceded that if this finding is supported by the evidence then the judgment must be sustained, since the northern line of plaintiffs' land as claimed by them is only 120 feet from this fence.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

That this finding is abundantly supported does not admit of any kind of doubt. Certainly, the grantors, if owning the land, had a right to fix the boundaries of the land which they conveyed. It is quite natural that they should mark those boundaries upon the ground. This we find was done at an early date. The northern and southern boundary lines of said block No. 1 were definitely fixed, and thereon fences were erected. It may be that the northern line as thus established was without the exterior limits of the property of the original owner of said lot but, as we shall see, this cannot affect the location of the line in question here. When these lines were first located it was undoubtedly believed that the northern line of said block corresponded with the section line. In this a mistake was made, but this mistake does not render uncertain the identity of said block. The northern fence was originally placed on this supposed line, and afterwards, when the street adjacent thereto, called "South Street," was widened and extended further south a distance of about 35 feet, the fence was moved south also correspondingly, reducing thereby to the same extent the depth of the northern segment of the block. The southern boundary line, however, as we have stated, has been identified and unquestioned for nearly 50 years. It was marked on the ground at the time of the original survey, it has ever since been recognized and acquiesced in by all parties, and it has been attested by the fence put there by the owners of the property with the intention of having said fence constitute a visible and substantial memorial of the southern extremity of the block. The finding of the court in this regard is "that said fence was built in 1860 on the south line of said block No. 1 of Matthews First addition; that prior to the building of said fence surveyors were on the ground and marked it off; that said fence was placed on the south boundary line of said block No. 1 after said surveyors had surveyed the ground as aforesaid; that said fence has been maintained at the same place ever since its erection in 1860 as aforesaid."

Turning to the evidence, we find that one Mary Young testified: "I have resided in Visalia 51 years, and am acquainted with block No. 1, Matthews First addition to the city of Visalia, and have been acquainted with said property ever since I can remember. I know something about a fence, on or about the south line of said block No. 1. I know only where the south line of said block No. 1 is by the fence that is there. I think said fence has been there, as well as I can remember, since 1859 or 1860. I saw the surveyors surveying there, or surveying the line of course. The fence was built shortly afterwards; could not tell who built it, but I think it was built by Joshua Lewis. * * * During all these years I never heard any of the Atwells claim any of the property south of the said fence. I have always lived down near that community; so far as my knowledge the property of the Atwells as possessed by them has always been north of said fence. All the property south of that fence was in the possession of Mr. Creighton and Mr. Griffin. * * * When that road (South street) was extended, they threw out somewhere in the neighborhood of 30 or 35 feet, because there were five or six rows of grape vines thrown out on the road; a strip of land about 30 or 35 feet wide was taken off along the north side of the piece of land the Atwells claimed inside of their fence, and they moved their fence back about 30 or 35 feet and that strip of land went into the street. The fence they moved back had been there about 29 years, as near as I can get at it."

A. T. Griffin also testified that no one to his knowledge, whoever owned any part of block No. 1, claimed any property south of that fence, and that "no other boundary line was ever put there between blocks 1 and 2."

Seth Smith, the county surveyor, testified to the establishment of the northeast corner of said block and the opening of South street, which necessitated the change of the northern boundary of the block, and that the fence was moved back accordingly.

What purported to be an official map of Matthews addition, over the objection of appellant, was received in evidence. But whether properly admitted or not is of no importance, as it is too meager to throw any light upon the disputed tract. The identification of block No. 1, at least as far as the southern boundary is concerned, is made complete by the testimony to which we have already referred, and the reference to the map may be disregarded. There can be no doubt that when a conveyance was made of a strip of land beginning at the southwest corner of said lot it was the intention of the parties and so understood that the western termination of said fence should be the initial point, as this fence was the established southern boundary of said lot.

In Banks v. Moreno, 39 Cal. 239, it is said: "In grants of real estate it is not always necessary to describe it by metes and bounds, or by a reference to actual or artificial monuments, nor by courses and distances. If the tract granted have a well-known name, and the boundaries of the tract known by that name are notorious and well defined, a grant of the tract by its name would doubtless convey the title to the whole. In like manner, a grant describing the tract by reference to the known occupation of the grantor or another—or to another instrument containing a sufficient description of the premises—would be sufficient. In short, any description will suffice which identifies the land granted with such certainty that the specific parcel intended to be granted can be ascertained either by the calls of the instrument, as applied to the land, or by aid of the descriptive features of the grant. These are familiar propositions, too well known to the profession to need the citation of authorities."

Appellant objected to the question asked of the county surveyor, "What did Mr. Atwell say about that lost corner?" The objection was overruled, and the witness answered: "If I recollect the exact words he said, it was about 33 feet north of where the true line would come." The evidence seems to have been brought within the rule permitting the declaration of a deceased person "made against his interest in respect to his real property." It is probably true, as pointed out by appellant, that the said Atwell owned at the time a strip of land on the south side of the lot, but upon appellant's theory of this case the mistake in the location of the said section line would affect Atwell's property in the same manner as if it had been adjacent to said South street. Atwell appeared to think so, as he said "the line should be straight, and the government survey should be straight and we can straighten it now better than any other time; and it hurts me worse than anybody else." But the testimony could not have affected the result, as it otherwise appears clear that the mistake was made in the original survey, and, as we have seen, this circumstance has really no bearing upon the conclusion of the trial court as to the identity of the southern boundary line of said lot No. 1.

The bid of appellant for the purchase of the property now owned by him, addressed to the administrator of the estate of the said A. B. Atwell, deceased, was admitted over objection. It was therein stated that "I am aware of the fact that the north line of said property may be in dispute, but will feel myself satisfied should I get 39 feet south of that certain fence which extends along the north side of what is known as the A. B. Atwell tract on which the brick building above referred to is situated." This was clearly admissible as an admission against interest, and as indicative of appellant's understanding of what property he was purchasing and paying for. At the time of his bid, and also, we must assume, at the time of the sale, he was satisfied with 39 feet. The only surprising thing is that he was dissatisfied with the ruling of the court confining him to that tract which he purchased and paid for.

All the points made by appellant have received careful attention, but we are convinced that the decision of the lower court is correct, and the judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

12 Cal. App. 730

PEOPLE v. WARREN. (Cr. 144.)

(Court of Appeal, Second District, California. March 8, 1910.)

1. CRIMINAL LAW (§ 1158*)—APPEAL—QUESTIONS OF FACT—VOLUNTARY NATURE OF CONFESSION.

Where there is a sharp conflict in the testimony whether a confession was voluntary, the finding of the trial court must, like its finding on any other disputed fact, be deemed conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3066; Dec. Dig. § 1158.*]

2. CRIMINAL LAW (§ 531*)—CONFESSIONS—ADMISSIBILITY.

The owner of stolen property applied to the police for assistance in its recovery. During the investigation of the circumstances and before the arrest of accused, a police officer believed that accused was cognizant of the theft, and requested that he tell of the whereabouts of the property. Several days later, after the property had been recovered and further evidence of the guilt of accused obtained, accused made a confession. The police denied the testimony of accused that the confession was not made voluntarily. *Held* to justify the court in holding that the confession was made voluntarily.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212-1217; Dec. Dig. § 531.*]

3. CRIMINAL LAW (§ 394*) — EVIDENCE WRONGFULLY OBTAINED—ADMISSIBILITY.

A letter written by accused while in jail, and strongly tending to prove his guilt, is admissible in evidence, though the letter was procured by strategy and fraud.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 876; Dec. Dig. § 394.*]

Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Lee B. Warren was convicted of grand larceny, and he appeals. Affirmed.

George M. Harker and Ezra Williams, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant prosecutes this appeal from an order denying his motion for a new trial and from a judgment pronounced against him upon conviction of the crime of grand larceny.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The chief ground, and indeed the only one worthy of consideration, upon which appellant bases his contention for a reversal is that the admission in evidence of defendant's confession over his objection constituted prejudicial error. Appellant claims that the confession was not made voluntarily, but that he was induced to make it by reason of the chief of police and another officer assuring him (together with other promises which, if made, were sufficient to render the confession inadmissible) that if the valuables stolen were returned and he would "tell the whole business," the prosecution would be dropped and the case dismissed. Not only did these officers deny making the several statements and representations attributed to them by defendant, and upon the strength of which he claims to have made the confession, but they denied using any language of like import. It thus appears there is a sharp conflict in the testimony of the witnesses upon a question of fact, as to which, like any other disputed fact, the finding of the trial court must be deemed conclusive.

Upon discovering that her diamonds had been stolen from the box wherein they were placed, which box was deposited in the custody of the cashier of the bathhouse where she went in bathing, the owner applied to the chief of police to assist her in their recovery. During his investigation of the circumstances connected with the commission of the crime, and before defendant was arrested, the chief of police said to him: "I am satisfied that you know exactly where the diamonds are, and come through and tell me where they are; the game is young." We are unable to perceive how this language could be construed as a promise of immunity. The words "the game is young" have no secret or hidden meaning. The police officer was engaged in an effort to recover the stolen goods, and being satisfied that defendant was cognizant of the theft, requested that he tell of their whereabouts, thus relieving the officer from the duty of a further search. The cases of People v. Williams, 133 Cal. 165, 65 Pac. 323, and People v. Thompson, 84 Cal. 598, 24 Pac. 384, have no bearing upon the question. In the former case, the defendant's admission was excluded from evidence because it was obtained by duress, while in the latter the defendant was induced to confess by reason of the sheriff telling him, in response to an inquiry, it would be better for him to make a full disclosure. In the case at bar it is significant that the confession was not made until several days after the alleged promise of immunity, and after the officer had recovered possession of the stolen property, and obtained further evidence of defendant's guilt. The direct evidence of the officers contradicting the testimony of defendant, as well as the inferences fairly deducible from circumstances, the existence of which was conclusively shown by the evidence, or admitted by defendant, fully justified the court in holding the confession to have been made voluntarily and without promise of any kind whatsoever.

While in jail defendant wrote a letter to one who had been his accomplice in the commission of the crime. The contents of this letter strongly tended to prove defendant's guilt. It was received in evidence over defendant's objection that it was procured by strategy and fraud. In the recent case of People v. Swaile (Cal. App.) 107 Pac. 134, this court, in discussing an objection of like character, said: "Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. 1 Greenleaf on Evidence (16th Ed.) § 254a." Moreover, there was evidence tending to prove that defendant's surrender of the letter was voluntary.

Other points urged by appellant are deserving of no consideration, other than to say that they are wholly without merit.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 44

SANTA BARBARA COUNTY v. YATES et al. (Civ. 760.)

(Court of Appeal, Second District, California. March 15, 1910. Rehearing Denied April 13, 1910; Denied by Supreme Court May 12, 1910.)

EMINENT DOMAIN (§ 188*)—PROCEEDINGS TO CONDEMN RIGHT OF WAY—BOND OF PETITIONERS—COLLATERAL ATTACK.

Pol. Code, § 2683, requires that the petitioners for the condemnation of a right of way for a road must accompany the petition with a sufficient bond, to be approved by the board of supervisors, in double the probable cost of the viewing and laying out or altering of any road, conditioned that the bondsmen will pay all the cost of viewing and surveying in case the prayer is not granted. Section 2690 provides that "no informality in the proceedings of the board shall vitiate said suit, but the said order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof." The bond presented by petitioners provided that the bondsmen "will pay all the costs of viewing and surveying in case the prayer of said petition is not granted and the said road finally not opened." *Held*, that the insertion in the bond of the provision "and the said road finally not opened" does not render the bond defective; and, if it did, the defect could not be attacked collaterally in the condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 506; Dec. Dig. § 188.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Proceeding by the County of Santa Barbara against Mary M. Yates and others to condemn a right of way for a public road. From the judgment of condemnation, Mary M. Yates appeals. Affirmed.

H. P. Starbuck and Canfield & Starbuck, for appellant. Wm. S. Day and Wm. G. Griffith, for respondent.

SHAW, J. This is a proceeding instituted by the county of Santa Barbara to condemn a right of way for a public road. Mary M. Yates, one of the defendants in the proceeding, appeals upon the judgment roll accompanied by a bill of exceptions from the judgment of condemnation.

The sole question presented for consideration is the alleged insufficiency of the bond, which, under the provisions of section 2683, Political Code, is required to accompany the petition for the opening of the road. This section provides that: "The petitioners must accompany the petition with a good and sufficient bond, to be approved by the board of supervisors, in double the amount of the probable cost of the viewing and laying out or altering of any road, conditioned that the bondsmen will pay all the costs of viewing and surveying in case the prayer is not granted." The bond presented with the petition was conditioned that the bondsmen "will pay all the costs of viewing and surveying in case the prayer of said petition is not granted, *and the said road finally not opened.*" It is contended that the insertion in the bond of the words italicized renders the bond void, and that the defect appearing in the bond itself objection thereto may be taken collaterally in the proceeding to condemn the property. Conceding the bond to be defective as claimed, we are nevertheless of the opinion that objection thereto upon such ground cannot be raised collaterally.

While the law requires certain preliminary steps to be taken before the board of supervisors prior to the maintenance of an action to condemn the property of nonconsenting landowners, jurisdiction to determine the sufficiency of such steps, or whether they have been properly taken, is vested solely in the board of supervisors. Its determination therein must be deemed the final judgment of a competent tribunal having jurisdiction in a proceeding entirely distinct and separate from the action to condemn. The order directing the district attorney to institute the action is in the nature of a judgment adjudicating upon the sufficiency of all prior proceedings requisite to the making of the order. If the proceedings be irregular, or any essential step therein wanting, objection thereto should be taken by obtaining a review upon certiorari of such proceedings in the proper court. Not only is this rule prescribed by section 2690 of the Political Code, which provides that "no informality in the proceedings of the board shall vitiate said suit, but the said order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof," but it finds ample support in the authorities. Humboldt County v. Dinsmore, 75 Cal. 604, 17 Pac. 710; County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468; County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 Pac. 972; County of Sutter v. Tisdale, 136 Cal. 474, 69 Pac. 141. In the case last cited it is said: "* * * * The form of the bond which was presented with the petition * * * became immaterial, and evidence in reference thereto * * * was properly excluded by the court." In San Luis Obispo v. Simas, supra, it is said that "none of the intermediate orders or proceedings are reviewable in this action," which "shall be determined by the court or jury in accordance with the rights of the respective parties as shown in court, independent of said proceedings before the board." While the taking of the preliminary steps required should be alleged in the complaint, it seems that the order directing the bringing of the action is in itself proof of the regularity of such proceedings.

Moreover, we are of the opinion that the bond in form is in substantial compliance with the requirements of the statute. There is no merit in appellant's contention that adding the words "and the said road finally not opened" renders the bond void, for the reason that it lessens the liability of the bondsmen. The added condition is mere surplusage. The words neither add to nor detract from the liability of the bondsmen. Their obligation is to pay the costs of viewing and surveying if, after such examination and survey, the board shall deem it inadvisable to grant their petition, the granting of which would be equivalent to the opening of the road. If the petition be denied, such denial constitutes a final disposition of the proceedings thereunder for the opening of the road and their liability would attach at once. The proceedings being at an end, the road could not be finally or otherwise opened thereunder. It is idle to claim that the bondsmen would be released from liability because, after their petition was denied, a road covering the same territory might be opened under a dedication or purchase. The bond could have reference to no road other than that opened in the proceeding initiated by the petition with which the bond was filed, and to which it referred. At most, the alleged defect constitutes a mere irregularity, which did not affect the private rights of appellant. Hill v. Board of Supervisors, 95 Cal. 239, 30 Pac. 385.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

13 Cal. App. 1

SAN PEDRO SALT CO. v. HAUSER PACKING CO. (Civ. 710.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. SALES (§ 84*)—CONTRACTS—RENEWAL AT ELECTION—TIME TO EXERCISE ELECTION.

A contract for the sale and delivery during a year of a specified quantity of salt at a fixed price, which gives the buyer the option to renew the agreement for a second year, without specifying the time within which the election must be made, binds the buyer to exercise his option before the expiration of the contract, and an election made within 30 days after the expiration of the contract is ineffectual.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 84.*]

2. SALES (§ 84*)—CONTRACTS—LIABILITY OF BUYER.

A contract for the sale and delivery during a year of 200 tons of salt at $5 per ton gave the buyer the option to renew the agreement for a second year, without specifying the time within which he should elect to renew. He did not elect to renew until after the expiration of the year. During the following year he ordered salt from the seller as he had previously done under the contract, and in conversations with representatives of the seller he insisted that the purchases were made at the price stipulated in the contract. The seller never consented to the sale at such price, but he disclaimed any renewal by the buyer of the contract, and the invoices accompanying the shipments gave the price which was in excess of the price fixed in the contract. *Held*, that the seller could recover the value of the salt delivered after the expiration of the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 84.*]

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

The error in sustaining objections to questions to witnesses on cross-examination was not prejudicial, where the most favorable answers could not have benefited the cross-examining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193; Dec. Dig. § 1056.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the San Pedro Salt Company against the Hauser Packing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Isidore B. Dockweiler, for appellant. B. W. Hahn and Hahn & Hahn, for respondent.

SHAW, J. On August 26, 1905, plaintiff contracted in writing to deliver to defendant during the ensuing year 200 tons of salt at the price of $5 per ton as therein stipulated. The contract contained a provision to the effect that the defendant should have the option to renew the agreement for a second year, but failed to specify the time within which defendant should elect to renew the agreement. By its terms the contract expired on August 27, 1906. Within the year following such expiration plaintiff delivered to defendant a certain amount of salt alleged to be of the reasonable market value of $2,525.50, and for the recovery of which, less payments made, this suit was instituted. Defendant claims that, pursuant to the provisions of the agreement according such right, it renewed the contract under which it was entitled to the salt so delivered at the price specified therein. The court found there was no renewal of the contract and gave judgment against defendant for the value of the salt. Defendant's motion for a new trial was denied, and it appeals from the order denying the same.

The evidence clearly tends to prove that defendant did not elect to renew the contract prior to its expiration on August 27, 1906. Appellant contends, however, that, as the contract fixed no time when it should exercise its option to renew, it had a reasonable time after the expiration thereof within which to act, and that it did, by letter, within 30 days after its expiration, notify plaintiff of its election to renew the contract. Where a contract provides for its renewal at the election of one party thereto without fixing the time when such option shall be exercised, the time for giving notice of such renewal cannot be extended beyond the date of the expiration of the contract. The right to renew, like other rights, must necessarily cease when there is no longer a contract under and by virtue of which to claim the privilege. Shamp v. White, 106 Cal. 220, 39 Pac. 537; Renoud v. Daskam, 34 Conn. 512; Thiebaud et al. v. First Nat. Bank, 42 Ind. 212. Under the contract defendant was required to take the salt so purchased thereunder within one year after the date of the contract. It might with equal propriety insist that it had a right to delivery of the salt within a reasonable time after the expiration of the year as to insist upon the right of renewal of the contract after it had expired.

Appellant claims that during the year following the expiration of the contract it ordered salt from respondent as it had previously done under the contract, and that in conversation with representatives of the salt company it insisted that such purchases were made at the price stipulated in the contract. Conceding this to be true, it is clear that plaintiff never assented to the sale at such price of the salt so ordered by defendant. On the contrary, the evidence clearly tends to show that plaintiff at all times disclaimed any renewal by defendant of the contract. The invoices, copies of which are brought up in the record, included a large number of shipments of salt. Copies of these invoices accompanied each shipment, and the price of $8.50 per ton inserted in such invoices afforded ample evidence to defendant that the price at which plaintiff was supplying the salt was greater than that of $5 per ton stipulated in the contract.

The alleged errors of law are all based upon rulings of the court in excluding certain questions asked by defendant on cross-examination of plaintiff's witnesses. We perceive no error in any of these rulings. None of the questions constituted proper cross-examination. Moreover, the most favorable answers to these questions could not have benefited defendant, and hence, if the rulings were improper, were not prejudicial to the defendant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The order denying defendant's motion for a new trial is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

12 Cal. App. 725

CONTINENTAL BUILDING & LOAN ASS'N v. WOOLF et al. (Civ. 670.)

(Court of Appeal, Third District, California. March 7, 1910.)

1. JUDGMENT (§ 87*)—ON STIPULATION—VALIDITY.

A judgment, which recites that it was made pursuant to stipulation entered into in open court in the presence of the attorneys for both parties, "and of such defendants, * * * it appearing to the satisfaction of the court that the said stipulation was duly entered into in open court," is a valid judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 143–145; Dec. Dig. § 87.*]

2. APPEAL AND ERROR (§ 907*) — REVIEW — PRESUMPTIONS.

Where there is no bill of exceptions, all intendments in support of the judgment appealed from must be indulged, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which would have authorized a judgment will be presumed to have been presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911–2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

3. APPEAL AND ERROR (§ 931*) — REVIEW — PRESUMPTIONS.

It will be presumed on appeal that findings were waived, where there is nothing to show that they were not waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3771; Dec. Dig. § 931.*]

4. TRIAL (§ 388*)—APPEAL AND ERROR (§ 934*) —NECESSITY OF FINDINGS.

Where a judgment is entered upon an agreed statement of facts, no findings are necessary, and the same rule applies where the judgment is entered upon stipulation; for it will be presumed, if necessary to support such judgment, that the stipulation was made a matter of entry, and was sufficiently specific to authorize the entry of the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908–911, 915; Dec. Dig. § 388;* Appeal and Error, Cent. Dig. §§ 3777–3781; Dec. Dig. § 934.*]

5. JUDGMENT (§ 73*)—RESCISSION.

Where judgment is entered in accordance with a verbal stipulation in open court that, on failure to make certain payments at specified times, judgment against defendants might be entered, defendants, having obtained an extension of time to make the payments, are not at liberty to repudiate the other provisions of the stipulation.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 73.*]

6. ATTORNEY AND CLIENT (§ 85*)—ORAL STIPULATIONS.

Where an attorney in open court verbally stipulates that an order or judgment may be entered, and agreeably thereto the order or judgment is entered, it then becomes an executed stipulation, and Code Civ. Proc. § 283, providing that an attorney shall have authority to bind his client in any of the steps of an action by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise, cannot be invoked to the prejudice of the opposing party, as such section refers to executory agreements only.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 1137; Dec. Dig. § 85.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Continental Building & Loan Association against Louis Woolf and Mary L. Woolf. Judgment for plaintiff, and defendants appeal from an order refusing to set aside the judgment. Judgment and order affirmed.

See, also, 106 Pac. 107.

Wm. Hoff Cook, for appellants. Gavin McNab, for respondent.

CHIPMAN, P. J. Action for the recovery of possession of real property. Plaintiff had judgment. Subsequently defendants moved to set aside and annul the judgment, which was denied. Defendants appeal from the judgment, and from the order denying their motion to vacate the judgment

The judgment was as follows:

"This matter coming on regularly for trial in open court, by the court, both parties having waived a jury, the 24th day of September, 1908, in the presence of Gavin McNab, Esq., counsel for plaintiff, and of Joseph Slye, Esq., of counsel for the defendants, Louis Woolf and Mary L. Woolf, and of said defendants, and the parties hereto having entered into a stipulation in open court and duly reported by the official reporter of this court, whereby the amount payable by the defendants to plaintiff was fixed at $1,300, together with subsequent costs, including the calendar fee and reporter's fee, $500 of said sum to be paid by the 28th of September, 1908, and the remainder within 30 days from said 24th day of September, 1908, and whereby it was agreed that in the event the said money should not be paid in accordance with said stipulation at that time, then judgment should go against said defendants as asked in the complaint, without further trial; and the cause having been regularly continued from time to time, and finally until this 18th day of November, 1908, and counsel for plaintiff having, on this said 18th day of November, 1908, in the presence of counsel for defendants, moved for judgment, pursuant to said stipulation, and Joseph Slye, Esq., of counsel for defendants, having moved for a further continuance to permit of compliance by defendants with the requirements of said stipulation; and it appearing to the satisfaction of the court that the said stipulation was duly entered into in open court, and that defendants, and each of them, had failed to comply with same, and that plaintiff is entitled to judgment in accordance with the terms of said stipulation, in all respects as asked in the complaint; and the law and the premises being by the court here understood and fully considered—it is hereby ordered, adjudged, and decreed, and this court does hereby order, adjudge, and decree, that plaintiff above named do have and recover possession of the real property, the subject of this action, which said real property is particularly described as follows, to wit: [Description of property.]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"J. M. Seawell, Judge.

"Dated November 18, 1908. Recorded Dec. 2/08. Book 22, Page 128."

Indorsed: "Filed Dec. 2, 1908. H. I. Mulcrevy, Clerk, by Milton M. Davis, Deputy Clerk."

It appears from what purports to be a bill of exceptions, in support of the motion to annul the judgment, that on January 12, 1909, defendants filed with the clerk a notice of motion to set aside and annul the judgment, on the grounds: (1) That the court had no jurisdiction to enter the judgment, and it is void; (2) that it was made without the consent of defendants, and without a trial of the facts in issue; (3) that it was made through mistake, inadvertence, and excusable neglect upon the part of defendants. The motion came on to be heard on January 29, 1909, upon the pleadings in the case, and upon certain affidavits filed by defendants and upon certain counter affidavits submitted by plaintiff. On February 11, 1909, the court made the following order: "Ordered that if within 15 days defendants pay to plaintiff the sum of $1,062, said motion be granted, and if not so paid, motion to be denied." The bill of exceptions purports to be "upon said motion and order of this court, made in relation thereto."

Respondent makes the point that the order refusing to set aside a judgment or order is not appealable. It was held in Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175: "The motion was not for a new trial, but was merely to set aside the judgment, and the judgment was itself appealable. It is settled that when a judgment or order is itself appealable the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set aside—citing cases. There are some exceptions to this rule, but the case does not fall within any of them. The plaintiff should have appealed from the judgment, with a bill of exceptions upon that appeal." See Kent v. Williams, 146 Cal. 3, 11, 79 Pac. 527. Nevertheless, we have examined the bill of exceptions, and, upon a careful reading of the affidavits before the trial court at the hearing of the motion, we think its order finds ample justification. We see no infirmity in the judgment. It is there recited that it was made pursuant to stipulation entered into in open court, in the presence of the attorneys for both parties, "and of said defendants; * * * it appearing to the satisfaction of the court that the said stipulation was duly entered into in open court," etc. There being no bill of exceptions upon the appeal from the judgment, all intendments in support of the judgment must be indulged (Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361), and all proceedings necessary to its validity will be presumed to have been regularly taken; and any matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented (Id.). Appellants now urge nothing against the validity of the judgment which might not have been presented to the court below, and passed upon by that court favorably to respondent.

It will be presumed that findings were waived where there is nothing to show that findings were not waived. Goyhinech v. Goyhinech, 80 Cal. 410, 22 Pac. 175. Where judgment is entered upon an agreed statement of all the facts in the case no findings are necessary (Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364); and we see no reason why the same rule should not apply where the judgment is entered upon stipulation, for it will be presumed, if necessary to support the judgment, that the stipulation was made a matter of minute entry, and was sufficiently full and specific to authorize the entry of the judgment. It appears from the recitals in the judgment that the matter came on to be heard September 24, 1908, and pursuant to the stipulation then made in open court the amount payable to plaintiff by defendants was fixed at $1,300, of which $500 was to be paid September 28, 1908, and the remainder within 30 days from September 24, 1908, and if not so paid, judgment should go against defendants as asked in the complaint. Judgment was not finally entered until November 28, 1908. The judgment shows on its face that defendants obtained an extension of time in which to make payments, and thus secured some favor by it. Having agreed to the judgment, in open court, though by verbal stipulation, defendants are not at liberty to repudiate the other provisions of the stipulation. Himmelmann v. Sullivan, 40 Cal. 125; Hawes v. Clark, 84 Cal. 275, 24 Pac. 116; Smith v. Whittier, 95 Cal. 279, 287, 30 Pac. 529. In Reclamation District v. Hamilton, 112 Cal. 603, 609, 44 Pac. 1074, approving Himmelmann v. Sullivan, supra, it was held that section 283, Code Civ. Proc., prescribing the manner in which the attorney may bind his client by stipulation, is executory, and does not refer to executed agreements. It seems to us that when an attorney in open court verbally consents or stipulates that an order or judgment may be entered, and agreeably thereto the order or judgment is entered, it then becomes an executed agreement or stipulation, and the rule last above stated applies. In Coonan v. Lowenthal, 129 Cal. 197, 61 Pac. 940, it was held that, where an attorney consents orally in open court to the amendment of a pleading, section 283, Code Civ. Proc., cannot be invoked to the prejudice of the opposing party. To give section 283 a literal construction would greatly retard the business of the court, and lead to absurd consequences. Every admission, consent, or agreement made in the course of the trial would either have to be reduced to writing or filed with the clerk or by the clerk entered in his minutes. It was never intended that the section should receive such a construction.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

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12 Cal. App. 760

PEOPLE v. PHILLIPS. (Cr. 152.)

(Court of Appeal, Second District, California. March 9, 1910.)

1. Homicide (§§ 228, 234*)—Sufficiency of Evidence.

Evidence, in a prosecution for homicide, *held* sufficient, if believed, to show that the crime was committed, and that accused was guilty of committing it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 471–476, 482–493; Dec. Dig. §§ 228, 234.*]

2. Criminal Law (§ 213*)—Preliminary Examination—Waiver of Objections.

After the jury was sworn, and the district attorney had made his opening statement, and the complaining witness was about to be sworn, defendant objected to the taking of any testimony on the ground that he had not been properly committed by the examining magistrate because in the body of the complaint the given name of the complaining witness was different from the given name signed to the complaint. *Held* that, if this variance was a material one, it should have been presented on motion to set aside the information, and it came too late at the time it was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 431–433; Dec. Dig. § 213.*]

3. Criminal Law (§ 660*)—Reception of Evidence—Objection to Interpreter.

Where, in a prosecution for homicide, a number of the witnesses were Indians, who were unable to testify in English, and it was recognized by all that the interpretation was likely to prove inexact in the hands of any one within reach of the court, the proper time to question the qualification of an interpreter was before he was permitted to act, and, where the best is made of the situation by consenting to a person acting as interpreter who was known not to be able to interpret exactly either the oath or the evidence, the accused was not entitled to have the testimony given through such an interpreter stricken out without some showing that in a particular instance complained of the oath was not correctly interpreted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 660.*]

4. Criminal Law (§ 707*)—Reception of Evidence—Harmless Error.

In a prosecution for murder, many of the witnesses were Indians, who could not testify in English, and the court allowed accused to introduce the testimony of his witnesses with the aid of his stepfather as an interpreter, and allowed the district attorney to have an Indian boy as a check interpreter to prompt him when it appeared to the boy that the interpretation had not been correctly made. Much of the defense was introduced in a leading form. The district attorney objected to one answer given by the interpreter, and said, "Is this interpreter giving the answers to the witness, or is she testifying?" *Held* that, there being enough in the record to justify the remark, the suggestion that the interpreter might be giving his own version of the matter was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 707.*]

5. Criminal Law (§ 782*)—Instructions—Justification.

A requested instruction, in a prosecution for homicide, that no justification or excuse of the act by defendant is required to be proven "by a preponderance of evidence," is properly modified by striking out the words in quotation marks.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

6. Criminal Law (§ 829*) — Instructions Already Given.

Striking out from an instruction on reasonable doubt the clause, "which never shifts, but remains throughout the whole case upon the prosecution," is not prejudicial to defendant, where it is in effect covered by other instructions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 829.*]

7. Criminal Law (§ 1104*)—Appeal and Error—Preparation of Transcripts.

The statute making a typewritten transcription of the evidence the record on appeal does not change the rule of the Supreme Court requiring the transcripts in all cases to conform to certain dimensions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1104.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Lee Phillips was convicted of murder, and appeals. Affirmed.

J. C. C. Russell, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for murder. Verdict of guilty of murder in the second degree, and judgment ordering imprisonment in state's prison for term of 50 years.

The defendant, the man whom he killed, Jim Alonzo, and all the witnesses who testified, except the officers and the complaining witness, were California Indians. The complaining witness, who is a Mexican and the son-in-law of the deceased, was the only witness, other than the officers, who could make himself fully understood in English; the others being assisted more or less by an interpreter who was sworn to interpret from English into Indian and from Indian into English. These Indians and the complaining witness were all staying at a sheep-shearing camp at the time of the killing of Jim Alonzo. The day of the occurrence, August 22,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1909, was Sunday, and some or all of these Indians had been to one of the neighboring towns and returned to camp toward night. The defendant and his wife were the last to reach camp, arriving about dusk or a little after dark; the former bringing with him some whisky. The deceased immediately upon defendant's arrival asked him for a drink, which was freely given; the complaining witness and another Indian, Andrew Tip or Tepe, also taking a drink. Upon Jim Alonzo asking for another drink a little later, some altercation took place between him and defendant which ended in the defendant pulling a pistol and firing three shots, one of which hit Jim Alonzo and caused his death. The conversation between the two men while quarreling was carried on principally in the Indian language, and the complaining witness was unable to understand the purport of it; but the testimony of the other witnesses for the prosecution, who testified, in part at least, through an interpreter, tends to show that defendant was at all times the aggressor, and that the deceased was acting in a conciliatory manner. So far as the complaining witness could understand what was said, or see what was done, his testimony supported the same view. The testimony of the witnesses for the defense (who were relatives and friends of the defendant, as the witnesses for the prosecution were relatives and friends of the deceased) tended to show that the deceased was the aggressor, and at least one of them testified that the first two of the three shots fired by the defendant were fired in the air to deter the deceased from advancing upon defendant, and that the third and fatal shot was only fired after these had failed, and when deceased was making a demonstration which might have indicated an intention upon the part of Jim Alonzo to pull a weapon. There can be no question that, if the evidence of the prosecution be believed, it was shown by the testimony of eyewitnesses that the crime was committed, and that defendant was guilty of committing it. This was supplemented by evidence that the defendant ran away immediately after the killing.

After the jury was sworn to try the cause, the district attorney had made his opening statement, and the complaining witness called and about to be sworn, defendant objected to the taking of any testimony on the ground that he had not been properly committed by the examining magistrate, because in the body of the complaint the name of the complaining witness was given as "Marcello" Baker, while the name signed to the complaint was "Undo" Baker. This is assigned as error. If this variance was a material one, it should have been presented on motion to set aside the information, and came too late at the time it was made. People v. Morley, 8 Cal. App. 372, 374, 97 Pac. 84.

The witness Belle Jim, the daughter of the deceased, and wife of the complaining witness, was examined through an interpreter named Willie Atwell, to whose acting in this capacity defendant consented before the witness was sworn; it being at that time recognized by all persons interested that the interpretation was a difficult matter and likely to prove inexact in the hands of any one within reach of the court, but the interpreter was permitted to proceed without objection. After the testimony of this witness was closed, and the next witness, Josie Alonzo, the wife of the deceased, was being interrogated with respect to her knowledge of English and of the significance of an oath, it was disclosed that the interpreter, Willie Atwell, was not able to clearly convey to the mind of the Indian witness the full purport of the oath administered by the clerk. Thereupon defendant moved that all the evidence of the witness Belle Jim be stricken out on the ground that she was not properly sworn. The court then interrogated the interpreter as to his qualifications and ability to interpret in the English and Indian languages and proceeded with the examination of the witness then on the stand, Josie Alonzo, without objection; and later, when the motion to strike out the testimony of Belle Jim was renewed, the court said: "The presumption is that the witness was properly sworn, and the motion to strike out is denied. If there is a showing made in this court that will overcome that presumption, in the opinion of the court, and tend to show the fact that the witness wasn't sworn, or didn't understand the oath when administered, the court will hear such offered proof or testimony if it be offered; but the motion is at this time denied." No further showing was made by the defendant as to the improper interpretation of the oath to the witness Belle Jim.

The trial court did not abuse its discretion in denying this motion. The proper time to question the qualification of an interpreter is before he is permitted to act, and where, as in this case, the best is made of an unsatisfactory situation, by consenting to a person acting in this capacity who is known not to be able to interpret or translate exactly either the oath or the evidence, it cannot be said the defendant is entitled to have the testimony given through such an interpreter stricken out, without making some showing that in the particular instance complained of the oath was not correctly interpreted. There was no showing whatever that the oath as administered to Belle Jim in English was not properly interpreted into the Indian language. Neither was there any attempt to negative the presumption that might have arisen, from the knowledge of English which she displayed, that she understood the oath when spoken by the clerk in that language. In other words, as the trial court said, the record is regular on its face, and no showing inconsistent with it was made.

When the defendant was permitted to introduce the testimony of his witnesses with the aid of his stepfather as an interpreter, the court allowed the district attorney to have an Indian boy as a check interpreter to prompt him when it appeared to the boy that the interpretation was not correctly made. The calling of the court's attention to the discrepancies reported by the boy on four or five occasions is assigned as misconduct on the part of the district attorney. On the first occasion the district attorney stated the answer of the question as interpreted by the boy, and, on being admonished that he must not state what the boy said, confined himself to objecting on the ground that the interpreter was not asking the question propounded by counsel, and in the last instance inquiring: "Is this interpreter giving the answers to the witness, or is she testifying?" Much of the defense was introduced in a leading and suggestive form, and there is enough in the record to justify the remark last made, and we do not see how the defendant could have been prejudiced by it. The trial court strained its discretion in respect to the admission of leading and suggestive questions on behalf of the defense in order that the defendant might have the full benefit of all the justification for his act that could be presented. This is not said in criticism of the court's action in this respect, but in support of the view that, under the conditions of this trial, the statement of the district attorney containing the suggestion that the interpreter might be giving his own version of the matter could not have been prejudicial to the defendant.

The language in the argument of the district attorney, the use of which is assigned as misconduct, is found in the evidence in the case. One witness at least testified that the defendant jumped over a fence and ran, after the shooting occurred.

It was not error for the trial court to make the modifications of the two instructions complained of. An instruction that no justification or excuse of an act by a defendant is required to be proven is only weakened by being stated in the form that he is not required to establish his justification or excuse, "by a preponderance of evidence." The insertion of the words quoted only tends to mislead the jury and detract from such an instruction given at the request of the defendant. The court properly eliminated these words from the instruction before giving it. The clause stricken out of the instruction on reasonable doubt, "which never shifts, but remains throughout the whole case upon the prosecution," is covered in effect by the instructions given by the court, and no prejudice could have resulted from the failure to give it where requested. We find no prejudicial error in the record.

We have considered this appeal upon the record presented without passing upon the Attorney General's objections urged in his brief. We have also done this, notwithstanding the record is not prepared in accordance with the rules of the Supreme Court. The statute making a typewritten transcription of the evidence the record on appeal does not change the rule of the Supreme Court requiring the transcripts in all cases to conform to certain dimensions. Whether typewritten or printed, there must be some uniformity of size in the files of the court that they may be preserved in satisfactory form, and for this reason the rules as to dimensions are applicable to written and typewritten, as well as printed, transcripts and briefs.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

13 Cal. App. 18

SCHINDLER v. YOUNG et al. (Civ. 755.)

(Court of Appeal, Second District, California. March 10, 1910.)

MUNICIPAL CORPORATIONS (§ 339*)—STREET IMPROVEMENTS—CONTRACTS—VALIDITY.

A clause in specifications for street work requiring the contractor to observe all the ordinances as to the obstruction of streets, keeping open passageways and protecting the same where they would be dangerous to public travel, and making him responsible for all damages the city may have to pay on his failure to protect the public, does not increase the obligation of the contractor and one subject to an assessment for the work may not complain on the ground that the cost of the work is thereby increased.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 868, 871; Dec. Dig. § 339.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Charles Schindler against C. C. Young and others. From a judgment for defendant C. C. Young, rendered on sustaining a demurrer to the amended complaint, plaintiff appeals. Reversed and remanded.

F. C. Spencer, for appellant. F. O. Daniel, for respondent C. C. Young.

SHAW, J. Action to recover the amount of an assessment levied for street improvement against a lot owned by defendant C. C. Young.

Defendant interposed a demurrer upon the ground that the second amended complaint failed to state facts sufficient to constitute a cause of action. The court sustained the demurrer and denied plaintiff's right to further amend, stating as a reason for such denial that it satisfactorily appeared to the court that plaintiff could not amend his complaint so as to state a cause of action. Judgment was thereupon rendered for defendant, from which plaintiff prosecutes this appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We regret that respondent has not deemed the case of sufficient importance to justify him in filing points and authorities, or otherwise attempting to aid the court in arriving at a decision upon the appeal. In the absence of any suggestion on his part directing our attention to other alleged defects in the voluminous complaint, which, with exhibits, covers some 35 pages of the transcript, we shall assume, as stated by appellant, that the chief ground upon which the ruling of the court was based was a clause in the specifications under and in accordance with which the proceedings were had and taken and the work required to be done. This clause is as follows: "The contractor will be required to observe all the ordinances of the board of trustees in relation to the obstruction of streets, keeping open passageways and protecting the same where they are exposed and would be dangerous to public travel, and he will be held responsible for all damages the city may have to pay in consequence of his failure to protect the public from injury."

The court no doubt had in view the principle applied in Brown v. Jenks, 98 Cal. 10, 32 Pac. 701, Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, and like cases. In the former case the specifications required the contractor to give a bond with sureties conditioned for the keeping of the street so improved in thorough repair for a period of five years from the completion of the contract. It was not only held that requiring the bond was unauthorized, but that such requirement changes and may increase the burdens of the property owner in that the contractor must charge a higher price for the work by reason of having to keep the street in repair. Clearly, its effect was to impose a duty upon the contractor other than that which the law imposed and as to which there was no authority in law for the creation of contractual relations.

The specifications in Blochman v. Spreckels contained the following provisions: "The contractor shall keep good and sufficient guards around said improvements, by fence or otherwise, to prevent accident, and shall hang thereon lights, to burn from dusk until daylight; and the contractor shall hold the city harmless for any and all suits for damages arising out of the construction of said improvements. The contractor shall, when required to do so by the superintendent of streets, remove from the work any overseer, laborer, or other person, who shall refuse or neglect to obey the said superintendent in anything relating to the work, or who shall perform his work in a manner contrary to these specifications or be found incompetent or unfaithful. All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." The court in denying a recovery based its conclusions solely upon the provision requiring the contractor to sustain all loss or damage, which it is held contemplated any damage which might subsequently result from the nature of the improvement. It was further held that the contractual assumption of such liability was unauthorized and its effect was to increase the burdens imposed upon the property owner. As to the other provisions contained in the specifications, it was intimated a fair interpretation would warrant holding them all to relate to damage during the progress of the work and before the city had accepted it.

In the case at bar the provision, while it had no proper place in the specifications, is clearly distinguishable from those discussed in the above and like cases. It does not contemplate any obligation devolving upon the contractor after the completion and acceptance of the work. Under the contract, he assumes no duty other than that which is imposed by law or the city ordinances. His obligations were not increased by the contract requiring him to take measures prescribed by ordinance applicable to all persons for the protection of the public from dangers incident to exposed and unprotected obstructions in the public highways. The specifications imposed no additional burdens in this respect. So, too, the contractor in prosecuting the work was liable for damages to persons who might receive personal injuries by reason of his negligence in failing to observe proper precautions to protect the public, but we know of no provision of law in this state under which the city could be required to pay damages to one injured in consequence of a defective street (Arnold v. City of San Jose, 81 Cal. 619, 22 Pac. 877; Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113), or the fact of the contractor neglecting a duty thus enjoined upon him. As the city could in no event be required to pay damages on account of the contractor's negligence in failing to observe the ordinances, the requirement imposed no new or additional obligation upon him. It is therefore apparent that the agreement on the part of the contractor to do that which the law, in the absence of a contract, required him to do, though not under the law a subject of contract, and hence unauthorized, added nothing to his duties, obligations, or liabilities. This being true, it would seem clear that no ground exists for presuming that, by reason of such specification, the cost of the work was increased to the detriment of the property owner. And, since his burdens were not increased, the case is not brought within the principle announced in the cases hereinbefore cited. The court erred in sustaining the general demurrer.

The court also sustained the demurrer interposed upon the ground that the complaint was ambiguous. An examination of the complaint discloses that, whatever uncertainty may exist therein, it is not obnoxious to demurrer on the ground of ambiguity.

The judgment is reversed, with instructions to the trial court to overrule the general demurrer and permit plaintiff to make such amendment to his complaint as he may be advised.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 33

EELLS v. GRAY BROS. CRUSHED ROCK CO. (Civ. 772.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. CORPORATIONS (§ 397*)—ACTS OF AGENTS—APPARENT AUTHORITY—LIABILITY OF CORPORATION.

Where the secretary of a corporation had apparent authority to act for the corporation, the fact that the board of directors had adopted no formal resolution conferring such authority was immaterial.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1598; Dec. Dig. § 397.*]

2. CORPORATIONS (§ 425*)—ACTS OF AGENTS—APPARENT AUTHORITY—LIABILITY OF CORPORATION—ESTOPPEL.

If a corporation clothes an officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with him in good faith and in ignorance of limitations upon his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701; Dec. Dig. § 425.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by George I. Eells against the Gray Brothers Crushed Rock Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Ames & Manning, for appellant. R. Y. Williams and Williams & Rutan, for respondent.

SHAW, J. Action to recover the value of certain nursery stock, consisting of budded walnut trees, alleged to have been sold and delivered to defendant at its special instance and request. Judgment was rendered for plaintiff. The appeal is from the judgment and an order denying defendant's motion for a new trial. Defendant offered no evidence, and the only point which it urges as ground for reversal is that the court erred in denying defendant's motion for a nonsuit.

Defendant is a corporation, and, as shown by the evidence, the owner of a 24-acre orchard in Orange county, which for 10 or 12 years prior to the commencement of this suit had been in the care and under the management of one William E. Case. The trees were delivered to defendant at the request of Case, who, pursuant to oral instructions given him by the secretary of the corporation, and acting on its behalf, ordered them delivered at defendant's orchard, and the fair inference from the evidence is that upon their delivery he planted them upon defendant's land, as he was instructed to do by defendant's secretary. Subsequently, the bill for the trees was sent to defendant, who, on November 27, 1908, returned it to plaintiff with the request that it be submitted to "Mr. W. E. Case, who has charge of our place, for his approval." On January 6, 1909, defendant, in reply to plaintiff's demand for payment, wrote: "In reference to the payment of the same (the bill for the trees), we would ask if it would not be satisfactory if we would send you a sixty and a ninety day note covering the amount as you want to close up the estate." It further appears from the evidence that it was and had been the custom of defendant to transmit directions to Case, its manager, regarding the care of the orchard, through its secretary. Case testifies that "sometimes it was one (the secretary) and sometimes the other, whichever one happens to be there, and sometimes they write about it." It thus clearly appears that the secretary, who directed the purchase, was clothed with apparent authority to act in the matter. The fact that the board of directors adopted no formal resolution conferring such authority upon him is immaterial; it was not necessary. "If a corporation clothes an officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with him in good faith, and in ignorance of limitations upon his authority." Section 707, Clark and Marshall on Private Corporations. It is unnecessary to cite authorities in support of this proposition. Suffice it to say that we cannot perceive how the court, under the facts here presented, could have reached any conclusion other than that which resulted in the judgment rendered for the value of the trees so delivered to defendant and by its agent planted upon its land.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 12

MORGAN v. LOS ANGELES PAC. CO. (Civ. 752.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. NEW TRIAL (§ 72*)—GROUNDS—WEIGHT OF EVIDENCE—DUTY OF TRIAL COURT.

On motion for a new trial for insufficiency of the evidence to sustain the verdict, the trial court cannot merely determine whether there is a conflict in the evidence, but must weigh it for both parties, and, if the verdict in his judgment is against the weight of the evidence, must grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. § 72.*]

2. APPEAL AND ERROR (§ 979*)—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL.

An order granting a new trial for insufficiency of the evidence to sustain the verdict will

not be reversed, unless there was a manifest abuse of discretion in granting it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871; Dec. Dig. § 979.*]

3. APPEAL AND ERROR (§ 933*)—PRESUMPTIONS—PRESUMPTIONS IN FAVOR OF JUDGMENT.

The language of an order granting a new trial, as to the grounds of granting it, must be interpreted by the appellate court so as to support the order if possible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3772; Dec. Dig. § 933.*]

4. NEW TRIAL (§ 163*)—ORDER—FINDINGS—CONSTRUCTIONS.

A statement, in the order granting a new trial after verdict for plaintiff, in an action for injuries by being thrown from a street car, that the new trial was granted because plaintiff assumed the risk of riding on the steps where he did was at most a mixed inference of fact and law, and meant only that plaintiff assumed all risks of riding where he did which the evidence showed were incurred by him.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 163.*]

5. CARRIERS (§ 346*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a street car company for injuries to plaintiff by being knocked off a street car by being struck by the handlebar on another car while he was riding on the steps, evidence *held* to support a finding that there was no risk to plaintiff due to a defective rail, or the swaying of the car from such cause.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 346.*]

6. NEW TRIAL (§ 157*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

In ruling upon a motion for new trial for insufficiency of the evidence to sustain the verdict, the trial court must assume that the instructions given by it correctly stated the law.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 317, 318; Dec. Dig. § 157.*]

7. NEW TRIAL (§ 157*) — GROUNDS — SUFFICIENCY OF EVIDENCE.

In passing upon a motion for a new trial on the ground that the evidence was insufficient to sustain the verdict, the trial court was bound to consider all testimony introduced without objection, whether competent or not.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 318; Dec. Dig. § 157.*]

8. CARRIERS (§ 292*) — EQUIPMENT — SAFETY BAR.

A street car company is not required, as a matter of law, either by a statute or rule of law, to keep a safety bar before the entrance of open street cars.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 292.*]

9. CARRIERS (§ 321*)—TRIAL (§ 256*)—INJURIES—ACTIONS—INSTRUCTIONS—REQUESTS.

In an action against a street car company for injuries by being knocked off the step of a car by the projecting handlebar of a car going in the opposite direction, an instruction that there was no law requiring the company to place a safety bar on the side of the car on which plaintiff was riding was correct so far as it went, and did not preclude plaintiff from showing negligence in not providing a safety bar under the circumstances, and plaintiff cannot complain thereof, not having requested an appropriate instruction on the subject.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321;* Trial, Cent. Dig. §§ 628–641; Dec. Dig. § 256.*]

10. CARRIERS (§ 320*)—PASSENGERS—INJURIES—JURY QUESTION—NEGLIGENCE.

The distance between the projecting steps of passing street cars on defendant's double tracks was only three inches, and the distance between the bodies of the cars was 18 inches, but the handlebars of cars on either track would extend 2⅝ inches beyond that distance. There was no safety bar across the entrance of the car on which plaintiff was riding and injured by being struck by a handlebar on another car, and plaintiff was riding on the step of the entrance because of the crowded condition of the car. *Held*, that it could not be said as a matter of law that it was negligence not to provide a safety bar on the car.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Harry H. Morgan against the Los Angeles Pacific Company. From an order granting defendant a new trial after verdict for plaintiff, plaintiff appeals. Affirmed.

E. B. Drake and Jones & Drake, for appellant. Gurney E. Newlin, John D. Pope, and J. W. McKinley, for respondent.

TAGGART, J. Action to recover damages for personal injuries sustained by plaintiff while a passenger upon an electric car of the defendant which was being operated in the city of Los Angeles. The verdict of the jury was for plaintiff for $5,000, and the superior court granted a motion by defendant for a new trial upon the ground of insufficiency of the evidence to sustain the verdict. This appeal is from that order.

Several other grounds of motion are stated in the notice of intention, and it appears to be conceded by appellant that, if the ruling of the trial court can be sustained upon any of the grounds stated in the notice, its order must be affirmed. We think, however, that under the rules applicable to the action of the trial court upon all matters relating to the weight of evidence and credibility of witnesses, the order of the superior court must be sustained on the ground therein stated. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions on a motion for a new trial. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. Where the decision is against the weight of the evidence it is the duty of that court to grant a new trial. In considering the question upon the motion, the trial judge must act upon his own judgment as to the effect of the evidence. In an action tried by a jury, the parties are entitled to the judgment of the jury in rendering a verdict in the first instance; but, upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence. Green v. Soule, 145 Cal. 96, 78 Pac.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

337. The trial court having discharged this duty (which duty, says the Supreme Court, judges of the superior court are generally only too reluctant to perform), and made its order granting a new trial on this ground, that order will not be reversed by an appellate court, unless it appears that there has been a manifest abuse of the sound, legal discretion which the trial court is presumed to exercise in passing upon such a motion. Pico v. Cohn, 67 Cal. 258, 7 Pac. 680. "It is only in rare instances and upon very strong grounds that the Supreme Court will set aside an order granting a new trial." Quinn v. Kenyon, 22 Cal. 82.

Plaintiff left the business part of the city of Los Angeles on one of defendant's regularly operated street cars to go to his home in the residence district of the city, about the hour of 5 o'clock in the afternoon. When he attempted to board it he found the car was "jammed," and he could not get in the car on the right-hand side, the proper side to enter. The conductor said: "Some of you fellows will have to get off of those steps; people cannot get on and off"—so he walked around to the steps at the rear of the car on the inside or left-hand side. According to his own testimony, he stood on the top step, holding himself on by the emergency brake wheel, while others testified that he was on the bottom step, and there was some testimony tending to show that he could not reach the brake wheel from the position in which he stood; one witness stating that he was holding on by hooking his arm around the post. The car upon which he was riding was a wide one, being 8 feet 6 inches across, while from tip to tip of the projecting steps it was nine feet and nine inches. The double tracks upon which the cars on this line were operated were of 3 feet 6 inch gauge and 10 feet from center to center, thus leaving but 3 inches clear between the steps of passing cars. The distance of 18 inches between the bodies of passing cars was also further reduced by the projection of the handlebars from each of them a distance of 2⅝ inches. There was no safety bar across the entrance to the car upon the steps of which plaintiff stood, and this is also alleged to be an act of negligence upon defendant's part which contributed to plaintiff's injury. The trial court instructed the jury that there was no law requiring the defendant to have a safety bar at such a place, and one of the witnesses who stood upon the steps with the plaintiff, testified, in effect, that if there had been one, it would only have rendered the position of a person standing on the top step the more dangerous, as it would have prevented him from getting his body inside the line of the car.

In the position described the plaintiff rode quite a distance without mishap, quite a number of cars being passed on the other track during this time, but when about a mile and a half from where he boarded the car he was struck by the projecting handlebar of another car of defendant going in the opposite direction, and thrown from his place on the step to the ground, the force of the collision wrenching loose the handlebar which struck him and precipitating that to the ground also. Plaintiff was badly injured, was in the hospital for nine weeks, and from the character of his injuries the verdict could not well be attacked on the ground that it was excessive. The negligence mainly relied upon by plaintiff is alleged to be the unsafe and defective condition of the defendant's roadbed at this point, which caused the car on which plaintiff was riding to give a sudden lurch or jerk to the side, thus throwing plaintiff's body out, and causing his head to project beyond the side of the car at the moment the other car was passing.

Plaintiff's own testimony located him as standing upon the top step, with his head inside the line of the body of the car, until the lurch or jerk threw him against the projecting bar. There was other evidence to sustain this view, as there was to support the theory of plaintiff that there was a lurch or sudden jerk of the car such as might have been caused by a defect in the rail. There was, however, no direct evidence of any particular defect or loose rail at the place of the accident at the time of the accident; there being, however, evidence as to the crooked condition of the track at other times when excavations were made to repair or relay the rails. Some of the other passengers who were on the car did not notice any such motion, and still others stated that there was no such swaying or rocking motion as would have been produced by a defect in the track, but merely the jerk caused by plaintiff coming in contact with the other car.

Appellant, however, quotes the language of the trial court in granting the motion to show that the order was made "because the plaintiff assumed all the risk in riding where he did," and contends that it was the evidence upon the issue of contributory negligence which the learned judge who tried the cause construed to support the order made. If it were necessary for us in considering the order before us to read this language of the trial judge into it, we would still be bound to interpret the language in support of the court's action. It could not be said that the evidence in the record would justify this court in saying as a matter of law, that the plaintiff did *not* assume all the risks in riding where he did, and it is not necessary that we should assume for the purpose of this appeal that the declaration of the trial court that he *did* was a conclusion of law alone. At most, it was a mixed inference of fact and law, and in considering the court's language we must so regard it. So considered, it would mean only that the plaintiff assumed all the risks of riding where he did which the facts of the case disclosed were incurred by him. Thus the question of reconciling the conflicting testimony above mentioned would be before us, and, taking the most favorable view of the evidence in support of the order, there was no risk due to a defective rail or swaying or lurch of the car from such a cause, referred to by the trial court when it said the plaintiff assumed all the risks in riding where he did.

For the purpose of passing upon the motion for a new trial the trial court was bound to assume the instructions given by it to correctly declare the law, as well as to consider all testimony introduced without objection, whether competent or not. Williams v. Hawley, 144 Cal. 102, 77 Pac. 762. In other words, the law given to the jury by the court, and the evidence which the court permitted the jury to hear, constitute the law and evidence which must be considered by the court upon a motion for a new trial. The trial judge must determine the sufficiency of the evidence to sustain the verdict in the light of the same facts and law that were before the jury. The instruction of the trial court that "there is no law requiring the defendant to place and keep in place a safety bar on the side of the car on which plaintiff was riding at the time of the accident which resulted in his injuries" is therefore not before us on this appeal except for the purpose indicated. Treating this question as one of those which we are called upon to determine for the purposes of a new trial (section 53, Code Civ. Proc.), we are of opinion that the instruction, as far as it went, correctly stated the law. There is neither statute nor ordinance, nor as we are advised, legal precedent, requring the defendant to place and keep in place a safety bar, either in the entrance where plaintiff was riding, or in entrances of this class generally. The instruction did not preclude the plaintiff from showing, or the jury from considering, whether or not it was negligence upon the part of defendant not to provide a safety bar under such circumstances as existed here. An appropriate instruction in this regard would no doubt have been given by the court had it been requested, but the trial court would not have been justified in saying as a matter of law that the absence of the safety bar in this case was negligence per se.

The order granting the new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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13 Cal. App. 48

PEOPLE v. LEE. (Cr. 205.)

(Court of Appeal, First District, California. March 16, 1910. Rehearing Denied April 13, 1910; Denied by Supreme Court May 13, 1910.)

1. Criminal Law (§ 1159*)—Appeal—Questions of Fact.

The question whether the testimony of a witness is improbable and in contradiction of the other testimony in the record is solely for the jury below, and the appellate court will not pass on their finding, where it is substantially supported.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

2. Homicide (§ 228*)—Sufficiency of Evidence—Venue.

Evidence in a prosecution for homicide to prove venue *held* to show that the crime was committed in the county where the venue was laid.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 228.*]

3. Witnesses (§ 268*)—Cross-Examination—Scope.

In a prosecution for homicide, a witness called by the prosecution testified that he was a police officer, that on the evening of the difficulty, and after he had heard of it, he saw accused. *Held*, that a question on cross-examination whether the deceased made any statement about not wanting to prosecute anybody, and that it was his own fault, was not proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

4. Witnesses (§ 236*)—Examination—Questions.

In a prosecution for homicide, a witness for defendant testified that he was a police officer, that he was present shortly after deceased had been arrested, and was then asked if he heard deceased make any statement at the time about the encounter. *Held*, that the question as asked was too indefinite, and an objection to it was properly sustained.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 236.*]

5. Criminal Law (§ 823*)—Instructions—"Manslaughter"—"Involuntary Manslaughter"—"Voluntary Manslaughter"—Error Cured by Other Instruction.

In a prosecution for manslaughter, the court instructed that manslaughter is the unlawful killing of a human being without malice, and that it is of two kinds—voluntary (that is, upon a sudden quarrel or heat of passion); involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution and circumspection. The instruction was in the language of Pen. Code, § 192. *Held*, that the portion of the section defining involuntary manslaughter might well have been omitted, but could not have misled the jury, as they were fully instructed elsewhere as to the rights of self-defense and of defendant to act upon appearances.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.*

For other definitions, see Words and Phrases, vol. 5, pp. 4338–4342; vol. 8, p. 7715; vol. 4, p. 3762; vol. 8, p. 7692; vol. 8, p. 7350.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Benjamin B. Lee was convicted of manslaughter, and appeals. Affirmed.

See, also, 99 Pac. 1110.

Wm. H. H. Hart (Joseph A. Brown, of counsel), for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The defendant was charged by the information with the crime of murder, and a verdict returned finding him guilty of manslaughter. He was thereupon sentenced to a term of five years in the state prison. He prosecutes this appeal from the judgment, and from the order denying his motion for a new trial. It is claimed that the evidence is insufficient to support the verdict, and we have carefully examined the same, and in our opinion find it sufficient.

The evidence of the witness Lloyd is to the effect that the defendant upon meeting deceased, with whom he was not on good terms, called him a vile name, and about the same instant aimed his umbrella at him, hitting him in the eye with it, thus inflicting the wound that caused his death; that at the time of the assault the deceased had not made any hostile demonstration or any attempt to injure defendant. Defendant's counsel in his brief claims that the version of the matter as given by Lloyd was improbable and in contradiction of the other testimony in the record. This was a question solely for the jury, and it is not our province to pass upon the evidence where it is conflicting, and where it is sufficient in substance to support the verdict.

The evidence as to the venue is sufficient. The witnesses referred to the restaurant near which the difficulty occurred as being next to Laib's saloon on the west side of Fillmore street in the city and county of San Francisco. The deceased was taken to the Scobie Hospital in the city and county of San Francisco, where he died. It is sufficient if it is shown by the evidence taken all together that the crime was committed in the county where the venue is laid.

One Bell was called as a witness for the prosecution, and testified that he was a police officer, and that on the evening of the difficulty and after he had heard of it he saw the defendant. He was then cross-examined, and at near the conclusion of the cross-examination he was asked by defendant's counsel: "Q. Did McCarthy make any statement about he did not want to prosecute anybody—about it being his own fault?" The question was objected to as being irrelevant and incompetent and not proper cross-examination, and the court sustained the objection. The ruling was correct. The question was not proper cross-examination as the witness had not even mentioned the name of McCarthy in his direct examination. If the deceased had made a dying statement, or a statement which was part of the res gestæ, the defendant no doubt would have been allowed to prove it, but he could not prove such a statement by a cross-examination entirely outside of any statement made by the witness in direct examination. The witness was not called by the defendant as his own witness, nor questioned in any way or manner in regard to the matter.

One Mitchell was called by the defendant as his own witness, and testified that he was a police officer; that he was present shortly after McCarthy, the deceased, had been placed under arrest by Officer Bell. He was then asked if he heard deceased make any statement at the time about the encounter. The witness answered: "Yes, sir." The district attorney then, after the answer had been given and was of record, objected to the question upon the ground that it was immaterial and irrelevant, and the court sustained the objection. No motion was made to strike out the answer, and it was not stricken out. No further question was asked as to the particular time of the statement, or whether it was a dying statement, or was so closely connected in time with the difficulty as to be part of the res gestæ. The question as asked was too indefinite, and was not pointed to any fact which would show that the ruling was prejudicial. It should have been asked with sufficient statement of particulars to show that defendant was entitled to the statement. The mere fact that the witness heard deceased make a statement after the trouble is too indefinite to show that the statement was admissible, or that it would throw any light upon the case. It is perfectly consistent with the question asked to conclude that the statement was a mere narrative of a past transaction. It was not shown by the question that the statement desired was contemporaneous with the transaction or within so short a time afterwards as to preclude the idea of deliberate design.

It is argued that the court erred in instructing the jury as follows: "Manslaughter is not murder. It is the unlawful killing of a human being without malice. It is of two kinds—voluntary (that is, upon a sudden quarrel or heat of passion); involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The instruction is a literal copy of section 192 of the Penal Code. The portion of the section defining involuntary manslaughter might well have been omitted, but it could not have misled the jury as they were fully instructed in other portions of the charge as to the right of self-defense, and the right of a defendant to act upon appearances.

The case of People v. Thomson, 145 Cal. 717, 79 Pac. 435, is not in point. In that case the defendant's requested instruction related to the right of defendant to defend himself when in apparent danger of death or great bodily harm, and that, "if defendant acted in self-defense from real and honest convictions as to the character of the danger induced by the existence of reasonable circumstances, he should be acquitted, even though he was mistaken as to the extent of the danger." The trial court refused to give the requested instruction, but after giving it in substance added to it: "But the killing must be done with due caution and circumspection, and not in a sudden quarrel or heat of passion. For, if the killing, under such circumstances, was done with due caution and circumspection, or was done in a sudden quarrel or heat of passion, then the defendant is guilty of manslaughter." The court very properly held that the effect of the instruction was to tell the jury that a defendant could not kill his adversary in self-defense unless the killing was done with due caution and circumspection, and that the giving of such instruction under the facts of that case was prejudicial error. Further, it clearly appears that the instruction was erroneous in that case, where the jury was told that if the killing was done with due caution and circumspection, or was done in a sudden quarrel or heat of passion, "then the defendant is guilty of manslaughter." In the case at bar, the definition of involuntary manslaughter was not given in connection with any particular instruction or with the right of self-defense. The jury were not told that the defendant in the killing must have acted with due caution and circumspection even if acting in self-defense.

Other instructions are criticized, but the objections to them are not sufficiently plausible to merit further discussion. The court fully and fairly instructed the jury upon every phase of the case. Their verdict was for the least offense included within the information, and recommended the defendant to the mercy of the court. The court accordingly sentenced defendant to one-half the term to which he might have been sentenced under the verdict.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

157 Cal. 649

CHORMICLE v. SOUTHWEST WAREHOUSE CO., Inc. (L. A. 2,388.)

(Supreme Court of California. April 23, 1910. Rehearing Denied May 23, 1910.)

1. Sales (§ 447*)—Special Findings—Conflicting Findings.

In an action for damages by breach of an oral warranty that barley sold was of a certain kind, the jury found in answer to special interrogatories that defendant's agent, S., was absent in another city when the oral sale was made, but that the sale was made by him, and that J., another agent, did not make the sale, but received the price, but did not warrant the barley. *Held*, that the findings were conflicting.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 447.*]

2. Trial (§ 350*)—Special Interrogatories—Questions Submitted.

Where, in an action for damages by breach of an oral warranty made when barley was sold, that it was of a certain kind, the pleadings admitted the sale, but did not contain an admission as to which of defendant's agents made it, a special interrogatory as to who made it was proper, and the finding thereon is binding.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 350.*]

3. Sales (§ 447*)—Action—Findings—Findings Inconsistent with General Verdict.

In an action for damages by breach of an oral warranty on the sale of barley that it was of a certain kind, a finding, implied from a general verdict for plaintiff, that a warranty was made, was overcome by special findings that the person whom plaintiff claimed made the warranty was not at the place of sale when it was made.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 447.*]

Department 2. Appeal from Superior Court, Orange County; F. E. Densmore, Judge.

Action by William H. Chormicle against the Southwest Warehouse Company, Incorporated. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Percy R. Wilson and W. W. Middlecoff, for appellant. J. L. Murphey and Horace C. Head, for respondent.

HENSHAW, J. This action was brought by plaintiff, claiming in his own right and as the assignee of two others, against the defendant corporation for damages for breach of warranty which plaintiff claims defendant made to the effect that certain seed barley purchased by plaintiff and his assignors from defendant was bearded barley, when, in fact, it was beardless barley. It is alleged that plaintiff planted the seed, but had no crop, and that the sole reason for the failure of the crop was that the seed was of the beardless variety, instead of the bearded variety, which latter would have yielded good returns. Defendant for answer admitted the sale of the barley, but denied the warranty. The only evidence of warranty was the testimony of plaintiff and his son that Harry Spencer, defendant's warehouse foreman, in a conversation represented and stated to plaintiff that the seed barley was bearded barley; that this conversation took place on December 7, 1906, at defendant's warehouse at Irvine at the time when the grain was bought and paid for. The case was tried before a jury, which rendered a general verdict in favor of plaintiff for $2,000. It also returned certain special verdicts and findings of fact. By reason of the irreconcilable conflict and inconsistency between these special verdicts and findings and the general verdict, the judgment must be reversed.

The evidence of the Chormicles, father and son, was to the effect that they with Elmer Porter rented the land which was to be sowed to barley; that on December 7, 1906, they bought 15 tons of barley for which a check was given to Mr. Spencer whom they identified in the courtroom. The receipt for their payment was made out by J. C. Jenkins, who was present at the time, but their conversation was with the foreman, Spencer, who made warranty as to the kind and quality of the seed grain. Elmer Porter, who accompanied the Chormicles, testified that he took no part in the conversation, but saw the plaintiff talking with Jenkins and probably with some other person, upon December 7th, the day when the sale was made, the check in payment dated, and the receipt signed by Jenkins given. Spencer and Jenkins testified that Spencer was not at the warehouse upon that day, and, in answer to special interrogatories, the jury found that Spencer was absent from defendant's warehouse and in the city of Santa Ana on December 7, 1906, "when plaintiff and his associates were at said warehouse and purchased said seed barley"; that Jenkins did not make the sale of the seed barley, but took the check and gave the receipt for the same; that the sale of the barley was made by Spencer; that Jenkins did not warrant that the seed barley was bearded barley.

The result of these special findings is inextricable confusion. The jury finds that Jenkins made no warranty and did not sell the barley. It finds that Spencer sold the barley, but it finds that Spencer was not at the warehouse where the sale took place upon the day when it finds that the sale did take place. There is no suggestion in the evidence that the sale was upon any other day or that representations were made at any time prior to the time of the sale. If Spencer was in Santa Ana, miles away from the warehouse on the day of the sale and at the time of the sale which, it will be remembered was orally effected (according to the testimony of the plaintiff) with Spencer at the warehouse, certainly Spencer could not have made the sale, though the special verdict upon this point by the jury is that he did. Saving for these special findings in support of the judgment, it would be permissible to conclude that the plaintiff mistook Jenkins for Spencer, and that the sale was actually consummated with Jenkins who took the check and gave the receipt, but we are forbidden to indulge in this construction, not because plaintiff's testimony positively identifies Spencer as the person with whom the sale was made, but because the jury itself specifically finds in accordance with that testimony that Jenkins did not make the sale and that Spencer did. The pleadings admit the sale, but we cannot for this reason disregard the special finding that defendant's sale was made by Spencer, since the admissions of the pleadings do not declare who the particular agent of the defendant was through whom the sale was effected, and a special finding upon this matter was therefore pertinent and proper. Moreover, there is no special verdict to the effect that the warranty was ever made by any one. A finding to this effect is embraced in the general verdict, but the special verdicts are destructive of this finding, in that from them it appears that no such warranty could have been given, since Jenkins did not give it, and Spencer, who plaintiff says gave it, was not present at the time of the sale, which was the time when the warranty was given. By reason of this conflict and inconsistency between the general verdict and the special verdicts, it is impossible for this court upon the record to do other than decree that the judgment appealed from be reversed and the cause remanded for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is ordered accordingly.

We concur: LORIGAN, J.; MELVIN, J.

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157 Cal. 652

STANTON v. HOTCHKISS. (S. F. 5,296.)

(Supreme Court of California. April 27, 1910.)

1. Taxation (§ 788*)—Tax Deeds—Effect as Evidence.

Tax deeds, if valid, are primary evidence of the regularity of the assessment upon which they are founded, equalization as required by law, levy of tax in accordance with law, nonpayment of tax, regular sales for such nonpayment, nonredemption from such sales, and that the person who executed the deed was the proper officer, under the express provisions of Pol. Code, § 3786, and conclusive evidence (except as against actual fraud) of the regularity of all other proceedings under the express provisions of section 3787.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555–1569; Dec. Dig. § 788.*]

2. Taxation (§ 779*)—Tax Deeds—Effect.

Valid tax deeds made to the state after failure to redeem, convey the absolute title to the property described therein, under the express provisions of Pol. Code, § 3787.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1547; Dec. Dig. § 779.*]

3. Evidence (§ 23*)—Judicial Notice—Government Surveys—Meridians.

Courts will take judicial notice of government surveys of the public lands, and that the meridian of Mt. Diablo is the only meridian for the townships and ranges in Fresno county.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 30; Dec. Dig. § 23.*]

4. Taxation (§ 764*)—Tax Deeds—Sufficiency of Description of Property.

A description of land in a tax deed as "lying and being within said county of Fresno, state of California, and described thus: "E. $\underline{2}$ of N. W. $\underline{4}$, Sec. 23, Twp. 16 S. R., 15 E.," is sufficient in view of the fact that there is only one meridian in that county, the description being clearly one by government subdivision, "E. $\underline{2}$" and "N. W. $\underline{4}$" plainly meaning "E. ½" and "N. W. ¼."

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 764.*]

5. Taxation (§ 764*)—Tax Deeds—Sufficiency of Description of Property.

A description in a tax deed of land "situate, lying and being within the said County of Fresno, State of California, and described thus W. ½ of N. W. ¼ of Sec. 23–16–15," was sufficient, being a description by government subdivision, the term "16" denoting township and "15" range, it appearing that in the county named there is only one meridian for the townships and ranges, and that all townships are "south" and all ranges "east" of the base and meridian.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 764.*]

6. Taxation (§ 688*)—Certificate of Sale—Incorrect Date—Curative Act.

St. 1903, c. 59, declaring that all certificates of tax sales which failed to recite the correct date, or any date, when the right of redemption shall expire, or had expired, or recited an incorrect date when the state would be entitled to a deed, were thereby confirmed and legalized, cured the error in a previous certificate of sale to the state which incorrectly stated the date of expiration of time for redemption.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1390; Dec. Dig. § 688.*]

7. Taxation (§ 656*)—Certificate of Sale—Time.

Where the first publications of notice of tax sales were made on June 3d, and the sale was had on June 24th, there was a sufficient compliance with Pol. Code, § 3767, providing that a tax sale must not be less that 21 nor more than 28 days from the time of the first publication of the notice required thereby.

Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1347; Dec. Dig. § 656.*]

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by P. A. Stanton against W. J. Hotchkiss. Judgment for defendant, and plaintiff appeals from an order denying a new trial. Affirmed.

A. M. Drew and J. R. Webb, for appellant. Stanton L. Carter and Carter & Carter, for respondent.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ANGELLOTTI, J. This is an appeal from an order denying plaintiff's motion for a new trial in an action brought to quiet his title to a parcel of land in Fresno county, being, as described in the complaint, the N. W. ¼ of section 23, township 16 S., range 15 E., Mt. Diablo base and meridian. The judgment was in favor of defendant, decreeing that defendant was the owner in fee of all of said land, and that plaintiff has no interest therein.

It was stipulated on the trial that plaintiff was the owner of said property, except in so far as his title thereto had been divested by certain purported sales and conveyances of the same to the state of California by the tax collector of Fresno county for delinquent taxes, and that, if the state had acquired the title by reason of said sales and conveyances, the same had since vested by mesne conveyances in defendant. The case was thus made to depend upon the validity of two purported conveyances by the tax collector of Fresno county to the state of California, one claimed to be for the W. ½ of said N. W. ¼, and the other claimed to be for the E. ½ of said N. W. ¼. These conveyances were received in evidence over the objection of plaintiff, and except for the stipulation already referred to, constituted all of the evidence given on the trial. If valid, these deeds constituted primary evidence of the regularity of the assessment upon which they were founded, equalization as required by law, levy of tax in accordance with law, nonpayment of tax, regular sales for such nonpayment, nonredemption from such sales, and that the person who executed the deed was the proper officer (Pol. Code, § 3786), and conclusive evidence of the regularity of all other proceedings, and conveyed to the state the absolute title to the property described therein (Pol. Code, § 3787).

The principal objection by plaintiff to these deeds is that they do not sufficiently describe the property attempted to be conveyed. As to the deed of the E. ½ of said N. W. ¼ this objection does not appear to be insisted upon in the briefs. The description was: "lying and being within said county of Fresno, state of California, and described thus: E. $\underline{2}$ of N. W. $\underline{4}$ Sec. 23, Twp. 16 S. R., 15 E." Our courts take judicial notice of government surveys of the public lands (Rogers v. Cady, 104 Cal. 288, 291, 38 Pac. 81, 43 Am. St. Rep. 100), and also that the meridian of Mt. Diablo is the only meridian for the townships and ranges in the county named in the description, Fresno county (Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594. Bank of Lemoore v. Fulgham, 151 Cal. 238, 90 Pac. 936). The description set forth in this deed was plainly one by government subdivision. "E. $\underline{2}$" and "N. W. $\underline{4}$" plainly meant "east one-half" and "northwest one-quarter," and the other abbreviations were abbreviations in common use susceptible of but one meaning. Thus we have clearly designated the east one-half of the parcel described in the complaint.

The description in the deed of the west one-half is somewhat more meager, but under the circumstances we think sufficient. It was "situate, lying and being within the said county of Fresno, State of California, and described thus W. ½ of N. W. ¼ of Sec. 23–16–15." If this denotes a description by government subdivision, it is clearly sufficient. We know that it is an invariable rule to immediately follow the number of the section with the description of the township, and the description of the township with the description of the range. As said in regard to the former description, we must take judicial notice that the meridian of Mt. Diablo is the only meridian for townships and ranges in Fresno county. It is not denied by plaintiff that in Fresno county all townships are "south" and all ranges "east" of Mt. Diablo base and meridian. If that be the fact, we must likewise take judicial notice thereof. If it can be held that "16" denotes the township and "15" the range, we would thus have a sufficient description. We are of the opinion that the description can reasonably be taken in no other way than as one by government subdivision, and that the terms "16" and "15" clearly indicate respectively township and range. A case in point is that of McChesney v. City of Chicago, 173 Ill. 75, 50 N. E. 191, involving the question of the sufficiency of a description in an assessment proceeding, exactly like the one under consideration. It was "Sec. 23, 38, 14." The claim was that it could not be told what the figures "38, 14" mean or refer to. The court said: "There can be no doubt that the abbreviation 'Sec.' means 'section.' This being so, the figures which follow the designation of the section clearly refer to the township and range, as if the word 'township' was inserted before '38,' and the word 'range' before '14.' The court will take judicial notice of the meaning of such abbreviations as are here used." While we are not to be understood as commending such strenuous efforts at abbreviations in descriptions as were apparently made in this matter, we believe that the description sufficiently identified the property, and that the deed cannot be held ineffectual on the ground of want of proper description. The cases cited by learned counsel for plaintiff are not in point, for, as we view the description, it was, in the light of facts of which the courts must take judicial notice, certain and definite and sufficient in itself to identify the land.

It is claimed that the certificates of sale to the state specified the wrong date on which the state would be entitled to a deed; section 3776 of the Political Code prescribing that such certificate shall specify, among other things, when the state will be entitled to a deed, and that the deeds to the state failed to state the correct time when the right of redemption had expired as required by section 3785 of the Political Code. The certificate as to the W. ½ of the N. W. ¼, as recited in the deed, stated the day of sale, June 24, 1898, and that, unless the property was redeemed within five years from the date of sale, the purchaser would be entitled to a deed thereof on the 24th day of June, 1903. The deed recited that the time for redeeming said property expired on the 24th day of June, 1903. It is conceded by counsel for defendant that the date when the purchaser would be entitled to a deed was incorrectly stated by one day in the certificate. So assuming, the error in the certificate in this regard was cured by the curative act thereafter enacted. St. 1903, p. 63. See Bank of Lemoore v. Fulgham, 151 Cal. 234, 239, 90 Pac. 936; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352. The recital in the deed made June 25, 1903, which was subsequent to the enactment of the curative act, was correct. June 24, 1903, was certainly the last day on which redemption could be effected within five years from the date of sale. While in the matter of the certificate and deed of the E. ½ of the N. W. ¼ the dates are different, the difference is not such as to affect the question and what we have said in regard to the other deed is equally applicable.

We do not think that it is established by allegations of the complaint undenied by the answer that the first installment of taxes for the year 1898 on the E. ½ of said N. W. ¼ was paid, or that the sale by the tax collector was for the second installment only. The record shows no evidence or stipulation to this effect. Hence it cannot be held that it has been shown that there was any error in the deed in its statement regarding nonpayment of the taxes. Both deeds sufficiently recite that the property was sold for delinquent taxes.

Section 3767 of the Political Code provides that the tax sale "must not be less than twenty-one nor more than twenty-eight days from the time of the first publication" of the notice required thereby. In the case of the W. ½ of such N. W. ¼, the first publication was on June 3, 1898, and the day fixed in the notice for the sale was June 24, 1898, the sale being made at that time. So, in the case of the E. ½, the first publication was on June 3, 1899, and the day fixed for the sale June 24, 1899. This was a sufficient compliance with the statute in each case. Bank of Lemoore v. Fulgham, 151 Cal. 238, 90 Pac. 936.

There is no other point requiring notice. The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

157 Cal. 657

DAVIS et al. v. MARTIN et al. (Sac. 1,724.)

(Supreme Court of California. April 28, 1910. Rehearing Denied May 26, 1910.)

1. APPEAL AND ERROR (§ 931*)—REVIEW—FINDINGS—PRESUMPTIONS.

The court on appeal must reconcile the findings, if possible, and must, if reasonable, give them such an interpretation as will support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3769; Dec. Dig. § 931.*]

2. WATERS AND WATER COURSES (§ 40*)—RIPARIAN RIGHTS—RIGHTS OF APPROPRIATOR.

Riparian rights which attach to land abutting on a stream are paramount to the rights of any appropriator.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 40.*]

3. WATERS AND WATER COURSES (§ 138*)—APPROPRIATION OF WATER—PRESCRIPTION.

Defendant owned a ranch bordering on a stream and used the waters thereof for irrigation by a ditch to carry the waters to portions of the ranch adjoining the ranch of a third person, who by the consent of defendant extended the ditch to his ranch and used a part of the water. Plaintiff, owning an adjacent ranch, extended the ditch to his lands, and used the waters with the consent of defendant. Defendant had complete control of the waters and of the ditch so far as it extended over his ranch, and plaintiff never used the waters under a claim of right. *Held*, that plaintiff did not acquire any right to the waters by prescription, notwithstanding a special finding that the waters were used by the interference of plaintiff.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.*]

4. ADVERSE POSSESSION (§ 60*)—HOSTILE POSSESSION—NECESSITY.

No length of time of use by permission will gain a title or right by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282–314; Dec. Dig. § 60.*]

5. WATERS AND WATER COURSES (§ 157*)—ACQUISITION OF RIGHT TO USE WATERS—ESTOPPEL.

An owner of land bordering on a stream, who, by means of ditches, used the waters thereof for irrigation and allowed the waters to run through his own ditch across his land and permitted his neighbors to make use of it as they desired, but who did not by any act give his neighbors reason to believe that such permission was to be permanently continued, or that it would be recognized as a right, was not estopped from denying that his neighbors had any right to the ditch or waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 185; Dec. Dig. § 157.*]

6. TRIAL (§ 370*)—SUBMISSION OF ISSUES TO JURY.

Error cannot be predicated on the refusal of the court in a suit in equity to submit to the jury requested interrogatories, the jury being merely advisory, and the questions to be submitted within the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 881; Dec. Dig. § 370.*]

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Henry L. Davis and others against Ann Martin and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Jas. F. Farraher and A. L. Shinn, for appellants. Gillis & Gillis, R. S. Taylor, and Jas. R. Tapscott, for respondents.

SHAW, J. The controversy in this action involves the respective rights of the parties to the use of the waters of a stream known as "Martin Creek," which rises in the eastern part of the lands of the defendants Ann Martin and Brice M. Martin known as the "Martin Ranch," and flows westerly through said ranch to the Little Shasta river, having a maximum flow, during the irrigating season, of 300 miner's inches measured under a 4-inch pressure.

The plaintiff H. L. Davis is the owner of a tract of land containing something over 700 acres, situated about a mile south of the Martin ranch. The plaintiffs J. E. Beaudroit, Jennie Beaudroit, and Louisa Beaudroit own a tract of land adjoining that of Davis, containing about 380 acres. The defendants Churchill Company and Milton F. Martin own a large tract of land immediately south of and adjoining the Martin ranch aforesaid, and known as the "Walbridge Ranch." In 1852 R. M. Martin, the predecessor in interest of Ann Martin and Brice M. Martin, settled upon the lands known as the Martin ranch, and from and after the year 1856 he and his successors used the waters of the stream for the irrigation of said lands. For that purpose they constructed a ditch to carry the waters of the stream southerly therefrom to portions of the Martin ranch adjoining the said Walbridge ranch. Prior to 1859, by consent of the owners of the Martin ranch, the owners of the Walbridge ranch extended the ditch to said Walbridge ranch, and thereafter, with the consent and permission of the owners of the Martin ranch, they used a portion of the waters of said stream for the irrigation of portions of the said Walbridge ranch. In 1859, the owners of the Davis and Beaudroit ranches aforesaid extended the ditch from its termination on the Walbridge ranch southerly to the lands owned by them, and thereafter, at times when it was not used on either the Martin ranch or Walbridge ranch, they used some of the waters of said stream, usually one-fourth thereof, for the irrigation of their lands, obtaining it through and by means of said ditch, with the consent and permission of the owners of the Martin ranch. The plaintiffs Davis and the Beaudroits now claim a right by appropriation to a part of the waters of said stream, and the right to maintain the said ditch from the point of diversion upon the stream to their lands for the purpose of carrying to said land their portion of the waters of said stream. Defendants Ann Martin and Brice M. Martin deny this right and assert that Davis and the Beaudroits have no right or interest in the water. The owners of the Walbridge ranch seem to stand indifferent between the other two parties. Whatever claim they may have in and to the waters of the stream is derived from the owners of the Martin ranch, and between these two there is no controversy.

Although the action was equitable in its nature, the court called a jury, and submitted certain issues of fact, in the form of questions, which were answered by the jury, and adopted as part of the findings of the court. It was found that the ditch leading from the stream was extended from the Walbridge ranch to the lands of the plaintiffs about the year 1860, with the knowledge and consent of the owners of the Martin ranch, and that thereafter until the present action was begun, whenever the water could be obtained from the Martins, the ditch was used by the plaintiffs in common with the owners of the Walbridge ranch, but that the plaintiffs did not purchase or otherwise obtain any right from the defendants or their predecessors to enter upon the ditch, or to extend the same. It was further found that the use of the water of the said stream by the plaintiffs was with the consent and permission of the owners of the Martin ranch, and that during all this time the defendants Ann Martin and Brice M. Martin, and their predecessors in interest, owners of the Martin ranch, had complete control of the ranch, of the water of the stream, and of the ditch so far as it extended over said ranch, and used the same in common with plaintiffs, but that the plaintiffs did not make use of the waters of the stream under a claim of right. On these findings, judgment was given in favor of the defendants.

In addition to the facts above found, the court adopted a question put to the jury and an answer thereto, which are as follows: "32. To what extent, if any, have the plaintiffs, or their successors in interest, by act or word or otherwise, recognized or conceded the right of R. M. Martin and his successor in interest to use the waters of said Martin creek, in excess of 90 inches thereof, measured under a 4-inch pressure, on the Martin premises, and about 80 inches, measured under a 4-inch pressure, on the Walbridge premises? Answer. It was used by the consent of the Martins and by the interference of the plaintiffs." Plaintiffs claim that by this answer an adverse use was established sufficient to give them title to the waters in excess of the amounts mentioned. We do not think it has this effect. Findings are to be reconciled if possible, and they are to be given that interpretation which will support the judgment if such interpretation is reasonable. It is somewhat difficult to understand exactly what was meant by this question and answer. But it is clear that it cannot be construed as a contradiction of the other findings to the effect that the use of the water was by the consent and permission of the owners of the Martin ranch.

Upon these facts judgment was rightfully given against the plaintiffs. The Martin ranch abutted upon the stream and the riparian rights attaching to said lands by reason of this contiguity were paramount to the rights of any appropriator. Being the owners of the land bordering its banks, they could control its flow and prevent others from diverting it at any point on their lands. There was no evidence or finding that the plaintiffs ever obtained by purchase or grant from the owners of the Martin ranch any right whatever either to maintain the ditch over that ranch, or to use the water of the stream. They could not obtain it in any other way except by prescription or possibly by way of estoppel. No length of time of use by permission will gain a title or right by prescription. The facts are insufficient to constitute an estoppel, either as to the ditch or the water. In Stoner v. Zucker, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, Zucker's right to the water was not disputed. He had constructed a ditch to carry it through the land of Stoner, under a parol license from Stoner, at an expense of more than $7,000. The revocation of the license would cause Zucker to lose the use of the ditch. It was held that, after such expenditure upon the faith of a license which from its very nature was to be continuous in use it could not be revoked by the owner of the land over which the ditch passed. In this case the plaintiffs did not construct any ditch over the lands of the defendants. There was no license to make such ditch, and no license to use the water that was of a continuing nature. The finding is that the water was used by permission. The evidence tends to show that R. M. Martin, the owner of the Martin ranch, was a man of generous nature, and that at times when he did not find it necessary or convenient to use the water of the stream, he freely allowed it to run through his ditch across his land and permitted his neighbors, including the plaintiffs, to make use of it as they desired. There is no evidence that he ever promised that he would continue to allow this use, or that he would allow them to use it at all when the water was required on his own land. It does not appear that the plaintiffs were, by any act of the owners of the Martin ranch, given reason to believe that this permission was to be permanently continued, or to believe that it was or would be recognized as a right. There was some evidence tending to show that the plaintiffs and their predecessors always succeeded in obtaining some water from the creek whenever they desired it. It appears however, that application therefor was always made to the owners of the Martin ranch when they were using the water at the time, that sometimes the plaintiffs were refused any part of the water, and from all the evidence it is a fair inference that the plaintiffs and their predecessor always recognized the superior right of the Martins to the water and yielded to their wishes. In addition to this there is direct evidence that for many years immediately preceding the action the owners of the Martin ranch had exercised complete control over the diversion of the water from the stream, and that the only part thereof which the plaintiffs succeeded in obtaining for use on their land was such waste waters as the owners of the Martin ranch allowed to pass through the ditch beyond their boundaries.

The plaintiffs complain that the court refused to put to the jury certain interrogatories requested by the plaintiffs. No error can be predicated upon such a ruling in a case of this character. It was a suit in equity, and the jury was merely advisory. It was within the sound discretion of the court to put to the jury such questions as it saw fit. It was neither compelled to call a jury at the demand of the plaintiffs, nor to put to them any questions of fact for their determination. We find no prejudicial error in the record.

The judgment and order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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12 Cal. App. 773

PEOPLE v. BARTLEY. (Cr. 147.)

(Court of Appeal, Second District, California. March 9, 1910.)

1. CRIMINAL LAW (§ 1023*)—APPEAL—JUDGMENTS APPEALABLE—ORDER DENYING PROBATION.

The granting or denial of a petition for probation by one convicted of crime is entirely within the trial court's discretion, and an order denying probation is not appealable.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1023.*]

2. INDICTMENT AND INFORMATION (§ 111*)—ALLEGATIONS—PLEADING EXCEPTIONS—CAPACITY TO COMMIT CRIME—NECESSITY OF SHOWING.

The information need not negative the exception contained in Pen. Code, § 26, excepting children under 14 years old from the class of persons capable of committing crimes; the information on its face not preventing the application of the presumption that one intends the ordinary consequences of his voluntary act, as provided by Code Civ. Proc. § 1963.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. § 111.*]

3. CRIMINAL LAW (§ 1144*)—EVIDENCE—PRESUMPTIONS—DISCHARGE OF FINAL DUTY.

The presumption that the trial court did its duty in sentencing one convicted of burglary to state's prison would negative any inference in the record, which referred to accused both as a "boy" and a "man," that accused was not over 14 years old, so as to be incapable of committing crime.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.*]

4. BURGLARY (§ 19*)—INFORMATION—ALLEGATIONS—INTENT—SUFFICIENCY.

An information, alleging that accused feloniously and burglariously entered a building, with the intent then and there to commit the crime of larceny, sufficiently alleged the intent of accused to commit the offense charged.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 40-47; Dec. Dig. § 19.*]

5. CRIMINAL LAW (§ 603*)—CONTINUANCE—SUFFICIENCY OF APPLICATION.

Where accused's motion for continuance was not supported by affidavit, and his counsel expressed a willingness to proceed without the witness to procure whom the continuance was asked, upon the district attorney's statement that such person was a fugitive from justice, the motion was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 603.*]

6. CRIMINAL LAW (§ 1159*)—APPEAL—FINDINGS—CONCLUSIVENESS.

A jury finding upon substantially conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

7. WITNESSES (§ 388*)—IMPEACHMENT—FOUNDATION.

The rule that a witness must be shown a particular thing or statement of his claimed to be in the record, before acquiring his assent thereto, is not applicable, where the witness is asked whether he made a certain statement during a long examination by a question assuming that he did not make it, as a negative answer would avoid the necessity of producing the record; but, where the question assumes that the language stated therein was the testimony of the witness at the preliminary examination for the purpose of having him assent thereto, the witness should be permitted to see the transcript, or have his testimony on the preliminary examination read him from the record, and that course was properly pursued where the question to the witness was, "I believe you said in your direct examination before the committing magistrate that you went out and looked around?"

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

8. CRIMINAL LAW (§ 698*)—TRIAL—DUTY OF COURT.

It is the trial court's duty to see that the trial is conducted according to the rules of evidence and law, whether an objection is taken or not; so that the trial court properly called counsel's attention to the fact that certain questions evaded a former ruling of the court, though no objection was made to such question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1652; Dec. Dig. § 698.*]

9. WITNESSES (§ 358*)—IMPEACHMENT OF REPUTATION.

One testifying to the general reputation of accused may be cross-examined as to his knowledge of particular instances and statements relating to particular acts of accused testified to by witness so as to discredit his opinion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1159; Dec. Dig. § 358.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Charles Bartley was convicted of burglary, and, from the judgment of conviction and an order denying a petition for probation, he appeals. Affirmed.

Jesse P. Osborne, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for burglary. Verdict of guilty and sentence of five years in the state prison. There is an appeal from the judgment and also from an order denying defendant's petition for probation. The latter order rests entirely within the discretion of the trial court and is not made appealable by the statute.

The information, after stating the name, place, and date of the offense, charges that defendant did "willfully, unlawfully, feloniously, and burglariously enter a building located at No. 15 East Haley street in the city of Santa Barbara, which said building then and there belonged to one Frank Loustalot, and was then and there used by the said Frank Loustalot as a saloon and barroom, with the intent then and there to commit the crime of larceny," etc. In support of the demurrer to this information, it is urged that it is insufficient, in that it nowhere alleges that the person charged was a competent person or one capable of committing a crime; and that the intent alleged by the information is the intent of the owner of the building, and not the intent of the person charged with the offense. The first objection appears to be based upon the theory that, the defendant having been characterized as "a boy" by some of the witnesses at the trial, the information should have contained some allegation negativing the inference that he lacked capacity to commit crime. Section 26 of the Penal Code says: "All persons are capable of committing crimes, except" certain enumerated classes, among which are: "(1) Children under the age of fourteen," etc. It is not necessary to negative this exception in the information any more than it is each of the other seven classes of persons mentioned who, upon their want of capacity being shown, would be held not responsible for offenses committed by them. It is always presumed that a person intends the ordinary consequences of his voluntary act (Code Civ. Proc. § 1963), and upon the face of this information there is nothing to prevent the application of this presumption.

If the evidence could be considered in this connection, we would still be called upon to say that there is nothing in the record to show that the "boy" is a child under the age of 14 years. His age does not appear, and, while some witnesses speak of him as a boy, he is also mentioned as a man. And the presumption that the trial court did its duty in sending him to state's prison would negative any inference from the record that he was not over 14 years of age.

There is nothing in the other point raised on the demurrer to the complaint; the intent is sufficiently clear.

The record gives no support to appellant's objection to the trial court's ruling denying his motion for a continuance. No showing by affidavit was made, and upon the statement by the district attorney that the witness, to procure whose attendance the continuance was sought, was a fugitive from justice, counsel for defendant expressed his willingness to proceed without the witness. The record does not sustain the contention of appellant that the court would not permit him to file an affidavit making a showing in this regard.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The verdict is fully supported by the evidence in the record. It is unnecessary to state either the facts or a summary of them. Every element of burglary in the first degree was established. If the use of the term "boy" by counsel and some of the witnesses could be considered as evidence tending to show that defendant had not reached the age at which he could be held legally responsible for crime, the use of the term "man" would be equally available to show the contrary, and thus there would be a substantial conflict upon this issue, which the verdict of the jury has settled, against appellant's contention, beyond disturbance by this court.

The rulings of the court upon the admission of evidence which are complained of were not erroneous. The proper practice when cross-examining a witness by asking him what his testimony was upon a former trial of the cause, or at the preliminary examination upon a felony charge, is well established. Where an attempt is made to put into the witness' mouth language which is stated to be his testimony given at the preliminary examination for the purpose of having him assent thereto, it is only fair and just to the witness that he should be permitted to see the transcript, or have the testimony read to him from the record, if there be such a record at hand, and the court properly required this to be done in this case. The distinction between the question presented here and that passed upon by the Supreme Court in People v. Hart, 153 Cal. 261, 94 Pac. 1042, is clear and evident. The questions to which objections of the people were sustained in that case were distinguished by the court as merely preliminary, but they were also of such a character that they could not have been effectively and conveniently asked by reading the record of the testimony of the witness given at the preliminary examination. In the case before us the question is: "Now, Mr. Brusatori, I believe you said in your direct examination before the committing magistrate that you went out and looked around?" In the Hart Case, after the witness had testified on direct examination that a certain statement had been made, he was asked on cross-examination: "You did not make this statement on the preliminary examination, did you?" An objection to this being sustained, he was asked: "Why did you not make this statement on the preliminary examination?" And again: "In your testimony on the preliminary examination did you then and there tell all you knew about the case?" The rule requiring that a witness must be shown a particular thing claimed to be in the record before assenting to its presence cannot, for reasons of convenience, be applied where the witness is called upon to remember whether or not he made a particular statement during the course of a lengthy examination, which makes a voluminous record, which statement the question assumes not to be in the record. In the latter instance a negative answer, that desired and expected by the cross-examiner, would avoid the necessity of introducing the entire record for the purpose of showing that no such testimony had been given by the witness on the former occasion. This rule in relation to the establishing of a negative is well recognized. The ruling of the court upon this matter might well have been assumed to be acquiesced in by appellant, were it not for the preservation of the objection by the amendment to section 647, Code Civ. Proc., made in 1909 (St. 1909, c. 355). This view is strengthened by the pursuit of the information sought to be elicited by the question by the adoption of the course suggested by the court, which rendered the ruling without prejudice.

It was not improper for the trial judge to call the attention of counsel for defendant to the fact that his questions were an evasion of a former ruling of the court where the district attorney made no objection. It is the duty of a judge to see that a trial is conducted in accordance with the rules of evidence and law as these appear to him, whether counsel object or not. The trial of a cause is not to be conducted as if it were the playing of a game by the parties and their attorneys, at which the judge sits to arbitrate disputed questions of law or practice only when called upon by one or the other or both of the parties, but as an administration of the law for the purpose of securing a hearing on the merits of the cause, and it is the duty of the judge trying the cause to assume the directing hand whenever this end is not being accomplished, assuming to act, however, only within his constitutional province of stating the testimony and declaring the law. There was no intimation in the conduct of the judge in this cause that could in any manner have conveyed to the jury that he had an opinion as to the guilt or innocence of the defendant.

We see nothing in the other assignments of error, in relation to the admission and rejection of evidence, prejudicial to the defendant. The examination of the witnesses by the district attorney assigned as misconduct was within the scope of proper examination in the case of the sheriff, and of proper cross-examination in the case of the witness McCaughey. A witness who testifies to the general reputation of a defendant may be asked on cross-examination as to his or her knowledge of particular instances and statements made by the witness relating to particular acts of the defendant tending to discredit the opinion given. Where such questions are asked in good faith by a district attorney, there is no misconduct, and such was the case here.

There being no prejudicial error in the record, the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

13 Cal. App. 22

HUGHES MFG. & LUMBER CO. v. WILCOX. (Civ. 764.)

(Court of Appeal, Second District, California. March 10, 1910. Rehearing Denied April 4, 1910; Denied by Supreme Court, May 9, 1910.)

1. CORPORATIONS (§ 76*) — STOCKHOLDERS — CONTRACT—ACCEPTANCE.

Any agreement showing an intention to become a stockholder in a corporation is sufficient, though there is no formal agreement; and, where a number of persons already stockholders agree among themselves in writing to take up the unissued stock of a corporation, pursuant to a proposal of the board of directors to issue the stock to them on certain terms, the delivery of the agreement to the secretary of the corporation constituted an acceptance of the proposal of the board, so as to make such persons stockholders as to the unissued stock.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 76.*]

2. CORPORATIONS (§ 76*)—SUBSCRIPTION FOR STOCK—MODIFICATION.

Where certain stockholders agreed to take up the unissued stock of a corporation, under an agreement by which they were to receive corporate bonds as a bonus, a subsequent resolution of such stockholders to receive corporate notes instead of the bonds was a modification of the subscription agreement by consent.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 76.*]

3. CORPORATIONS (§ 94*)—STOCKHOLDERS—EXISTENCE OF RELATION.

Payment for corporate stock and the voluntary acceptance of bonus notes of the corporation, which were given to induce the subscription, made the persons paying therefor and accepting the notes stockholders, though no stock certificates were issued.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. § 94.*]

4. CORPORATIONS (§ 81*)—SUBSCRIPTION FOR STOCK—WAIVER OF PROVISIONS.

Even if an agreement between the directors of a corporation and certain persons for the issuance of bonus bonds to induce such persons to purchase stock was a condition precedent to the enforcement of the agreement to take the stock, the voluntary acceptance of corporate notes in lieu of the bonds waived such condition.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 81.*]

5. CORPORATIONS (§ 243*) — LIABILITY OF STOCKHOLDERS — STATUTORY LIABILITY — "OWNER"—"STOCKHOLDER."

Const. art. 12, § 3, and Civ. Code, § 322, make each stockholder of a corporation individually liable for such proportion of its debts incurred while he was a stockholder as the shares owned by him bear to the whole of the subscribed shares of the corporation, and the Code section also provides that the term "stockholder" as used therein applies, not only to such as appear by the corporate books to be such, but to every equitable owner of stock though it is on the books in another's name. Const. art. 12, § 14, requires books to be kept by the corporation wherein shall be recorded the amount of the capital stock subscribed, the names of the owners, and the amount of stock owned by each. *Held*, that the stockholders were not bound to see that not only their own names, but also the names of all other stockholders, were entered on the books as such, and that it would not be presumed that the corporation had entered the names of all stockholders on its books, so as to prevent a stockholder from showing other subscriptions than those shown by the corporate books, when sued on his statutory liability under section 322, so as to reduce the amount of such liability; the terms "owner" and "stockholder" in the statute including the real owner, though his name does not appear on the corporate books as owner.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 243.*

For other definitions, see Words and Phrases, vol. 6, pp. 5134-5151; vol. 8, p. 7744; vol. 7, pp. 6667, 6668; vol. 8, p. 7804.]

6. CORPORATIONS (§ 243*)—STATUTORY LIABILITY—LIABILITY OF ONE NOT OWNER—GROUNDS OF LIABILITY—ESTOPPEL.

The statutory liability of one not the real owner of stock, but who appears on the corporate books as an owner, is based upon his estoppel to deny ownership.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 243.*]

7. CORPORATIONS (§ 94*)—STOCKHOLDERS—ISSUE OF CERTIFICATES—NECESSITY.

The issuance of certificates of stock is not necessary to make one a stockholder in a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 435; Dec. Dig. § 94.*]

8. EVIDENCE (§ 157*) — PAROL EVIDENCE — CORPORATE RECORDS — PROCEEDINGS — ABSENCE OF MINUTES.

The minutes of the proceedings of the board of directors of a corporation are at most prima facie evidence thereof, and such proceedings may be shown by parol evidence in absence of minute entries.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 157.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Hughes Manufacturing & Lumber Company against Fred E. Wilcox. From a judgment for defendant, plaintiff appeals. Affirmed.

W. G. Van Pelt and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for appellant. W. S. Wright, for respondent.

SHAW, J. This is an action to enforce defendant's statutory liability as a stockholder of the Brand Manufacturing Company, a corporation, for the value of certain lumber and building materials sold and delivered to said corporation by plaintiff. The only point in controversy is the extent of defendant's liability. Plaintiff contends that at the time of the transaction had with the Brand Manufacturing Company only 530 shares of its authorized capital stock of $100,000 had been issued or sold, of which number defendant was the owner of 105 shares of the par value of $100 each, thus fixing the defendant's statutory liability at $^{105}/_{530}$ of the amount due plaintiff from the corporation. On the other hand, defendant contends that at the time the corporation became indebted to plaintiff the outstanding and subscribed capital stock consisted of 1,000 shares of the par value of $100 each, of which he owned 135 shares, thus making the amount for which he was liable $^{135}/_{1000}$ of such indebtedness, instead of $^{105}/_{530}$, as contended for by plaintiff. The court rendered judgment in accordance with the contention of defendant, from which plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The case was tried upon an agreed statement of facts, from which it appears the authorized capital of the corporation was $100,000, divided into 1,000 shares of the par value of $100 each, and that at the time the indebtedness was created, to wit, January 1, 1907, the journal, ledger, and stock book of the corporation showed that certificates for 530 shares of such stock, and no more, had been issued, and that defendant, as shown by said books, was the owner and holder of 105 shares thereof, and no more; that the minute book of the Brand Manufacturing Company disclosed that during the summer of 1906 the board of directors discussed plans for disposing of the unissued stock of the corporation, and at a meeting of the board held on August 29, 1906, decided that all the treasury stock should be sold, and offered the same for sale to its stockholders. On December 5, 1906, at a meeting of the board of directors, it was proposed to create a bonded indebtedness of $50,000, out of which there should be issued to the subscribers for the 470 shares of the unissued stock of the corporation bonds in an amount equal to the par value of the stock for which they subscribed; that thereupon, on December 8, 1906, defendant and others agreed among themselves in writing to take the entire amount of unissued treasury stock of 470 shares upon the terms and conditions of said proposal, each subscribing for the number of shares set opposite his respective name; defendant subscribing for 30 shares of the stock. This agreement was delivered to the secretary of the company, and at a meeting held on December 8th the board of directors agreed that the subscribers, on paying the money under their subscriptions, should receive interim notes from the company to hold until the bonds could be finally printed and delivered, but no minute entry of this agreement appears in the minute book. Defendant subscribed for 30 shares of the stock, and he and the other signers of the agreement in due course paid the amount of their respective subscriptions, covering the entire 470 shares of stock, and part of them, including defendant, received the interim notes referred to covering the amount of their respective subscriptions, but no certificates of stock were ever issued. On May 14, 1907, at a meeting of the board of directors, it was resolved that the company go into liquidation, and at a subsequent meeting of the stockholders of the company, held on May 24, 1907, at which all of the subscribers of the 470 shares of stock, together with two-thirds of the old stockholders, were present, it was resolved by said stockholders that, instead of issuing the bonds authorized by the board of directors at the meeting held on December 5, 1906, the president and secretary be authorized and directed to issue the company's notes payable on demand to such stockholders as had not already received notes to cover cash advanced by them to the company upon subscriptions for stock for which they had expected the company's bonds, the said notes to be dated as of even date with the dates on which such subscribers had paid in the amounts of their subscriptions to the stock of said company, which notes were issued and delivered in accordance with such resolution; and it was further unanimously resolved that said meeting ratify and confirm all the acts of the board of directors done subsequent to the last stockholders' meeting. Subsequently, the company was by its creditors thrown into bankruptcy, which proceedings are still pending.

Appellant contends that the corporation was not a party to the agreement signed by defendant and others, who "agreed together to join in taking up the treasury stock of the corporation," upon the understanding that they should have a bonus in 7 per cent. bonds of the corporation. Delivery to the secretary of the company of the agreement whereby the subscribers agreed to take the 470 shares of stock constituted an acceptance of the proposal made by the board of directors. The substitution of notes of the corporation, which the subscribers accepted in lieu of bonds, was to such extent a modification of the agreement by consent. As thus modified, the contract was fully executed. No formal contract is required to constitute one a stockholder in a corporation. "Any agreement by which a person shows an intention to become a stockholder is sufficient." Cook on Corporations, § 52. In this case, disregarding the agreement, payment for the stock and voluntary acceptance of the bonus agreed upon in the form of notes executed and delivered by the corporation was clearly sufficient, in the absence of other objection, to constitute defendant and his associates owners of the shares of stock to the extent of their respective subscriptions. Conceding the subscription to have been conditional upon the issuance of the bonds, as claimed by appellant, and that without complying with the condition the corporation could not have enforced the contract, nevertheless, this condition was waived by the voluntary acceptance of the notes in lieu of the proposed bonds.

No entry appears in the books of the corporation showing defendant to be the holder of these 30 shares of stock, for which he had subscribed and paid the purchase price thereof. Appellant contends that by reason of this fact defendant cannot as regards these shares be deemed a stockholder in the company; in other words, that we must indulge in the conclusive presumption that the corporation complied with the provisions of section 14, art. 12, of the Constitution, which requires that books be kept by the corporation wherein "shall be recorded the amount of capital stock subscribed and by whom," together with "the names of the owners of its capital stock and the amount owned by them respectively," and that the statutory liability of a stockholder must be based upon the ownership and amount of capital stock subscribed as appears from the entries in the books. We find no authority in support of this position. It is contrary to section 3, art. 12, of the Constitution, and in direct conflict with the provisions of section 322, Civ. Code, which provides: "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. * * * The term stockholder, as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another." Neither section 3, art. 12, nor said section 322, limits the ownership of shares of stock to one whose name appears upon the books of the corporation as the owner thereof. The Constitution (section 14, art. 12) imposes upon a corporation the duty of entering in books kept for that purpose the amount of its subscribed capital stock, by whom subscribed, the names of the owners of its stock, and number of shares owned by them, respectively. Failure to perform such duty by the corporation, however, cannot be imputed to the owner of the stock, who has a right to assume that the proper book entries are made. No duty devolves upon the purchaser of stock to see that, not only his name, but the names of all other purchasers, together with the number of shares owned by them, respectively, are entered in the corporate books. Hence, in the absence of facts constituting an estoppel—and none appears here—his liability is unaffected by such neglect of duty on the part of the corporation. The term "stockholder" or "owner," as used in the statute, is not confined to one who appears upon the books of the corporation as such, but to the real owner, notwithstanding the fact that the stock as shown by the books appears in the name of another. While the latter, though not the owner may be required to respond to a creditor of the corporation, such liability is based, not upon ownership, but upon grounds of estoppel to deny ownership. O'Connor v. Witherly, 111 Cal. 523, 44 Pac. 227; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Abbott v. Jack, 136 Cal. 510, 69 Pac. 257; Hurlburt v. Arthur, 140 Cal. 103, 73 Pac. 734, 98 Am. St. Rep. 17. To hold that a creditor of a corporation cannot recover from an owner of stock upon a statutory liability because the corporation has neglected to make the proper book entries of his holdings, showing him to be a stockholder, would nullify the provisions of both the Constitution and statute. This being true, then, in the absence of acts constituting an estoppel, the converse of the rule must likewise be true, namely, that where the corporate books fail to disclose an increased subscription of stock, by reason of which increase (whether his own subscription or that of another, or both) the stockholder's liability, as in the case at bar, is less than it would otherwise be, he is entitled to establish such fact and insist upon his statutory liability being fixed upon such basis.

Appellant has cited a number of cases in support of its contention. An examination of these cases will disclose the fact that the creditor was pursuing one whose name appeared upon the books of the corporation as a stockholder, but who denied liability upon the ground that he was not the owner of the stock, and where recovery was had it was based upon grounds of estoppel. See cases above cited. And where recovery was denied against one who was not in fact the owner, but appeared upon the books to be a stockholder, it was due to a finding that he was not guilty of acts, either of omission or commission, which would, as against the creditor of the corporation, estop him from denying ownership. Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248; Shattuck v. Gillelen, 154 Cal. 779, 99 Pac. 348.

The fact that no stock was issued to defendant and the other subscribers is immaterial. Issuance of the certificates of stock is not necessary to constitute one a stockholder or owner of shares in a corporation. Garretson v. Crude Oil Co., 146 Cal. 188, 79 Pac. 838; California S. Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; Pacific Fruit Co. v. Coon, 107 Cal. 447, 452, 40 Pac. 542. It is likewise immaterial that the minutes failed to disclose the action of the board taken in regard to certain matters. At most, the minutes of the proceedings of the board of directors are prima facie evidence only of its acts. In the absence of minute entry of its proceedings they may be proved by parol evidence. The agreed statement of facts upon which the case was submitted shows the amount of the subscribed capital stock of the corporation to have been $100,000 divided into 1,000 shares of the par value of $100 each, of which defendant was the owner of 135 shares.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

13 Cal. App. 29

BROWN v. CALDWELL et al. (Civ. 775.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. Judgment (§ 279*)—Judgment Roll—Contents—Notice of Appearance.

The notice of appearance which defendant may give to plaintiff or which his attorney may give, as authorized by Code Civ. Proc. § 1014, is no part of the judgment roll defined by section 670.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546–551; Dec. Dig. § 279.*]

2. Appeal and Error (§ 664*) — Record — Judgment Roll.

The failure to serve a defendant with a summons and the absence of an answer, demurrer, or other appearance on his part, all of which appears from the judgment roll, is not inconsistent with the recital in the judgment that he appeared in one of the other modes authorized by law, evidence of which is no part of the judgment roll, and on appeal by defendant on the judgment roll alone the recital in the judgment must be taken as at least prima facie true, so that the judgment will not be reversed for want of jurisdiction over the person of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 664.*]

3. Appeal and Error (§ 934*) — Record — Presumptions.

All presumptions on appeal are in favor of the correctness of the judgment, and, where a recital in the judgment on appeal on the judgment roll alone finds support in other portions of the record which under any condition of facts could exist, it will be presumed, in the absence of any contradictory showing, that such condition of facts existed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3781; Dec. Dig. § 934.*]

4. Appeal and Error (§ 907*) — Record — Presumptions.

Where the trial court found that defendant appeared by attorney, the court on appeal on the judgment roll alone must presume, in the absence of a contrary showing, that the evidence supported the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911–2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

5. Judgment (§ 120*)—Default Judgment—Appearance of Defendant.

Where the court obtained jurisdiction of the person of defendant by reason of his appearance, no formal entry of his default was necessary to enable it to render judgment against him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 210; Dec. Dig. § 120.*]

6. Judgment (§ 118*)—Default Judgment—Extent of Relief.

Under Code Civ. Proc. § 580, providing that the relief granted to plaintiff, where there is no answer, cannot exceed that which he shall have demanded in his complaint, a recovery against a defendant who appears by attorney, but who does not answer, cannot exceed the sum prayed for in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 234; Dec. Dig. § 118.*]

7. Judgment (§ 118*)—Default Judgment—Extent of Relief.

Where a defendant by his answer raises no issue as to the sum claimed to be due and unpaid in an action on a note, the recovery cannot exceed the sum prayed for in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 234; Dec. Dig. § 118.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John Brown against H. J. Caldwell and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Watkins & Blodget, for appellants. T. M. Stewart and Hester, Merrill & Craig, for respondent.

SHAW, J. Action to recover from defendants on their joint and several promissory note. The appeal is from a judgment rendered against both defendants, and is prosecuted upon the judgment roll alone.

On behalf of appellant Tungate, it is contended that the judgment as to him should be reversed for the reason that it does not appear that any summons was ever issued or served upon him; nor does the judgment roll disclose any answer, demurrer, or other appearance filed on his part. The judgment, however, recites that defendant Tungate appeared by Watkins & Blodget, as attorneys for himself and his codefendant, Caldwell. Section 1014, Code Civ. Proc., provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." While under the provisions of section 670, Code Civ. Proc., his answer or demurrer is made a part of the judgment roll, the notice of appearance which he may give to plaintiff, or which his attorney is authorized to give under the provisions of section 1014, supra, constitutes no part of such roll; hence, failure to serve Tungate with a summons, and the absence of an answer, demurrer, or other appearance on his part, all of which appears from the judgment roll, is not inconsistent with the fact recited in the judgment that he did appear in one of the other modes authorized by law, evidence of which, under the statute, constitutes no part of the judgment roll. "The Code does not require such appearance to be made part of the judgment roll; and as appellant appeals upon the judgment roll alone, which shows nothing contradictory of or inconsistent with said recital (which was that defendant regularly appeared in said action by ——— an attorney of the court), it must be taken as at least prima facie true." Lyons v. Roach, 84 Cal. 29, 23 Pac. 1026. In the case of Sichler v.

Look, 93 Cal. 606, 29 Pac. 221, the court, in discussing a like question, says: "The recitals in a judgment are the court's record of its own acts, and although upon a direct appeal the jurisdiction of the court is not to be established by its mere assertion in the judgment that it had acquired jurisdiction, yet if such recital finds support in other portions of the record, which under any condition of facts could exist, it will be presumed, in the absence of any contradictory showing, that such condition of facts existed." All presumptions are in favor of the correctness of the judgment. Parker v. Altschul, 60 Cal. 380. While defendant claims the recital of appearance is not sustained by the facts, he offers nothing in contradiction of the fact so recited, other than the judgment roll, which, as we have seen, is insufficient for the reason that the Code does not require the fact of defendant's appearance to be shown in such roll. Since the court has found that he did appear by attorney, we must presume, in the absence of a contrary showing, that the evidence presented to the court fully supports such finding. See, also, In re Eichhoff, 101 Cal. 600, 36 Pac. 11. In the case of Weeks v. Gold Mining Co., 73 Cal. 599, 15 Pac. 302, and other cases cited by appellant, the judgment attacked did not contain a recital of appearance by defendant, but recitals of facts required to be shown by the judgment roll, which recitals were contradicted by the facts thus shown.

If the judgment against Tungate was in fact rendered without jurisdiction of the person, he is, of course, entitled to relief therefrom, but not in this proceeding nor upon the record before us.

The court having obtained jurisdiction of the person of defendant by reason of his appearance, no formal entry of his default was necessary to enable it to render judgment against him. Drake v. Duvenick, 45 Cal. 455; Hibernia S. & L. Soc. v. Matthai, 116 Cal. 424, 48 Pac. 370.

On behalf of appellant Caldwell, it is claimed that, as the judgment is against both himself and Tungate, it must, if reversed as to the latter, fail also as to him. The foregoing views render it unnecessary to discuss his rights from such standpoint.

The note sued upon was for the sum of $1,000, bearing interest at the rate of 10 per cent. per annum from date, payable semiannually, and dated February 1, 1907. The complaint alleges: "That said promissory note has not been paid, nor any part thereof, or the interest thereon, save and excepting the sum of $50; that there is now due, owing, and unpaid to the said plaintiff on said promissory note the whole of the principal sum of $1,000, United States gold coin, together with interest thereon at the rate of 10 per cent. per annum from April 1, 1908." The prayer of the complaint follows this allegation, praying for judgment for $1,000 and interest at 10 per cent. per annum from April 1, 1908. No issue was raised by either defendant as to the amount alleged to be due. In no event could recovery against Tungate exceed the sum prayed for in the complaint. Section 580, Code Civ. Proc. The allegation of the complaint as to the amount unpaid on the note is somewhat ambiguous. Construing it most strongly against the pleader, the sum alleged to be unpaid upon the note is $1,000, with interest from April 1, 1908, for which plaintiff prays judgment. Since defendant by his answer raised no issue as to the sum claimed to be due and unpaid, we think the rule applicable to one not answering is likewise applicable to one admitting such allegation. The court, however, in rendering judgment, computed interest from August 1, 1907, instead of from April 1, 1908. To the extent of the interest accruing prior to April 1, 1908, amounting to $73.55, the judgment is erroneous.

It is therefore ordered that upon the going down of the remittitur the trial court modify the judgment by deducting therefrom as of the date of its rendition, the sum of $73.55, and as thus modified the judgment is affirmed. It is further ordered that appellants recover costs of this appeal.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 52

FOSTER v. BEAU DE ZART. (Civ. 766.)

(Court of Appeal, Second District, California. March 16, 1910.)

1. Appeal and Error (§ 1010*)—Review—Findings.

A finding of fact by the court supported by some evidence will be sustained on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. Bills and Notes (§ 92*)—Consideration—Gaming Contracts.

Plaintiff having in good faith advanced money to defendant with which to complete a contract for purchase of stock with a third person, his recovery on a note given for the loan secured by the stock could not be defeated on the ground that the consideration therefor was a gaming contract simply because plaintiff had a general knowledge that the contract between defendant and the third person was for a sale upon margin.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 92.*]

3. Bills and Notes (§ 397*)—Demand Notes—Necessity for Demand Before Bringing Suit.

Demand of payment of a note payable on demand before suing thereon is not required where it appears that it would have been unavailing, and hence would not be required where the maker before suit refused payment and demanded return of the stock deposited as collateral with the note, together with payments made.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1029–1044; Dec. Dig. § 397.*]

4. Bills and Notes (§ 530*)—Demand Notes—Interest.

In an action on a demand note, interest was properly allowed where plaintiff recovered.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1941–1944; Dec. Dig. § 530.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action by E. K. Foster against Fred W. Beau de Zart. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Jones & Weller, for appellant. H. C. Millsap, for respondent.

ALLEN, P. J. The action was one to recover the unpaid balance upon a promissory note executed by defendant to plaintiff. Defendant, admitting the execution of the note, alleged that there was no consideration therefor, and that the same was executed by defendant to plaintiff to secure certain margins on stocks. By way of cross-complaint defendant set up the purchase from plaintiff by defendant of 34,000 shares of mining stock on a margin, and that, pursuant to an agreement that it would be necessary for defendant to pay additional margins from time to time, the note set out in the complaint was executed and 63,500 shares of mining stock were deposited with plaintiff as collateral thereto, that plaintiff keeps and retains said stock, notwithstanding the invalidity of the note and of the transaction and refuses to surrender the same upon demand, and he prays judgment for the value of such stock. In various other separate counts of the cross-complaint defendant sets up the payment by him to plaintiff of various sums by way of margins upon the stock transaction between them, and asks for judgment for the amount of such margin payments. Issue is tendered by the plaintiff on all the matters set out in the cross-complaint.

Upon the trial the court found that the note was executed for a valuable consideration; that it was not executed or delivered to secure the payment of any margin or margins on stock, but, on the contrary, was executed in consideration of money loaned; that no sums by way of margin or margins were ever paid by defendant to plaintiff; that no stock or stocks were deposited as security by defendant for any margin or margins; that, while the stock set forth was delivered by defendant to plaintiff as collateral security for the note, plaintiff under the terms of the note, before commencement of the action, sold the stock so hypothecated as security; and that the sum remaining as the proceeds of said sale after payment of costs of sale was $1,365.25 and no more, which amount was duly credited upon said note; that the price at which such stock was sold was the highest market value of said stock on said date; that the stock mentioned in the cross-complaint had not been converted by plaintiff; and that a balance of $1,771.30 remained unpaid upon said note, for which sum, with attorney's fees amounting to $171.80, judgment was rendered. Defendant moved for a new trial, which was denied, and this appeal is prosecuted from the judgment and an order denying a new trial.

It appears from the statement that defendant had bought from one Blagge, a broker, on margin certain shares of stock and had paid to Blagge certain sums by way of margin upon such purchase, and that the amount of $2,957.55 remained unpaid on account of the stock purchased. Plaintiff testifies that he knew nothing of the details of the purchase, but did know in a general way that the stock had been purchased upon margins and had seen a memorandum showing the various amounts paid to Blagge; that defendant represented to plaintiff that it would be necessary for him to have the amount mentioned in the note, which was then owing to Blagge, in order to take up the stock. Plaintiff agreed with defendant that if he would deposit the stock so purchased, with certain other stock as collateral, he would advance the amount of money necessary to take up the stock from Blagge. Pursuant to this, plaintiff did advance the amount of money mentioned in the promissory note, the stock was taken up, and the transaction with Blagge closed. Plaintiff actually paid out the sum mentioned in the note on account of the delivery of the stock to him; plaintiff testifying that the whole transaction was in good faith and a bona fide loan of the amount mentioned in the promissory note to defendant to enable him thus to complete the purchase of the stock so originally purchased upon margin. From this it is claimed by appellant that the contract between plaintiff and defendant was founded on an illegal consideration, that it was a gambling contract, and no recovery can be had under it, and in this connection he attacks the testimony of plaintiff, which is uncontradicted, as being insufficient to support the finding of the court. As to this last proposition, it is sufficient to say that there is some testimony in the record warranting the finding of the court, and the same will therefore be sustained. We are not of the opinion that, under the facts disclosed, the transaction between plaintiff and defendant is prohibited by statute, or that the same may be regarded as a gambling contract. Plaintiff having in good faith advanced to defendant money with which to complete the contract for the purchase of the stock, recovery of such advancement could not be defeated simply for the reason that plaintiff had a general knowledge of the marginal character of the contract as between defendant and the broker. There is nothing in the record indicating any irregularity or invalidity of the contract entered into between plaintiff and defendant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The note set out in the complaint was payable on demand, and it is claimed that there is no evidence in the record showing a demand before suit was brought. There is evidence in the record, however, tending to show that, before the suit was brought, Beau de Zart refused payment of the note and demanded a return of the stock with the money he had paid on it. Demand is not required when it appears that it would have been unavailing. In addition to this, plaintiff testifies that he did make a demand.

There is in the record a point sought to be made with relation to the regularity of an assignment of the note by plaintiff to one Wagy and by Wagy back to plaintiff. There is sufficient in the record to warrant the finding of the court that such assignments were made, and that plaintiff was the holder and owner of the note at the time suit was brought.

There was no error in the court rendering judgment for interest. O'Neil v. Magner, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: TAGGART, J.; SHAW, J.

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13 Cal. App. 56

AYDELOTTE v. BLOOM. (Civ. 708.)

(Court of Appeal, First District, California. March 17, 1910.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE—REVIEW.

A verdict based on conflicting evidence will not be interfered with on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

2. ATTORNEY AND CLIENT (§ 165*)—ACTION FOR FEES—ISSUES AND PROOF.

Where, in an action for attorney's services, plaintiff furnished a bill of particulars including various items of disbursements and one item detailing various services rendered and making one lump charge for all the services, no further bill of particulars having been called for, evidence as to the amount of a reasonable retaining fee and the reasonable value of the services was competent, though no charge for retainer was pleaded.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 366; Dec. Dig. § 165.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by William M. Aydelotte against I. T. Bloom. From a judgment denying defendant's motion for a new trial, he appeals. Affirmed.

Hugh R. Ostrom, for appellant. Wm. M. Aydelotte, in pro. per. (A. H. Jarman, of counsel), for respondent.

KERRIGAN, J. This is an action to recover the reasonable value of services rendered as an attorney at law. The case was tried with a jury, and in accordance with its verdict a judgment was entered in favor of the plaintiff and against the defendant for the sum of $600. This appeal is from an order denying defendant's motion for a new trial.

The evidence upon both sides presented has been read and considered. Very briefly, the facts are as follows: The plaintiff testified that he rendered the defendant certain services as an attorney at law; that the reasonable compensation for such services was $1,000. He rendered a bill, however, for $750, and sued for this amount. His testimony as to the services rendered and as to their value was corroborated. The defendant did not dispute that the plaintiff had rendered the services, but claimed that they were performed, not as an attorney at law, but as an expert bookkeeper, and that they were not so extensive as claimed by plaintiff, and that the reasonable value of the same was $265, and introduced evidence to that effect.

It thus appears that there is a conflict in the evidence; and, as there is evidence to sustain the verdict of the jury, this court, as has been repeatedly held, will not interfere. Berger v. Horlock, 10 Cal. App. 352, 101 Pac. 918; Ernest v. McCauley, 155 Cal. 739, 102 Pac. 924. In the case of Long v. Saufley, 89 Cal. 437, 26 Pac. 902, it was said: "This court has repeatedly held that the decision of the trial court upon conflicting evidence is conclusive, and that, when that court upon a motion for a new trial has refused to set aside such decision, this court will not reverse or even review its action."

One of plaintiff's witnesses, an attorney at law, in testifying as to what in his opinion plaintiff's services were reasonably worth, said: "I should say he should be entitled to a retainer of $500, and his services should be worth in addition to that from $700 or $750 to $1,000. I should say that he should have $1,250 for those services including the retainer." Defendant objected to that part of the answer referring to the retainer, and now claims that, as the plaintiff did not sue for or demand a retainer, the testimony was erroneously admitted. It is true that the plaintiff does not in his complaint in terms mention a retaining fee, but merely alleges that the amount sought to be recovered is the reasonable value of the services rendered; but it has been decided that upon such an allegation an attorney may in proving such value include therein the amount of a reasonable retaining fee. Knight v. Russ, 77 Cal. 410, 19 Pac. 698; Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956. In the former case the court said: "When an action is brought to recover the value of an attorney's services, the retainer, it not having been paid, constitutes a part of the plaintiff's cause of action; but it is not necessary to set forth the items of the account in the complaint. It is sufficient to state the facts constituting the cause of action in ordinary and concise language, and if the defendant desires further particulars he may call for them, and they must be given to him within a reasonable time. Code Civ. Proc. §§ 426, 454. At the trial, if an issue has been tendered as to the value of the services, their value must be proved, and that will include the value of the retainer." In the case at bar, on the demand of defendant, a bill of particulars was furnished, which included various items of disbursements, and one item detailing the various services rendered, and making one lumping charge for the whole of those services. No further bill of particulars was called for. It was in proving the value of the services detailed in this last-mentioned item that the testimony was received as to the amount of a reasonable retaining fee; and we think, under the authority of the two cases last cited, that the evidence was properly received.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

13 Cal. App. 59

FRANK CO. v. LEOPOLD & FERRON CO.

(Civ. 750.)

(Court of Appeal, First District, California. March 17, 1910.)

1. APPEAL AND ERROR (§ 934*)—PRESUMPTIONS—VALIDITY OF ORDER OF COURT.

Where the record on appeal does not disclose when a default judgment was entered, it will be assumed as against appellant, on whom the burden of showing error lies, and who contends that a motion to vacate the judgment came too late to permit the use of proof aliunde, the judgment roll to show its invalidity for want of jurisdiction over defendant, in that the motion was made more than six months after the judgment was taken, and in support of the order of the court granting the motion, that the entry was within six months preceding the notice of motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3778; Dec. Dig. § 934.*]

2. JUDGMENT (§ 153*) — VACATION — VOID JUDGMENT—TIME.

The right to have a void judgment vacated exists independent of statute, and, while a motion to vacate a void judgment, the invalidity of which must be shown by extrinsic proof, must be made within a reasonable time, a judgment appearing to be void upon its face—that is, by inspection of the judgment roll—may be vacated upon motion at any time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300; Dec. Dig. § 153.*]

3. JUDGMENT (§ 153*)—VACATION—REASONABLE TIME.

A motion to vacate a default judgment, void in fact, but not so appearing on the record, made six months and one day after rendition of the judgment, was made within a reasonable time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300; Dec. Dig. § 153.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Frank Company against the Leopold & Ferron Company. From an order vacating a default judgment against defendant, plaintiff appeals. Affirmed.

Will M. Beggs, for appellant. Campbell, Metson, Drew, Oatman & Mackenzie, for respondent.

HALL, J. This is an appeal from an order vacating and setting aside a default judgment entered against defendant as damages for an unlawful and malicious attachment.

The action is purely a personal one, and was brought in October, 1906. The defendant is a foreign corporation, organized and existing under the laws of the state of Illinois. It had never filed in the office of the Secretary of State of this state a copy of its articles of incorporation, or a designation of an agent upon whom process might be served, as is required by the statute of this state of all foreign corporations doing business in the state. Civ. Code, §§ 408, 405. Service of summons was made upon defendant by serving a copy of the summons and complaint upon the Secretary of State.

Upon the 16th day of November, 1906, a judgment upon default against defendant for the sum of $25,000 was signed by the judge of the court and filed with the clerk. On the 17th day of May, 1907, just six months and one day after the rendition of the judgment, the defendant specially appeared in the action for the purpose of its motion only, and gave and filed a notice of motion to vacate and set aside said judgment upon the ground that the court never obtained jurisdiction of the defendant, in that no service of summons, as required by law, had been made on defendant, and that it had never appeared in said action or submitted itself to the jurisdiction of the court. Upon the hearing the court granted the motion, and it is from this order that the plaintiff has appealed. At the hearing the court allowed defendant to read in evidence an affidavit served with the notice and other affidavits replying to affidavits read by plaintiff. From the affidavits read by defendant it appears that defendant was not at the time of bringing the action, and had not for over a year prior thereto, or since, been engaged in business in the state of California, nor had it at that time, nor for over a year prior thereto, nor since, any officer, managing or business agent, cashier, or secretary, officer, representative, or agent in said state of California. In other words, the facts disclosed by these affidavits show that service of summons on this defendant could not be had in this action by service of such summons on the Secretary of State, and in consequence the judgment is void. We do not understand that this is disputed by appellant. Its contention is that the motion came too late to permit the use of proof aliunde the judgment roll to show its invalidity for want of jurisdiction over the defendant, in that the motion was made more than six months after the judgment was taken. The record does not disclose when the judgment was entered other than the notice of the motion recited that the judgment was entered on the 17th day of November, 1906; but, if the date of its entry be important, we would assume as against an appellant, upon whom the burden of showing error lies, and in support of the order of the trial court, that the entry was within six months preceding the notice of motion.

The fallacy of appellant's position lies in the assumption that the time within which a motion to set aside a judgment void in fact, but not so appearing upon the judgment roll, is limited by section 473, Code Civ. Proc. This motion is not made under this section at all. The right to have a void judgment vacated and set aside exists independent of and outside of any statutory provision. Waller v. Weston, 125 Cal. 201, 57 Pac. 892; Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Mott Iron Works v. West Coast Plumbing Co., 113 Cal. 341, 45 Pac. 683. Where the judgment appears to be void upon its face—that is, by inspection of the judgment roll—it may be vacated upon motion at any time; but, where its invalidity must be shown by extrinsic proof, it is well settled that such motion can only be entertained when made within a reasonable time. In this connection appellant insists that it has been settled in this state by authoritative decisions that such reasonable time cannot exceed the maximum time allowed for the motions authorized by section 473, Code Civ. Proc., and that the time allowed by that section cannot exceed six months from the rendition of the judgment as contradistinguished from the entry thereof.

We have examined all the cases cited by appellant as well as all those cited by respondent upon this point, and we are of the opinion that the result of the decisions is that a motion to vacate a void judgment, not appearing to be such upon its face, must be made within a reasonable time. So much has been authoritatively settled. But in none of the cases has it been decided whether the time shall run from the rendition of the judgment or from the entry thereof. In none of the cases has it been necessary to fix precisely what is a reasonable time. It being established that the motion may be made within a reasonable time, it would seem to follow on principle that what is a reasonable time, in the absence of a statutory limitation, should be largely left to the determination of the trial court. We have just said that in none of these cases has it been necessary to fix precisely what is a reasonable time for such a motion as this. Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198, may be considered a leading case in this state upon the right to vacate a judgment, void in fact, but not so appearing upon the record by motion. The right to vacate such a judgment upon motion at all was attacked, and it was held that the right existed, but must be exercised within a reasonable time. It was there said: "Under our present system, terms of court are abolished, and a motion to set aside a judgment would have to be made within a reasonable time, and perhaps, following the analogy of section 473, six months might be considered the extent of a reasonable time for the motion; but, however that may be, there is no question in the case at bar as to reasonable time because the motion was made within 10 days after the judgment. * * * We hold, therefore, that, when a nonresident has not been personally served within the state, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the service of summons and vacate the judgment. This is as broad a statement of the rule as the facts of this case require." It is thus apparent that it was only decided in that case as to the time of such motion that it must be made within a reasonable time, and that 10 days was such reasonable time. The suggestion that the time fixed by section 473, Code Civ. Proc., should be adopted, cannot mean anything more than that approximately such time should not be exceeded, in view of the fact that it is laid down authoritatively that such motion may be made within a reasonable time, and in view of the rule that what is a reasonable time, in the absence of a statutory limitation, is a question largely within the discretion of the trial court.

In People v. Temple, 103 Cal. 453, 37 Pac. 415, cited by appellant, the motion was made more than 12 years after the judgment was entered, and it was held that it came too late. It was there said "that a judgment which is in fact void for want of jurisdiction over the person of the defendant, but where its invalidity does not appear from the judgment roll, may be set aside upon motion within a reasonable time after its *entry*." (Italics are ours.) The court further said: "And what is a reasonable time within which a motion may be made to set aside a judgment, not void upon its face, must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure." This reference to what has been "determined," so far as we are advised has no greater justification than the suggestion concerning the effect of section 473 in Norton v. Atchison, etc., R. R. Co., supra. No such point was there definitely determined or determined at all. Whether or not the exact time limited for motions under section 473, Code Civ. Proc., was the maximum limit for a motion to vacate a judgment void dehors the record, was not involved in the Temple Case. The gist of the decision is contained in the concluding paragraph, which is: "The judgment was not void upon its face, and could not, upon that ground, be set aside on motion. The motion was made more than *12 years after the judgment was entered, and was not within a reasonable time.* The court had no power, therefore, to grant the motion, and its action in doing so must be held void and of no effect." (Italics are ours.) When this case is carefully read in the light of its facts, it will be seen to only authoritatively decide that such a motion as was there involved must be made within a reasonable time, and that 12 years after the entry of judgment is not a reasonable time.

People v. Harrison, 107 Cal. 541, 40 Pac. 956, cited by appellant, involved rights of conflicting purchasers of state lands. Incidental reference is made to an order vacating a judgment not void upon the record, made three years after the rendition of the judgment, and the Temple Case is cited as determining that such a motion must be made within six months after the rendition of the judgment. But all that was said on this subject is obiter, as the case was decided upon another point and in favor of the party relying on the order. People v. Norris, 144 Cal. 422, 77 Pac. 998, also cited by appellant, decides that on a motion made six years after judgment evidence dehors the record cannot be used to prove the invalidity of the judgment. On the other hand, there are expressions in cases to the effect that the time runs from the entry of the judgment. But in none of the cases was any point being made as to whether or not the time should be counted from the rendition or entry of the judgment. So, too, in none of the cases cited on either side was it important for the court to fix accurately what should be the maximum limit for a reasonable time within which a motion to vacate a judgment, void in fact, but not so appearing on the record, must be made. In no case did the time involved approximate near to six months, either from the rendition or entry of the judgment. The fundamental rule recognized in all the cases is that such motion must be made within a reasonable time. That is as much as has been authoritatively decided. The section of the Code relied on by appellant does not deal with the matter of vacating void judgments at all. In the state of the authorities on the subject we are not prepared to say that a motion made six months and one day after the rendition of a judgment, void in fact, is not made within a reasonable time, or that the court had no power under such circumstances to vacate such judgment upon proof dehors the record that the court never obtained jurisdiction over the person of the defendant.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

12 Cal. App. 786

LOUD v. COLLINS et al. (Civ. 747.)

(Court of Appeal, Second District, California. March 10, 1910.)

1. Limitation of Actions (§ 197*)—Action on Note—Findings—Evidence—Sufficiency.

In an action upon a note, evidence *held* to support a finding that the note was executed out of the state, so that the cause of action was barred by Code Civ. Proc. § 339, subd. 1, which provides that actions upon written instruments executed out of the state must be begun within two years.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

2. Contracts (§ 145*)—Delivery—Execution.

Under Civ. Code, § 1626, providing that a contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent, the place where a contract was written, signed, or dated does not necessarily fix or determine the place where it was executed; delivery being the final act essential to its consummation as an obligation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 728; Dec. Dig. § 145.*]

3. Evidence (§ 413*)—Contracts (§ 145*)—Place of Delivery—Parol Evidence.

The place of delivery of a written contract is the place of execution, and, in the absence of an estoppel, this fact may be established by parol evidence, notwithstanding another venue is designated in the date line; such designation being only prima facie evidence of the fact.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 413;* Contracts, Cent. Dig. § 728; Dec. Dig. § 145.*]

4. Bills and Notes (§ 127*)—Place of Execution—Depositing in Post Office—Foreign State.

Under Civ. Code, § 1626, providing that a contract in writing takes effect upon its delivery, where a note was sent by mail to another state by two of the makers, with the knowledge of the payee, so that another, whom the payee insisted should sign the note, could affix his signature, and the note was so signed and mailed to the payee, and received by him in due time, the note was delivered and executed in the other state.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 282; Dec. Dig. § 127.*]

5. Evidence (§ 65*)—Presumptions—Knowledge of the Law.

Where a note was sent by mail to another state by two of the signers in order to obtain the signature of a third person whom the payee insisted should also sign, and the third person signed the note and mailed it to the payee, who received it in due course, the payee is presumed to have knowledge that the place of execution of the note was in the other state.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 85; Dec. Dig. § 65.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. S. Loud against James R. Collins and John W. Kemp and another. Judgment for plaintiff against Collins and for defendants, Kemp and another, and plaintiff appeals. Affirmed.

H. S. Rollins, for appellant. Frank G. Finlayson, Elon G. Galusha, and W. A. Alderson, for respondents.

SHAW, J. This is an action to recover $1,300 and interest at the rate of 5 per cent. per month, compounded monthly, alleged to be due and unpaid upon a promissory note dated, "Los Angeles, Cal., January 17, 1903," made payable generally to Watson & Co., by whom it was transferred for collection to plaintiff. Judgment went against defendant Collins by default. Defendants Kemp and Alderson answered, alleging, among other defenses, that the action was barred by section 339, subd. 1, Code Civ. Proc. Among other things, the court found: "The note sued on in this case and set out in the complaint was not executed until it was deposited by the defendant Alderson in the post office in Chicago, in an envelope directed to John W. Watson, and was therefore executed out of the state of California, and in the state of Illinois, and is barred by section 339, subdivision 1, of the Code of Civil Procedure of the state of California." Judgment followed in favor of defendants Kemp and Alderson. From this judgment, and an order denying his motion for a new trial, plaintiff appeals.

Appellant's contention for a reversal is based solely upon the ground that this finding of the court is unsupported by the evidence; his claim being that the note was executed in this state. Section 339, subd. 1, Code Civ. Proc., prescribes the time for the commencement of actions founded upon instruments of writing executed out of the state to be within two years. The complaint herein was filed a few days prior to the expiration of four years after the note matured. If, therefore, it was executed out of the state, as claimed by respondents, then, clearly, the cause of action thereon was barred. Higgins v. Graham, 143 Cal. 131, 76 Pac. 898.

While there is some conflict in the evidence, it clearly tends to show the following facts: Collins desired to borrow $1,100, and he and Kemp went to the office of Watson & Co., whose calling was that of lending money, and applied for the loan. As security for the payment of same, Collins proposed to assign to Watson an interest in a certain oil venture, which he held with Alderson, and also have Alderson, who resided in Chicago, sign the note. Watson declined to make the loan upon the security then offered, but during the negotiations proposed to loan the money upon a note signed by all three of the defendants, provided he received an assignment of an interest equal to the sum of $500 in the oil venture, and, in addition to this and the interest reserved in the note, received also a bonus of $200. Collins and Kemp assented to this proposition, and in accordance with this agreement Collins and Kemp, at Los Angeles, Cal., signed and delivered to Watson a note identical in form with the one set out in the complaint, and Collins attached his signature to an instrument whereby he assigned to Watson the said interest in the oil venture, which, however, it seems, had to be approved or accepted by Alderson. At the same time with the making and delivery of this note so executed by Collins and Kemp, they also signed the note upon which this action is based, and this last-mentioned note, together with the assignment of the oil interest, and letters written by Collins and Kemp to Alderson, requesting him to sign the note and return same to Watson, were, with an envelope addressed, "John W. Watson, 322 Los Angeles Trust Building, Los Angeles, Cal.," all inclosed in an envelope which was addressed to Alderson at Chicago and by Watson deposited in the United States post office at Los Angeles. At the same time Watson paid to Kemp for Collins the sum of $1,100, the amount agreed to be advanced on the $1,300 note. Alderson received the note and other papers so forwarded to him through the United States mail, and, after signing his name to the note, inclosed it in the self-addressed envelope to John W. Watson, which had been sent to him for such purpose, and deposited it in the post office at Chicago, all in accordance with the understanding and agreement had between Collins, Kemp, and Watson. Watson received it in due course of mail, and thereupon delivered to Collins and Kemp the note which they alone had signed, as above stated. Says Mr. Kemp in his testimony: "The agreement with Mr. Watson and Mr. Collins was that Mr. Collins should sign the note, that I should sign the note, and that it should be sent to Mr. Alderson in Chicago to be signed by him and then returned to Mr. Watson." In our opinion, this evidence fully sustains the finding.

The place where the contract was written, signed, or dated does not necessarily fix or determine the place where it was executed. Delivery of the instrument is the final act essential to its consummation as an obligation. Civ. Code, § 1626; Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777. The place of delivery is the place of execution, and, in the absence of matters constituting an estoppel, this fact may be established by parol evidence, notwithstanding a venue other than that shown to exist is designated in the date line of the instrument. Such designation is prima facie evidence only of the fact when disputed. Wells, Fargo & Co. v. Vansickle (C. C.) 64 Fed. 944. It is, therefore, immaterial that Kemp and Collins signed the note in this state.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The general rule is that depositing a note in the post office addressed to the payee with his assent is a sufficient delivery thereof. Daniel on Negotiable Instruments, § 67; Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777; Ivey v. Kern County Land Co., 115 Cal. 196, 46 Pac. 926; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90. Appellant concedes this proposition, but insists that it should be limited to those transactions directly conducted by the parties through the medium of the post office; that is, where one party makes the proposal, and the other accepts by signing and transmitting the contract. Accepting his view, the facts do not bring this case within the exception for which he contends. Watson proposed to lend the money in consideration that each of the parties should obligate himself by written contract to repay the same with the agreed interest. The fact that he did not directly communicate this proposal to Alderson is immaterial. It was sufficient that it was communicated to him, as intended by Watson, through Kemp and Collins, as a proposition made by Watson to all three defendants, and which, in order to constitute a contract, must be accepted by all three. While Watson himself did not write the letters to Alderson, submitting his proposal, the action taken by Kemp and Collins in submitting it was with his knowledge and consent. It was clearly his intention, implied from his acts, that if his offer, which had been agreed to by Collins and Kemp, was accepted by their codefendant Alderson, the latter, at Chicago, Ill., should attach his signature to the note theretefore signed by Kemp and Collins, but not delivered, and inclose the same in the self-addressed envelope sent with the note for such purpose, and deposit it in the United States post office at Chicago, Ill. Upon receipt of the note Alderson signed it—however reluctantly, or by what inducements prompted so to do, is immaterial—and inclosed it in the envelope and mailed it to Watson, by whom it was received in due course. With full knowledge of all the facts and circumstances connected with the signing and delivery of the note, Watson accepted it in lieu of the note of Kemp and Collins which he held pending the action of Alderson in joining with his codefendants in accepting the offer made by him. Under these circumstances, the deposit of the note in the post office at Chicago, Ill., constituted the delivery thereof to Watson in the state of Illinois. The note was executed out of this state, of which fact plaintiff's assignor must be deemed to have had full knowledge.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

13 Cal. App. 65

CALIFORNIA PINE BOX & LUMBER CO. v. MOGAN, Judge. (Civ. 795.)

(Court of Appeal, First District, California. March 17, 1910. Rehearing Denied by Supreme Court May 18, 1910.)

1. APPEARANCE (§ 24*) — GENERAL APPEARANCE—WAIVER.

A general appearance by a defendant waives all question as to service of process and is equivalent to personal service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 118; Dec. Dig. § 24.*]

2. APPEARANCE (§ 8*) — ACTS CONSTITUTING "APPEARANCE."

An "appearance" is generally defined as the formal proceeding by which a defendant submits himself to the jurisdiction of the court, and under Code Civ. Proc. § 1014, a defendant appears when he answers, demurs, or gives plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 26, 27; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 1, pp. 449-451.]

3. CORPORATIONS (§ 669*)—FOREIGN CORPORATION — GENERAL APPEARANCE — ACTS CONSTITUTING.

A summons, in an action against a foreign corporation having no place of business in the state or agent therein, was served on its president temporarily in the state. Thereafter an attorney wrote to plaintiff's attorney inclosing a stipulation extending the time to answer. Plaintiff's attorney signed and returned the stipulation. Subsequently the attorney made an affidavit entitled in the court and cause to procure an order of court giving the corporation further time in which to answer. The court granted further time. *Held*, that the corporation appeared generally in the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2641; Dec. Dig. § 669.*]

4. MANDAMUS (§ 28*)—SUBJECTS OF RELIEF—MATTERS OF DISCRETION.

Where the facts are undisputed, and the law establishes the right of a party to an order or to relief which the court refuses, mandamus lies to compel action, and while in many cases the discretion exercised by the trial court is conclusive, especially where the evidence is conflicting, mandamus lies to control judicial action involving discretion when the discretion has been abused.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 64; Dec. Dig. § 28.*]

5. MANDAMUS (§ 51*)—SUBJECTS OF RELIEF —MATTERS OF DISCRETION.

Where the time within which a defendant, appearing generally in an action, may answer or demur, has expired, and no answer or demurrer has been interposed, the trial court must enter his default, and the refusal so to do is a refusal to perform a duty, and mandamus lies to compel performance thereof.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 98; Dec. Dig. § 51.*]

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6. MANDAMUS (§ 51*)—ADEQUACY OF OTHER REMEDY.

Where the court set aside the service of summons after defendant had appeared generally and then refused to enter the default of defendant, who did not answer or demur within the time fixed therefor, plaintiff has no adequate remedy at law, and mandamus lies to compel the trial court to enter the default of defendant.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 98; Dec. Dig. § 51.*]

Application for a writ of mandate by the California Pine Box & Lumber Company against E. P. Mogan, Judge of the Superior Court in and for the City and County of San Francisco, Department 7 Thereof, to compel the making of an order directing the clerk of the court to enter a default in an action. Writ issued.

Joseph C. Meyerstein, for petitioner. W. T. Phipps and Percy E. Towne, for respondent.

COOPER, P. J. This is an application for a writ of mandate to compel the superior court of the city and county of San Francisco and Hon. E. P. Mogan, one of the judges thereof, to make an order, directing the clerk of said court in the department presided over by such judge to enter the default of the defendant in an action pending in said court, entitled "California Pine Box & Lumber Co., a Corporation, Plaintiff, v. Des Moines Casket Company, a Corporation, Defendant."

The facts of the case are substantially as follows: In October, 1909, the petitioner commenced an action in said court against said Des Moines Casket Company, as defendant, to recover upon an alleged express contract for goods sold and delivered by the plaintiff therein to said defendant. The defendant was a foreign corporation, existing and doing business under the laws of the state of Iowa, and had no place of business in the state of California, and no agent upon whom summons could be served. A summons was duly issued and attempted to be served by personally delivering the same to one Antes, the president of said defendant, who was then temporarily in the state of California on business, but not engaged in any business in connection with the said corporation. After the summons had been left with said Antes, and on November 1, 1909, W. T. Phipps, an attorney at law, wrote to the plaintiff's attorneys in said action inclosing a stipulation, and requesting that it be signed, which letter is as follows: "In the two cases, one of the California Pine Box & Lumber Company v. Des Moines Casket Company, and the other California Pine Box & Lumber Company v. Wichita Casket Company, in which you are attorneys for plaintiff, I wish you to give me the inclosed stipulation extending time for answer. The president of these two companies has not yet got back from his recent trip to this coast, and I want a report from him before I can put in an answer. If this extension is granted I hope to avoid the necessity of putting in any demurrer, and I think time will be saved by granting it. Yours respectfully, W. T. Phipps." In answer to this letter, the attorneys for the plaintiff signed and inclosed a stipulation in said cause, which is as follows: "It is hereby stipulated that the time for answering in the above case shall be and is hereby extended to and including the 20th day of November, 1909. This stipulation shall be effective without being filed. J. C. Meyerstein and J. V. B. Filippini, Attorneys for plaintiff." Afterwards, on the 17th day of November, 1909, said Phipps made an affidavit, in which he stated and set forth that he was attorney for the defendant in said action; that the summons was served upon the president of the defendant while he was temporarily traveling in the state of California; that said president had returned to the state of Iowa, and was the only person in position to furnish affiant "with the necessary data from which to prepare and file the answer in the above-entitled matter." The affidavit further stated: "That said president of said defendant has not as yet had sufficient time in which to furnish affiant with said data, and it is therefore necessary that affiant, for the benefit of said defendant, get an extension of time herein for answering or demurring to said complaint. That defendant's time for answering or demurring will, unless extended, expire on November 20, 1909. Wherefore affiant prays that said court make an order extending the time for answer or demurrer herein, to and including December 20, 1909." Upon the above affidavit being so filed in said court by said attorney for the defendant, and at his request, the court and the said judge thereof made an order extending the time for said defendant to demur or answer to and including the 20th day of December, 1909, and no other or further extension of time has been granted by stipulation or otherwise. After the attorney for said defendant had so procured the stipulation as aforesaid, and filed the affidavit as hereinbefore stated, on which he procured the order of court giving him to and including December 20, 1909, in which to answer or demur, and on December 3, 1909, he made a motion in said court in said cause for an order setting aside the attempting service of summons therein, upon the ground that it had not been served upon any person upon whom service could be legally made under the laws of California. The said court thereafter, on the 7th day of December, 1909, made an order granting said motion and setting aside and quashing the said service of summons. The defendant in said action has filed no pleading or demurrer therein. Thereafter upon due notice petitioner, on the 7th day of January, 1910, made a motion for an order directing the clerk of the said court to enter the default of the said defendant, and the court thereupon made an order denying said motion, and refusing to order the clerk of said court to enter the default of said defendant, holding that it had no jurisdiction of defendant. Thereafter, on the 10th day of February, 1910, the petitioner applied to the clerk of said court for entry of default against defendant, and the clerk, in view of the order so made by the court, refused to enter the same.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The first question for determination here is as to whether or not the defendant, by reason of the facts above set forth, appeared in the action. The judge of the superior court concluded that the defendant had not appeared, and that the court had no jurisdiction of it, and no doubt based its order denying the motion for entry of default upon this ground. The question as to the service of the summons and the order setting aside the same may be eliminated, for the reason that, if the facts appearing of record show an appearance as a matter of law, it was the duty of the court to order the entry of default. It is elementary that a general appearance by a defendant waives all question as to the service of process, and is equivalent to personal service. An "appearance" is generally defined as the formal proceeding by which a defendant submits himself to the jurisdiction of the court. Our Code provides (Code Civ. Proc. § 1014) that a "defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him." In this case the question is: Did Phipps give petitioner notice of appearance for the defendant? In our opinion he did. When he wrote to plaintiff's attorneys and procured a stipulation giving more time to answer or demur, he gave written notice of his appearance. He stated that he hoped to avoid the necessity of putting in a demurrer, and that time would be saved by the stipulation. This was written information to the plaintiff's attorneys giving them notice that Phipps was the attorney for the defendant. Plaintiff's attorneys acted upon the notice when they signed and returned the desired stipulation. Defendant's attorney then made an affidavit, entitled in the court and cause, for the purpose of procuring the affirmative action of the court in giving it further time. This affidavit was filed, and the court made an order granting the further time. There was nothing in the letter, stipulation, affidavit, or order made by the court as to a special appearance. The court could not have granted the defendant an extension of time in which to plead unless the defendant was before the court. In our opinion the defendant appeared in said action, and comes within the reason and principle of the ruling in Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006, and Roth v. Superior Court, 147 Cal. 604, 82 Pac. 246.

The next question is as to whether or not the writ of mandate will lie to compel the court to make a particular order. It is conceded that the writ will not lie to control the discretion of the court where the facts are such that the court may use its discretion. In many cases the discretion exercised by the trial court is conclusive, particularly where the evidence is conflicting; but the rule is now more liberally extended in regard to the writ of mandate and its use to control judicial action, and even judicial discretion when such discretion has been abused. Where the facts are undisputed, and the law establishes the right of a party to an order or to the relief which the court has refused, the writ will lie. Now in this case it is the law that when defendant's time for answering or demurring expired, plaintiff was entitled to have its default entered. It was the duty of the court under the law to order the entry of such default, and the denial of the order is a refusal to perform a duty.

In Wood on Mandamus, p. 48, it is stated: "The rule is that a mandamus will issue to an inferior court to compel the performance of an official duty, to which a party is clearly entitled and which is refused to him, when no other effectual remedy exists, and to compel a judicial officer to perform an act which it is his imperative duty to perform, and with reference to the manner of the performance of which he has no reasonable discretion."

In Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699, the petitioner sought a writ of mandate to compel the superior court to hear a contempt proceeding which it had refused to do, and the Supreme Court said: "Under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and avoid the duty of hearing and determining it."

In Johnston v. Superior Court, 105 Cal. 666, 39 Pac. 36, the superior court, being satisfied that due notice to creditors had not been given, ordered additional notice to be given, and refused to make an order that due notice to creditors had been given. Upon application for a writ of mandate to compel the court to make its decree, showing that due notice had been given, the facts were reviewed, and a writ of mandate was issued, directing the court to make such decree.

In Hensley v. Superior Court, 111 Cal. 541, 44 Pac. 232, it appeared that the court had refused to make an order or decree of due notice to creditors upon the ground that the order of notice to creditors was not in conformity with the law. The Supreme Court held that it was, and directed the writ to issue, and in the opinion said: "Where as here the law affixes a right to specific relief from certain facts, and there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and nothing but a clear duty remains; and if the relief is refused, and there is, as in this instance, no appeal or other plain, speedy, and adequate remedy, mandamus will lie to compel it."

For a very clear discussion of the law on this subject, see the opinion of the Supreme Court in the late case of Inglin v. Hoppin et al., 105 Pac. 582 (November 19, 1909). It was there said by Mr. Justice Henshaw in his usual clear style: "While of course it is the general rule that mandamus will not lie to control the discretion of a court or officer, meaning by that that it will not lie to force the exercise of discretion in a particular manner, the above cases abundantly show that mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, when the law clearly establishes the petitioner's right to such action."

It cannot be said that petitioner in this case has a plain, speedy, and adequate remedy in the ordinary course of law. He cannot appeal, as there is no judgment or order from which an appeal will lie. Under the ruling of the superior court he cannot proceed, although the defendant has appeared and submitted itself to the jurisdiction of the court. The court, having jurisdiction, holds that it has not, and refuses further relief in the cause.

What we have said in this opinion is not to be understood as precluding the court from hearing an application by the defendant to be relieved of the default upon a proper showing.

Let the writ issue as prayed.

We concur: HALL, J.; KERRIGAN, J.

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13 Cal. App. 72

SACCHI v. BAYSIDE LUMBER CO.

(Civ. 654.)

(Court of Appeal, Third District, California. March 21, 1910. Rehearing Denied by Supreme Court May 19, 1910.)

1. LANDLORD AND TENANT (§ 142*)—INJURIES TO DEMISED PREMISES—EVIDENCE.

In an action by a tenant against a third person for injuries to the demised premises by obstructing a stream, and causing an overflow, evidence *held* to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 514; Dec. Dig. § 142.*]

2. WATERS AND WATER COURSES (§ 179*)—INJURIES FROM FLOWAGE—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action for injury to land caused by an overflow due to the obstruction of a stream, the question whether the overflow was caused by the acts of the defendant in loosening lodged refuse, or by the operators of a quarry by throwing débris into the stream, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 258; Dec. Dig. § 179.*]

3. MASTER AND SERVANT (§ 332*)—INDEPENDENT CONTRACTORS—QUESTION FOR JURY.

In an action by a tenant for injury to the demised premises caused by the obstruction of a stream, the question whether the operator of a quarry on the bank of the stream and a person engaged in removing a log jam from the stream, both of whom were employed by defendant, were independent contractors so as to relieve defendant from liability for their acts in obstructing the stream, *held*, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1276; Dec. Dig. § 332.*]

4. MASTER AND SERVANT (§ 318*)—INDEPENDENT CONTRACTOR—SUPERVISION OF WORK BY MASTER.

That a person employed to do particular acts receives a specified compensation for his services, not in the nature of wages, does not make him an independent contractor where his work is performed under the direct superintendence of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*]

5. WATERS AND WATER COURSES (§ 171*)—INJURIES FROM OVERFLOW OF LAND—PROXIMATE CAUSE OF INJURY.

Where a jam had existed in a stream for a number of years, but had not obstructed the flow of the water, and a lumber company removed logs from the jam to obtain material for shingle bolts, as a result of which portions of the jam floated down the stream and made a jam at a lower point causing plaintiff's land to overflow, the lumber company's act in loosening the jam was the proximate cause of the injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216–221; Dec. Dig. § 171.*]

6. APPEAL AND ERROR (§ 842*)—REVIEW—QUESTIONS OF FACT.

In an action by a tenant against a lumber company for injury to the demised premises by an overflow caused by the obstruction of a stream, whether the act of the lumber company in loosening a log jam so that portions of it floated down the stream and formed the obstruction was the proximate cause of the injury was a question of fact, the determination of which by the jury was conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. § 842.*]

7. LANDLORD AND TENANT (§ 142*)—INJURY TO DEMISED PREMISES — DAMAGES — EVIDENCE.

In an action by a tenant engaged in the dairy business, for injury to the demised premises, caused by the overflow of a stream, evidence as to what the land produced the year previous to the year in which the damage was sustained, was admissible as tending to show the adaptability of the land to cultivation of the crops customarily grown thereon, and its capacity for producing such crops in such quantity as was essential to the dairy business.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 514, 515; Dec. Dig. § 142.*]

8. LANDLORD AND TENANT (§ 142*)—INJURY TO DEMISED PREMISES — DAMAGES — EVIDENCE.

In such case, it was proper to show the diminished value of the leasehold during the remainder of the term, and, to that end, prove the rental value of the damaged land per acre and the cost of restoring it to the condition in which it was at the time it was submerged.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 514, 515; Dec. Dig. § 142.*]

9. Landlord and Tenant (§ 142*)—Injury to Demised Premises — Damages — Evidence.

In such case, evidence as to the number of dairy cows kept by plaintiff, and the quantity of butter fat produced the same year, and the cost of maintaining his cows on other land which he was compelled to rent for that purpose after the flood was admissible.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 514, 515; Dec. Dig. § 142.*]

10. Waters and Water Courses (§ 179*)—Injury from Flowage—Instructions.

In an action against a lumber company for injury to land resulting from an overflow caused by the act of defendant in loosening a jam of refuse which had existed for years, but had not interfered with the flow of the water, such loosening causing débris to float down the stream and obstruct it at a point opposite plaintiff's land, it was not error to refuse an instruction requested by defendant on the theory that the injury was caused by an act of God.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 257; Dec. Dig. § 179.*]

11. Landlord and Tenant (§ 142*) — Injuries to Demised Premises — Elements of Damage.

In an action by a tenant against a lumber company for injuries to the demised premises, caused by an overflow of a stream, plaintiff was entitled to recover, as an element of his damage, for the destruction of bridges built across a slough to permit his cattle to pass from one field to another, though the bridges were imbedded in the soil, and he testified that he intended to leave them there at the termination of his lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 515; Dec. Dig. § 142.*]

12. Waters and Water Courses (§ 179*) — Injury from Flowage—Instructions.

An instruction requested by defendant that if the jam endangered a trestle of a bridge owned by defendant, defendant had the right to remove the jam, was properly refused as too general and indefinite, since it omitted the necessary qualification that defendant, in removing the jam, was bound to do so with reference to the rights of lower riparian owners.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 257; Dec. Dig. § 179.*]

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Charles E. Sacchi against the Bayside Lumber Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Denver Sevier, for appellant. Geo. D. Murray and Gregor & Connick, for respondent.

HART, J. This is an action for damages for injuries alleged to have been inflicted upon the leasehold of plaintiff through the negligence of the defendant. The complaint asked for damages in the sum of $5,200, but the jury by whom the cause was tried assessed the damages at the sum of $3,500, for which amount the court subsequently caused judgment to be entered in favor of plaintiff. This appeal is from the judgment so entered and the order denying defendant's motion for a new trial. The injuries alleged to have been sustained to plaintiff's property were the result of the overflow upon his land of the water from Jacoby creek, in Humboldt county, and it is charged that said overflow and the consequent submerging and damaging of plaintiff's land was caused by the negligent acts of the defendant.

The defendant is a corporation, and the purpose for which it was organized as such was to carry on and conduct the logging and lumbering business, in which, for many years prior to the institution of this action, it and its predecessor, the Bayside Mill & Lumber Company, were engaged on Jacoby creek, in Humboldt county.

The plaintiff, at the time the injuries complained of were sustained, and for some years prior thereto, was the lessee and in the possession of something over 300 acres of land bordering on said Jacoby creek, and through and over the southwesterly portion of which the channel of said creek passed. Said creek is described in the complaint as "a natural water course in said Humboldt county, about 12 miles in length, and flowing in a northwesterly direction and emptying into the northern portion of Humboldt Bay * * *; that said Jacoby creek is a stream amply sufficient in width, size, and flow of water to carry and bear along and float in its waters to said Humboldt Bay, while flowing along from its source to said Humboldt Bay, all natural débris, refuse, and drift, if unrestrained, which would naturally float or fall into and be carried along by the waters thereof and the natural current of said Jacoby creek." The complaint further states that, for more than a year prior to the time at which the alleged injuries were inflicted upon plaintiff's leasehold, the said land of plaintiff was "protected by a good and substantial dike and embankment theretofore constructed and built on and along said bank by said plaintiff and his said lessors, and that, at the said time of said hereinafter mentioned overflow of said Jacoby creek, and for a year or more prior thereto, said dike and embankment was of sufficient width, height, and strength to fully protect, and the same would have fully protected and did fully protect, said land leased to said plaintiff as aforesaid from and against any encroachment of or overflow by the salt tidewaters of said Humboldt Bay and the waters of said Jacoby creek in the natural rise and fall and flow of said waters of said Humboldt Bay and of said Jacoby creek." Said land so under lease to plaintiff, it is alleged, was prior to and at the time of the infliction of the damage complained of, improved and valuable farming and dairy land "and prior thereto had been properly seeded to tame grasses by said plaintiff, and was then valuable grazing land and producing an abundant stand of tame grasses for pasturing purposes and was then used by said plaintiff as dairy and grazing land."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is averred that, for more than six years prior to the 27th day of January, 1905, the predecessor of defendant, Bayside Mill & Lumber Company, a corporation, was the owner and in the possession of a large tract of land situated on both sides of Jacoby creek, "and lying along said creek up said creek from and above" the land leased to plaintiff; that said corporation was for many years engaged in cutting and logging the timber standing on its said tract of land and removing the same therefrom; that, "while said timber was being so cut and removed from said tract of land and by reason thereof, great quantities of débris and refuse logs, timber, and material were worked up from said timber so cut, logged, and removed as aforesaid, and remained and were left upon said tract of land and thereby accumulated thereon and were placed in and left upon, along and adjacent to the banks of said Jacoby creek and in such manner that said débris and refuse logs, timber, and material, placed in and left upon, along, and adjacent to said banks of Jacoby creek as aforesaid, would be and were, prior to the 2d day of January, 1905, in large and excessive quantities carried and floated by the elements and the natural flow and current of said Jacoby creek into the waters of said Jacoby creek."

It is further shown by the complaint that said corporation, in order to restrain and keep said débris, drift, refuse logs and timber, etc., from being carried further down said creek, and to thereby prevent the bed of said creek from being filled therewith, and the water therein from running over and inundating the lands of lower riparian owners, caused to be formed out of said natural débris, drift, logs, etc., "an immense and compact jam and obstruction in and across said Jacoby creek and which extended up, in and along said Jacoby creek for a distance of 400 yards or thereabouts and completely filled and obstructed said Jacoby creek for said distance from bank to bank, and, as so detained and restrained by said Bayside Mill & Lumber Company, * * * said jam and obstruction was then and there so compact in character and so fastened and secured by said Bayside Mill & Lumber Company, * * * that said débris and refuse logs, timber, and material and natural débris contributing and forming the same would not be, and no part thereof would be, thereafter carried downstream by the current and waters of said Jacoby creek, and that said jam and obstruction, if not disturbed or interfered with or loosened or opened up by any person, would thereafter permanently remain intact and in the same place and condition as the same was then in." The complaint discloses that, on the 27th day of January, 1905, the defendant became the owner of all the property and rights of the Bayside Mill & Lumber Company heretofore mentioned, and thereafter, as stated, continued to carry on and conduct the logging and lumbering business on said Jacoby creek.

It is charged that the defendant, after succeeding to the business of said Bayside Mill & Lumber Company, negligently caused the "big jam" to be so disturbed and loosened as that the drift, débris, refuse logs, and other materials of which it was composed floated lower down the creek and formed other jams at different points, one of which being opposite the dike erected on plaintiff's land for its protection against overflow from said creek. It is declared that these latter jams became compact in form, and in that condition would not have interfered with the natural capacity of the creek to carry to the Humboldt Bay all the waters, débris, etc., naturally flowing therein, but that defendant carelessly and negligently caused said jams to be loosened, with the result that said débris and refuse logs, timber, and material and drift were forced further down the stream, forming, at a point where said creek passes through the southwesterly portion of plaintiff's land, an immense jam and an obstruction to the free and natural passage of the waters of said creek. This last-mentioned jam, it is averred, caused the waters of said creek to be restrained from their natural flow and impounded, so that when the winter rains of 1906–07 came, said obstruction or jam caused the waters of said creek to "back up in great and unnatural volume and rise to a great and unnatural height and break through and destroy said dike and embankment and overflow the banks of said Jacoby creek," and overflow and submerge a large portion of plaintiff's land, thereby destroying said land for pasturage and dairy business purposes for which plaintiff had leased and to which he had put the use of said land. The complaint further charges that the defendant had maintained railroad trestles at several different points across Jacoby creek and that "said trestles obstructed the otherwise free passage of all kinds of drift while being carried downstream in said Jacoby creek by the current thereof." The answer specifically denies all the important and essential averments of the complaint. The appellant contends that the evidence is insufficient to justify the verdict, and that the court erred in its rulings receiving and excluding certain evidence and in giving, refusing and modifying certain instructions.

1. That the evidence conclusively shows that in the month of January, 1907, the high waters of Jacoby creek "backed up" and broke through the embankment or dike which had been constructed and maintained on plaintiff's leasehold, and that by reason thereof a large portion of plaintiff's land was inundated and seriously damaged, is not, and,

manifestly, could not be, confuted by the defendant. It is the contention of the appellant, however, that the defendant was in no manner or degree responsible for the breaking of the plaintiff's dike by the high waters of Jacoby creek and the consequent submerging and damaging of plaintiff's land. The facts developed by the evidence may be epitomized as follows:

The plaintiff, by an instrument in writing, leased the land involved here for the term of six years, beginning with the 1st day of November, 1904. By the terms of said lease, he agreed to pay for the use of said land the sum of $1,800 per year for the first two years of said term and $2,000 per year for the remaining four years. It was stipulated that said rent should be paid to the lessors in monthly installments equal to one-twelfth of the annual rent on the first of each and every month during the term. It was further covenanted on the part of the plaintiff that he would "keep all buildings, fences, dikes, floodgates, etc., in good repair during the continuance of said lease." The land leased by plaintiff was reclaimed tide and marsh lands, and on it were a number of sloughs across which small bridges had been erected and maintained by plaintiff to enable the dairy stock to pass from one part of the land to another. The plaintiff conducted a dairy business on said land, having leased it expressly for that purpose. The evidence shows that the land damaged was capable of feeding and accommodating about 30 head of cows. This number of cows, it was shown, was in fact kept on the land up to the time that it was overflowed by the waters from the creek. The "big jam," to which reference has been made, was the result of the gradual accumulation for many years of logs, timber, débris, drift, etc., and was in existence before and at the time the defendant acquired the property and rights of the Bayside Mill & Lumber Company. In the years 1895 and 1896, one Monahan caused a boom to be placed across the creek at the point where said "big jam" was located, for the purpose of restraining said jam, or preventing it from becoming loosened and floating down the stream. The boom was fastened by a wire rope. The jam remained in this condition for many years and until after the defendant became the owner of the logging and lumbering business of its predecessor. According to the testimony, had said jam remained in this condition—that is, in compact form and so restrained as to have prevented it from floating down with the current during the high waters of the winter—it could have produced no harm. In the year 1905 the defendant entered into a contract with one De Lucca, by the terms of which the latter agreed to, and in pursuance of said contract did, cut up and convert into shingle bolts the timber suitable for that purpose of which said "big jam" was largely constituted. The result of thus handling said timber was to so loosen the jam as to cause the remaining materials of which it was partly formed to float down the stream. The complaint charges and the proof shows that other jams were formed in the creek from the materials which came from the "big jam" and floated down the creek. In January, 1906, the plaintiff served upon the superintendent of defendant a written notice, calling his attention to the probable damage which would result to plaintiff's land if the defendant did not take proper care of the tree tops and timber refuse from its logging operations and prevent the same from being carried into Jacoby creek.

As alleged in the complaint, the evidence discloses that an immense jam was formed near plaintiff's land from the refuse and other materials of which the "big jam" was originally in part formed, and, additionally, as the result generally of the logging operations of defendant. There was also formed a jam around one of the railroad trestles of defendant. It was these last-mentioned jams which finally, through the rise of the waters of Jacoby creek from the rains of the winter of 1906–1907, which were directly responsible for the gathering of the water in said creek opposite plaintiff's dike in such a large and unusual volume as that said creek was incapable of accommodating and carrying off the same in and through its natural channel. The result was, as the complaint alleges, that said water "backed up" and broke through plaintiff's dike, flooding approximately 80 acres of his land, forming a new channel of said creek through a portion of said land, and practically destroying for the purposes for which plaintiff had leased it that portion so flooded and inundated.

The immediate effect of the submergence of plaintiff's land in the manner thus described was, according to the testimony, to leave a large portion thereof covered with refuse, débris, drift, gravel, sediment, and salt tidewater. Some of the witnesses testified that about seven acres were covered with gravel, from 3 inches, in some places, to over 2 feet deep, in other places; that about 16 acres were covered with sediment of sufficient depth to kill the vegetation growing thereon at the time, and that approximately 60 acres were covered with salt tidewater, the effect of which was to destroy the grass then growing thereon. It was shown that the land inundated could not be restored to its original condition, or to a condition in which it could be utilized for dairying purposes under two years. There were remaining, at the time of the flood, two years of the term stipulated for in the lease, so that that portion of the leasehold affected by the overflow was completely destroyed, so far as plaintiff's rights under the lease were concerned. The evidence shows that De Lucca cut the timber of which the "big jam" was largely formed and transformed the same into shingle bolts under a contract with defendant.

On behalf of the defense, one Newell testified that for many years prior to the flooding of plaintiff's land, he was engaged in the logging business on Jacoby creek. It appears that he had a contract with the defendant by which he did all the logging for that corporation. He testified that the bank of said creek was very steep at the points where he carried on the logging and that refuse from the logging operations was naturally carried and precipitated into the bed of the creek by the winter rains and high water. The object of this testimony was, undoubtedly, to show that the overflow of plaintiff's land was caused primarily by the refuse from the logging operations prosecuted by Newell under his contract with defendant as an independent contractor, and not, as alleged and contended by plaintiff, by the formation and disturbance of the jams in the manner described in the complaint.

It further appears, from evidence produced by the defendant, that, for many years, a large rock quarry was operated by certain parties on land bordering upon Jacoby creek. The obvious purpose of this testimony was to show, if it could be done to the satisfaction of the jury, that the bed of the creek was filled with débris or rocks and other refuse as the result of the operation of said quarry, and that thus the channel of the creek was so filled up as to interrupt and greatly interfere with the natural flow or passage of the waters of said creek; that the "backing up" of the water and the consequent flooding of plaintiff's land was primarily and proximately occasioned by the operations of said rock quarry, and not due to any act or acts of the defendant. We have thus briefly stated the facts brought out by the evidence introduced by the plaintiff, and have referred to some of the evidence presented by the defendant involving the defenses upon which it appeared to have relied against the claims of the complaint.

Appellant points out a large number of particulars in which it insists that the verdict is not justified by the evidence. These we shall not give specific examination. We have satisfied ourselves, from a painstaking examination of the whole record, that the jury were fully warranted in returning the verdict upon which the judgment is founded. The questions whether the damage was caused by the operations of the rock quarry or by the logging operations conducted by Newell were for the jury to determine. The verdict is, of course, indubitable evidence that the jury were satisfied from the proofs that the damage was the direct result of the negligence of the defendant.

So it is true as to the question whether De Lucca and Newell were independent contractors. While it is true that both De Lucca and Newell performed the work assigned to them under contracts by which they were to receive a certain specific compensation for such services, not in the nature of wages, each, nevertheless, prosecuted his work in conformity with the general directions of the defendant. The work in which De Lucca engaged was, in fact, done under the direct superintendence of one Monahan, an employé of defendant. Moreover, the court submitted for the jury's decision the questions whether Newell and De Lucca were independent contractors, and, if so, whether the performance of the work done by them for defendant in the ordinary mode of doing such work would and did necessarily and naturally result in producing the defect or condition which caused the injury. The jury, therefore, passed upon these questions, and, as the the verdict shows, against the theory advanced and contended for by the defendant.

It is scarcely necessary to remark that it is plainly manifest that the necessary and natural result of the removal from the "big jam" of the large quantity of timber out of which from 140 to 150 cords of shingle bolts were manufactured by De Lucca would be the disturbance of said jam so that the remainder of the materials of which it consisted would not remain in their original position, but would, upon the first heavy rains and consequent rising of the waters of the creek, naturally flow down the stream with the current. And, in this connection, it may well be observed that such result must necessarily have been known to and anticipated by defendant or its officers.

Appellant advances the further proposition that, in removing the jam which had formed about one of its railroad trestles, it only did what was absolutely necessary to be done in order to protect its property from destruction. This question, too, was submitted to the jury by the court, and upon that as well as upon all the questions of fact submitted for determination the jury's verdict is conclusive.

2. Many errors are imputed to the rulings of the court in admitting and rejecting certain evidence. Most of these involve questions bearing upon the elements which the court permitted to be shown as forming the basis upon which the amount of damages should be determined. The following may be given as examples of the rulings to which we refer: Permitting proof of the kind and character of the crop grown on the damaged land in the year immediately preceding that in which the damage was sustained; proof of the number of cows plaintiff had and which grazed on said land the previous year; proof of what plaintiff did with his cows after the flood—that is, that he was compelled by reason of the flood to rent other land on which to keep and feed said cows; proof of the cost of floodgates destroyed; proof of steps taken and work necessary to divert the waters of the creek to its old or original channel; that plaintiff had to buy feed for his cows subsequently to the flood; the number of pounds of butter fat obtained from said cows in the years 1906 and 1907; the number of cows he had on the land in 1907; the amount of

rent he was required to pay for the use of other lands after the flood; the effect of the gravel left on the ground by the flood; the rental value of the flooded land; the cost per acre "to place the land back into the same condition it was before the sediment was on, and to seed it to clover or rye grass"; the value of the crop raised on the land in 1906, the year immediately preceding that of the flood, etc., etc. The testimony shows, as the complaint alleges, that the flooded and damaged land was under a state of cultivation at the time of the overflow, and that it had formerly produced a sufficient quantity of grasses for the proper sustenance of the dairy cattle kept by plaintiff on said land. We perceive nothing in the testimony upon the question of damages allowed by the court over the objections of the defendant which was not competent and relevant.

Evidence of what the land produced the year previous to the year in which the damage was sustained was proper as tending to show the adaptability of the land to the cultivation of the crops customarily grown thereon and its capacity for producing such crops in such quantity as was essential to the dairy business. It will not be denied, we suppose, that it was proper to show the diminished value of the leasehold during the remainder of the term by reason of the damage to the land, and to that end prove the rental value of the damaged land per acre and likewise the cost of restoring the land to the condition in which it was at the time it was submerged. In short, all this testimony, as well as that relating to the number of dairy cows kept by plaintiff and the quantity of butter fat produced the previous year and the cost of maintaining his cows on other land which he was compelled to rent for that purpose after the flood, competently furnished as fair a foundation as can be shown or approximately laid in such cases upon which the jury might be enabled to reach an intelligent, just, and satisfactory conclusion as to the probable extent of the actual damage suffered by the plaintiff and thus to arrive at a just and reasonable assessment of damages.

Appellant declares that much of this testimony is too remote and speculative; but it is always permissible, in cases of alleged tortious injury to land, in order to reach a reasonably fair and equitable estimation of damages, to prove that it is peculiarly adapted to the production of a particular kind of crop, and what it is capable, under ordinary circumstances, of growing, both as to quality and quantity. Therefore, it is proper to show what the land has ordinarily produced within a reasonable time in the past as bearing upon what it might reasonably be expected to have produced when destroyed, when, as here, such destruction has taken place before the maturity of the crop and what it is probable that it might yield (in this case) during the remainder of the unexpired term of the lease. This, too, together with evidence of what has been the ordinary yield of butter and other products from the dairy, would serve as a reasonable criterion by which the future profits might reasonably be expected to be. And it is always permissible to prove and recover "prospective profits," where it is shown that such profits would naturally and directly flow from a business which had been damaged had such business not been destroyed or impaired by the damage so as to obstruct its prosecution in the usual and ordinary way in which it had always been conducted. Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Giacomini v. Bulkeley, 51 Cal. 260; Shoemaker v. Aker, 116 Cal. 240, 48 Pac. 62; Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406. In other words, the damages which, in the ordinary course of things, would be likely to result from a wrongful or tortious injury to property, must be taken as the basis or measure of the compensation to which the complaining party would be entitled for the injury so inflicted. Civ. Code, § 3300.

That evidence of the diminished value of the leasehold by reason of the injury thereto was competent, is a proposition so obvious that authorities need not be cited in its support, although many may be found in which the doctrine is asserted and applied. Ellis v. Tone, 58 Cal. 289; Ft. Worth & N. O. R. Co. v. Wallace, 74 Tex. 581, 12 S. W. 227; Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Ft. Worth & D. C. Ry. Co. v. Hogsett, 67 Tex. 685, 4 S. W. 365; Pennsylvania Co. v. Hunsley, 23 Ind. App. 37, 54 N. E. 1071; Fremont Ry. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578; Baltimore & O. S. W. R. Co. et al. v. Quillen, 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. Rep. 183; Wichita Gas & Elec. Light & Power Co. v. Wright, 9 Kan. App. 730, 59 Pac. 1085. Some other rulings than those to which we have devoted some special attention are complained of, but they were, in our opinion, without prejudice, assuming that they were erroneous.

3. Appellant challenges the correctness of the action of the court in refusing to give certain instructions requested by it, and in modifying certain other instructions proposed by it, and, as so modified, submitting the same to the jury. We shall notice only a few of these assignments in detail. But we may here say that we have given the entire charge of the court careful consideration, and that therein, in our judgment, every principle applicable to the issues raised by the pleadings and developed by the proofs was correctly declared and explained to the jury by the court in singularly clear language. It may be added that in all instances where instructions, containing correct and pertinent declarations of principles of law, were proposed by defendant and disallowed, the court in other instructions submitted to the jury

such principles; and where instructions proposed by defendant were modified, it was either because the principle involved in the part modified was not applicable or not correctly stated, or was announced in some other of the given instructions.

There was no evidence justifying the giving of instruction No. 6, requested by defendant, wherein it was proposed to tell the jury that if they found that the injuries to plaintiff's property were caused by the "act of God" the defendant would not be liable.

Instruction 15, requested by defendant and disallowed by the court, was properly refused. It would have declared to the jury that, if the bridges referred to in the complaint as spanning some small sloughs on plaintiff's leasehold were "imbedded in the real estate and was considered by plaintiff as a part thereof not to be removed," then such bridges must be considered by them as part of the realty, and that plaintiff could not recover for their destruction. As we have seen, the plaintiff built these bridges for the purpose of permitting his cattle to pass from one field to another, and, while he testified that they were built with the intention that they should remain permanently on the land, it is no defense to a recovery for their loss or destruction to say that they became and were a permanent part of the realty. By the terms of his lease it was his duty to keep the bridges and other fixtures on the premises in repair. But the bridges were an essential and necessary part of plaintiff's leasehold, and as well could it be maintained that he could not recover for the crops growing on the land and destroyed by the water.

The several instructions expounding the principle that a person may take such steps as may be reasonably necessary to protect his own property from injury or destruction, where he exercised ordinary care in so doing, were properly refused. There was, as seen, some evidence that the defendant had removed a jam which had formed around one of its railroad trestles, and, as to this jam and the act of the defendant in removing it, the court instructed the jury that, in order to protect said trestle or any other of its property from destruction or injury, the defendant had the right to remove said jam, if it did so in view of "the rights of others below" and by the exercise of ordinary care. The rejected instructions were entirely too general and indefinite and would perhaps have tended to mislead the jury into the belief that the defendant caused the "big jam" to be disturbed in order to protect its property, when the truth is the disturbance of the "big jam" was for the sole purpose, as seen, of enabling the defendant to profitably utilize a quantity of the timber of which said jam was composed. Had said jam been allowed to remain intact, it is probable that the high waters of Jacoby creek brought about by the rains of the winter of 1906–1907 could have been easily carried through its natural channel to Humboldt Bay and thus the injury to plaintiff's leasehold avoided.

Some complaint is made of the verdict, the claim being that it is so excessive or far beyond a reasonable admeasurement of damages under the circumstances as revealed by the evidence, that the same must have been given under the influence of passion or prejudice. Section 657, subd. 5, Code Civ. Proc. We cannot say, from the face of the record, that this contention has any merit. It appears to us that the evidence amply justifies the amount of damages awarded. In any event, there is nothing in the record which would warrant this court in substituting its judgment upon that proposition for that of the jury and of the trial judge, to whom the question was no doubt fully presented on the motion for a new trial.

The judgment and order appealed from are, for the reasons herein expressed, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

13 Cal. App. 4

WESTERN LUMBER & MILL CO. v. MERCHANTS' AMUSEMENT CO. et al.

PACIFIC ORNAMENTAL DECORATING CO. v. SAME. (Civ. 749.)

(Court of Appeal, Second District, California. March 10, 1910. Rehearing Denied April 4, 1910; Denied by Supreme Court May 9, 1910.)

1. Appeal and Error (§§ 911, 934*)—Presumptions—Jurisdiction of Trial Court.

Where the record on appeal is silent on the subject, it will be presumed that the court had jurisdiction of the subject-matter and of the person of defendant before rendering judgment, and, in support of the judgment, that the court acted on evidence of some kind.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3682–3688, 3777–3781; Dec. Dig. §§ 911, 934.*]

2. Appeal and Error (§ 911*)—Presumptions—Jurisdiction of Trial Court.

Where the record on appeal discloses a recital in the judgment or judgment roll that jurisdiction has been acquired or of facts from which jurisdiction may be inferred, the presumption of jurisdiction of the trial court of the subject-matter and of the person of defendant need not be invoked.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

3. Appeal and Error (§ 911*)—Presumptions—Jurisdiction of Trial Court.

The court on appeal never presumes that a court of record heard a controversy before determining that it had jurisdiction of the cause and the parties, for to do so would involve the presumption that the court failed to do its duty.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

4. Appeal and Error (§ 911*)—Presumptions—Jurisdiction of Trial Court.

On appeal from a domestic judgment, the party seeking to sustain it must show by the record that the court had jurisdiction of defendant, for on a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction over defendant, but in all matters of which the judgment contains a record, its verity, in the absence of contradictory evidence, will be presumed, and defendant may, by bill of exceptions, present evidence outside the record to show that the court did not have jurisdiction over him, and the recitals in the record may be aided by facts on which, if they appeared in the judgment roll, a finding of jurisdiction might be predicated.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

5. JUDGMENT (§ 495*)—COLLATERAL ATTACK—JURISDICTION—PRESUMPTIONS.

On a collateral attack of a domestic judgment, the entry of the judgment is itself conclusive of the jurisdiction of defendant, and, in all matters in which the judgment contains a record, its verity is presumed, and the objection of want of jurisdiction over defendant is available only when it appears from the record itself.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

6. JUDGMENT (§ 279*)—JUDGMENT ROLL.

An appearance made by a defendant in either of the manners authorized by Code Civ. Proc. § 1014, need not be made a part of the judgment roll.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546–551; Dec. Dig. § 279.*]

7. APPEAL AND ERROR (§ 911*)—PRESUMPTIONS—JURISDICTION.

Where there is a recital in the judgment roll that a defendant appeared in the action, and uncontradicted evidence in the bill of exceptions sustains the recital, the contention that the court was without jurisdiction to render judgment in favor of plaintiff against defendant cannot be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 911.*]

8. APPEAL AND ERROR (§ 193*)—PRESENTATION OF GROUNDS OF REVIEW—OBJECTIONS TO COMPLAINT.

Where, in a suit to foreclose a mechanic's lien, the court found that the contract was to erect a building for a price exceeding $1,000, and that the contract was not recorded, and the issue was tried without objection by the parties or limitation by the court, objection on appeal to the complaint based on its failure to allege that there was anything due from the owner to the contractor at the time the lien was filed, or that the contract was for an amount exceeding $1,000 and not recorded, came too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226–1240; Dec. Dig. § 193.*]

9. MECHANICS' LIENS (§ 78*)—NOTICES—STATUTES.

Where an owner used a lessee as an agent to construct a building, and he had knowledge of the intention to build as early as there was such an intention, and the lease was given for the purposes of the lessee erecting the building, the finding that the owner did not post notices under Code Civ. Proc. § 1192, within three days after he obtained knowledge of the intended construction of the building was immaterial, for the owner was not entitled to give such notices.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. § 78.*]

10. MECHANICS' LIENS (§ 78*)—NOTICES—STATUTES.

Code Civ. Proc. § 1192, providing for the giving of notice by the owner after obtaining knowledge of the construction of a building on his land that he will not be responsible therefor, does not give to the owner two periods at which he may give the notice, and where he has knowledge of the intention to build, he must act on that knowledge, and at once post the notice, and where he has no knowledge of the intention, he must move with like promptness on learning of the fact of construction.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 78.*]

11. MECHANICS' LIENS (§ 290*)—ENFORCEMENT—FINDINGS—CONFORMITY TO ISSUES.

A pleading in a suit to enforce a mechanic's lien which alleges that defendant was the owner of the premises, and that a codefendant was the lessee, and a finding that the lessee was the mere agent of the owner in the construction of the building, are not inconsistent, because neither the ownership of defendant nor the holding of the lease by codefendant prevented the latter from acting as agent of the former in constructing the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 290.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Consolidated actions by the Western Lumber & Mill Company and by the Pacific Ornamental Decorating Company against the Merchants' Amusement Company and others. From a judgment for plaintiffs in each action, defendant, J. R. Gager, in each action appeals. Affirmed.

Elon G. Galusha and Gray, Barker & Bowen, for appellant. Scarborough & Bowen, for respondent Western Lumber & Mill Co. Lloyd W. Moultrie, for respondent E. G. Judah. Borden & Carhart, for respondents City Mill & Mfg. Co., Whittier-Coburn Co., and L. J. Smith. G. P. Adams, for respondent Howe Bros. Hickcox & Crenshaw, for respondent United Casting Co. Haas, Garrett & Dunnigan, for respondent Pacific Ornamental Decorating Co. John W. Kemp and Kemp & Collier, for respondents J. B. Dawson and Merchants' Amusement Co.

TAGGART, J. Consolidated action to foreclose mechanics' liens. Complaints were filed by Western Lumber & Mill Company and Pacific Ornamental Decorating Company. In the former action, the owner of the land, Gager, the lessee in whose name the building was constructed, Merchants' Amusement Company, the contractor, J. B. Dawson, and all persons claiming liens, including the plaintiff in the other action, the Pacific Ornamental Decorating Company, were named as defendants. In the action last entitled only the owner, lessee, and contractor and two fictitious persons were made defendants. Of the defendant lienors, in the first action, Whittier-Coburn Company, E. G. Judah, City Mill & Manufacturing Company, Mutual (United) Casting Company, Howe Bros., and L. J. Smith filed answers and cross-complaints. The defendants owner, lessee, and contractor answered to each of the cross-complaints, except that of Howe Bros., and to the complaint of the Western Lumber & Mill Company, but did not answer the complaint of the Pacific Ornamental Decorating Company, and no answers or cross-complaints were filed by any one in the action instituted by the last-named plaintiff. Neither did the Pacific Ornamental Decorating Company file an answer or cross-complaint in the other action. Judgment was given for both plaintiffs and all the lien claimants who appeared, and a sale of the premises to satisfy the liens ordered.

This appeal is by Gager, the owner of the land upon which the building was constructed. It is contended that as to the action of the Pacific Ornamental Decorating Company the record fails to show that jurisdiction was ever acquired of the person of the appellant, and that as to him the complaint filed by that corporation states no cause of action. A reversal of the entire judgment is also asked upon the grounds that the evidence does not sustain the finding of the trial court that appellant's attempt to post a notice of nonliability under section 1192 of the Code of Civil Procedure was ineffective because not posted in accordance with the provisions of the section, or the finding that the Merchants' Amusement Company was merely the agent of appellant in the construction of the building on his premises, and that therefore appellant was not entitled to give the notice provided by that section.

The copy of the judgment roll in the transcript, which is certified to be full, true, and correct, contains no evidence of any service of summons or of the complaint of the Pacific Ornamental Decorating Company upon any of the defendants therein named, of any appearance by either or any of them, or of any issue joined upon any of the allegations of the complaint, and the only finding or recital in this respect is found in the findings of fact, that "the plaintiffs and cross-complainants, and the various defendants appearing by their respective attorneys," etc. The bill of exceptions recites that upon the trial of the consolidated actions the attorneys for the Western Lumber & Mill Company appeared for the plaintiff, while the names of the attorneys signing the complaint in the other action appear as attorneys "for the defendant the Pacific Ornamental Decorating Company." Appellant was represented at the trial by counsel, and it was stipulated by the parties, and ordered by the court, that "any testimony introduced in the case will be introduced for the benefit of all the parties to the suit represented upon the trial"; and also, "that it may be deemed that the defendants Gager and Dawson and Merchants' Amusement Company specifically deny each of the allegations in each of the cross-complaints, except the allegation that Gager is the owner of the property, * * * except also where answers are filed to such cross-complaints the case will stand on such answers." Unless the complaint of the Pacific Ornamental Decorating Company is assumed to have been treated the same as a cross-complaint in the other action, the latter stipulation would affect only the defendant Howe Bros. It is apparent from the stipulation as to the evidence, and the introduction of the notice and lien of the Pacific Ornamental Decorating Company without objection, that all parties assumed that corporation to be properly before the court to present its lien and obtain a judgment, if otherwise entitled. The question of jurisdiction was not raised at the trial, and seems to hinge upon whether or not the recital in the findings that there was such an appearance by Gager is sufficient to sustain the judgment against the attack here made.

The fact that a judgment was rendered against Gager in favor of the Pacific Ornamental Decorating Company implies that the court ascertained that it had jurisdiction of both the subject-matter of the complaint and the person of appellant before rendering such judgment. It will be presumed in support of the judgment of a court of record that the court acted upon evidence of some kind. If the record discloses a recital in the judgment or judgment roll that jurisdiction has been acquired, or facts from which jurisdiction may be inferred, there is no occasion to invoke the presumption; it is only when the record is silent that the necessity for the presumption arises. To assume that a court has proceeded to hear a controversy before determining that it had jurisdiction of the cause and the parties to the controversy would involve the presumption that the court had failed to do its duty, and such a presumption is never indulged. In re Eichhoff, 101 Cal. 600, 36 Pac. 11. While the attack upon the judgment in the case cited was a collateral one, it was said by the Supreme Court in another case in which the jurisdiction of the trial court to enter a judgment was questioned on a direct appeal: The presumption of verity which attaches to the record of a domestic judgment is the same upon a direct appeal therefrom as exists in the collateral attack, the only difference being that upon a direct appeal it is essential for the party seeking to sustain the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas in a collateral attack the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant; but in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon collateral attack. The defendant may, upon a direct appeal, by bill of exceptions, present evidence outside of the record for the purpose of showing that the court did not have jurisdiction over him, while in a collateral attack such objection is available only when it appears from the record itself. In both cases the record is conclusive as to all matters as to which it speaks, unless impeached in the foregoing manner. Sichler v. Look, 93 Cal. 600, 606, 29 Pac. 220. No effort was made to impeach the recital of the trial court that the appellant appeared by attorney at the trial of the issues raised by the Pacific Ornamental Decorating Company's complaint. The same rule which permits the record to be impeached also allows a showing to be made in support of the recitals in the record, and the latter may be aided by the presentation of any facts upon which, if they appeared in the judgment roll, a finding of jurisdiction might be predicated. The recital in the judgment roll that appellant appeared by attorney, impliedly to contest the claim of the Pacific Ornamental Decorating Company, is supported by the record of the proceedings at the trial, while, on the other hand, no attempt is made to impeach either the recital or the evidence tending to establish its truth. The voluntary appearance of a defendant is equivalent to personal service of summons and complaint. Code Civ. Proc. § 416. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him (Code Civ. Proc. § 1014). The Code does not require such an appearance to be made a part of the judgment roll (Lyons v. Roach, 84 Cal. 27, 29, 23 Pac. 1026); and if the judgment roll were silent, the presumption that the court had some evidence to sustain it in assuming jurisdiction would be supported by the facts in the bill of exceptions above mentioned, and there is no evidence in conflict with this. There being, however, a recital in the judgment roll that appellant appeared in both actions, and uncontradicted evidence tending to sustain the recital in the bill of exceptions, the contention that the court was without jurisdiction to render judgment in favor of the Pacific Ornamental Decorating Company cannot be sustained.

It is contended that the complaint of the Pacific Ornamental Decorating Company does not state a cause of action because it neither alleges that there was anything due from the owner to the contractor at the time the lien was filed, nor that the contract was for an amount exceeding one thousand dollars and not recorded. No demurrer to the complaint was filed, and the evidence at the trial disclosed, and the court found, that the contract was to erect a building for a price exceeding one thousand dollars, and that the contract was not recorded. This issue having been tried and a general finding made thereon as to all the parties to both actions, without objection by appellant or limitation by the court, it must be presumed that the trial was had and the finding made in support of the claim of the decorating company. It is, therefore, too late to object to the absence of this allegation, if necessary (which we are not to be understood as holding) at this time. It is conceded that, if it had been alleged that there was a contract for an amount exceeding $1,000, which was not recorded, it would have been unnecessary to allege there was anything due on the contract in order to bind the owner.

The finding of the trial court that appellant did not post notices under section 1192 within three days after he had obtained knowledge of the intended construction of the building thereon, and not within three days after he obtained knowledge of the actual work of construction, etc., is rendered immaterial by the other finding that the corporation lessee was the mere agent of the owner of the land in the erection and construction of the building, and that such an owner was not entitled to give the notice under section 1192, Code Civ. Proc. No other inference could well be drawn from the evidence than that Gager had full knowledge of, and participated in, all the acts of the corporation, either in person or by representative. He had knowledge of the intention to build as early as there was such an intention, and the lease was given to the defendant corporation, and the corporation was formed for the purpose of erecting the building in question. We do not understand that the law gives to an owner two periods at which he may give the notice provided by section 1192. If he has knowledge of the intention to build, he must act on that knowledge and at once (within three days) post the notice that all materialmen, artisans, and laborers may know that he will not be responsible. If he has no knowledge of the intention upon which to act, he must move with like promptness upon obtaining knowledge of the construction. As above said, however, this is rendered immaterial, as the evidence justifies the finding that Gager was himself merely using the corporation as an instrument to carry out the venture in which that body was engaged.

We do not think the latter finding is inconsistent with the pleadings. It is true that it was both alleged and stipulated that Gager was the owner of the premises, and that the amusement company was the lessee, but neither the ownership of the former nor the holding of the lease by the latter prevented the latter from acting as the agent of the former in constructing the building. If it were alleged that Gager was the owner, and the evidence disclosed that the work was done in the name of a corporation which he organized and controlled and through which he acted, a finding that he acted through such corporation as his agent would be sustained. Shorb v. Beaudry, 56 Cal. 446; Cornell v. Corbin, 64 Cal. 197, 30 Pac. 629; Hunt v. Davis, 135 Cal. 31, 66 Pac. 957.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

13 Cal. App. 35

SULLIVAN v. MORTON DRAYING & WAREHOUSE CO. et al.

(Civ. 755, 757.)

(Court of Appeal, First District, California. March 11, 1910. Rehearing Denied April 8, 1910; Denied by Supreme Court May 9, 1910.)

1. Master and Servant (§ 304*) — Injuries to Third Persons—Negligence of Servant—Liability of Master—Violation of Ordinance.

Where the driver of a dray left his team on a public street without first securing the wheels on the dray, in violation of ordinance, his employer is guilty of statutory negligence, though a suitable chain for locking the wheels was attached to the body of the dray.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 304.*]

2. Municipal Corporations (§ 705*)—Use of Streets—Locking Wheels—Leaving Vehicles Without Lock—"Leave."

Defendant's dray driver finished loading his dray from a car, drove away from the car from four to six feet and stopped the team, and was tying the load on the dray without having hold of the lines, when another team frightened his horses and they backed against the car, crushing plaintiff. *Held*, that the driver was not negligent as having left his team, within an ordinance making it unlawful to leave an animal attached to a dray upon a public street without locking the wheels of the vehicle; to "leave," within the ordinance, meaning to depart or abandon for the time, to go away from the immediate charge and supervision of the animals.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*

For other definitions, see Words and Phrases, vol. 5, pp. 4050–4053; vol. 8, p. 7703.]

3. Municipal Corporations (§ 703*)—Ordinances—Construction—Use of Streets—Fastening Wheels of Wagon.

An ordinance making it a misdemeanor to leave an animal attached to a dray on a public street without locking the wheels of the vehicle, and to drive a dray, etc., without having attached a suitable chain for locking to the body thereof, is penal in its nature, and cannot be extended beyond the plain meaning of its words.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 703.*]

4. Negligence (§ 121*)—Burden of Proof.

The burden is upon plaintiff to prove negligence, either by direct or circumstantial evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 224–228; Dec. Dig. § 121.*]

5. Municipal Corporations (§ 706*) — Injuries — Actions — Admissibility of Evidence.

In an action against two defendants, B. and M., for injuries by the team of M. being frightened by B.'s team and backing against a car, crushing plaintiff, evidence was admissible by B. that the space between the horses attached by M.'s dray and the railroad tracks was sufficient for its own team to pass.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

6. Appeal and Error (§ 1057*)—Harmless Error—Exclusion of Evidence.

Where, in an action against two defendants, M. and B., for injuries by M.'s team being frightened by B.'s team and backing against a car, crushing plaintiff, ample evidence was admitted as to whether there was room for B.'s team to pass in front of M.'s horses, and the evidence sustained a finding that B.'s team was negligently driven into M.'s team, causing it to back, error in excluding other evidence offered by B. as to the space in front of M.'s horses to show that there was sufficient space for its team to pass between the tracks and the horses, was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194–4199; Dec. Dig. § 1057.*]

7. Evidence (§ 507*)—Opinion Evidence—Expert Testimony—Matters of Common Knowledge.

The question of how near the driver of a team can approach the heads of horses of another team without danger, in the exercise of due care, depends on various circumstances which are matters of common knowledge and experience and not of science, so that expert testimony on the question is not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2310; Dec. Dig. § 507.*]

8. Appeal and Error (§ 1041*)—Harmless Error—Rulings on Pleadings—Amendments.

In an action against two defendants for negligent injuries, one defendant could not complain of an amendment to the complaint tending to show negligence of the other defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. § 1041.*]

9. Trial (§ 252*)—Instructions—Application to Facts.

In an action against two defendants, M. and B., for injuries by M.'s team backing over plaintiff and crushing him because frightened by B.'s team claimed to have been caused by the violation of an ordinance making it unlawful to leave a dray without locking the wheels, an instruction requested by B. that men in governing their conduct, in absence of contrary knowledge, may assume that others have not violated the law, was properly refused as inapplicable, where M.'s driver did not leave the dray, within the meaning of the ordinance.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

10. Municipal Corporations (§ 705*)—Use of Streets—Negligent Driving—Proximate Cause of Injury.

While the driver of M.'s team had gotten down to fasten his load, B.'s team was negligently driven so as to frighten M.'s team, which backed up and crushed plaintiff's intestate. *Held*, that the fact that the accident would not have happened if the wheels of M.'s dray had been locked was no excuse for the negligent driving of B.'s team, where the act of M.'s driver in getting down did not amount to a leaving of his team within an ordinance requiring wheels to be locked in such cases, the condition and equipment of M.'s dray being immaterial on the question of B.'s liability, unless M.'s driver violated the ordinance and by the fact of so doing was negligent.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Frank J. Sullivan, administrator of the estate of Michael P. Sullivan, against the Morton Draying & Warehouse Company and another. From a judgment for plaintiff and an order denying a motion for a new trial, and an order denying a motion to vacate the judgment, each defendant appeals.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Reversed as to defendant named, and affirmed as to the other defendant.

In No. 755: Myrick & Deering, for appellant. William J. Herrin, for respondent. Jesse W. Lilienthal, for Morton Draying & Warehouse Co.

In No. 757: Jesse Lilienthal and Albert Raymond, for appellant Morton Draying & Warehouse Co. William J. Herrin, for respondent Sullivan. Myrick & Deering, for respondent Bocarde Drayage Co.

COOPER, P. J. This action was brought against defendants to recover damages caused by reason of their alleged joint negligence in causing the death of plaintiff's intestate. The jury returned a verdict in favor of plaintiff against both defendants, and judgment was accordingly entered. Each defendant appeals in a separate record from the judgment and the order denying its motion for a new trial, and from an order denying its motion to vacate the judgment, but both appeals will be considered together. In this opinion the appellants will be referred to as the Morton Company and the Bocarde Company respectively. Upon an examination of the record we are of the opinion that the motion of the Morton Company for a nonsuit should have been granted, and that the evidence is not sufficient to sustain the verdict as to it.

The evidence shows that while deceased was standing at the door of a railroad box car, with his back toward the dray of the Morton Company, in a place of apparent safety, where he was following his usual avocation, the dray, which was from four to six feet from the car, and which had just been loaded with freight, consisting of boxes, tent poles, tents, and government supplies, was backed up by the team jerking backward toward the car, thus catching deceased between the dray and the car, crushing and killing him. The evidence tended to show that while the Morton dray was standing in the street, and about four to six feet from the said car, with two horses attached, a team with the dray attached belonging to the Bocarde Company was carelessly and negligently driven into the Morton Company's team, thereby frightening the team and causing it to back the dray against the car. There is no claim made as to negligence on the part of the Morton Company except that it was guilty of statutory negligence in violating an ordinance of the city and county of San Francisco, which ordinance is as follows:

"Section 1. It shall be unlawful for any person using or having control of any animal to leave the same upon any public street without being securely fastened, unless it be attached to a dray, truck or water-cart; or, if attached to a dray, truck or water-cart, to leave such animal upon the public street without first securely locking the wheels of the vehicle to which it is attached.

"2. It shall be unlawful for any person to drive or use any truck, dray or water-cart without having attached to the body thereof a suitable chain for locking the wheels thereof.

"3. Any person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor."

It is admitted that the Morton Company's dray did not have attached to the body thereof a suitable chain for locking the wheels, and that the wheels were not locked at the time of the accident. In so far as the Morton Company violated the ordinance by not having a suitable chain attached to its dray, that is a matter entirely with the city authorities in a proper proceeding, and in no way applies to the facts here. If the driver of the Morton Company's team left it upon a public street without first securely locking the wheels of the dray the company would be guilty of statutory negligence, and this would be so even if a suitable chain had been attached to the body of the dray. The question then, as to the Morton Company, is narrowed down to the single one as to whether or not its driver left the team upon the public street within the meaning of the ordinance.

The evidence shows, without conflict, that the Morton Company's driver Sorensen, had just finished loading the dray with freight, tent poles and tents in cases; that he then pulled away from the car from four to six feet, stopping the team and heading the horses towards Sixth street; that he then took a rope and was engaged in fastening the load and tying the cases when he heard some one give the alarm and immediately he observed that his team was backing from the fright caused by the approach of the Bocarde team and dray. Sorensen did not then have hold of the lines, but he was right at the dray and engaged in fastening the load. Immediately upon hearing the alarm and seeing the team backing he jumped on the footboard and drove the horses up so as to release deceased. In our opinion the driver had not left the team within the meaning of the ordinance. The meaning of the word "leave" as used in the ordinance is, to depart or go from, to quit. We use the word "leave" in such sense when we say, "He has just left the house," or "He left his plow in the furrow," or "He has left his wife and children." Thus Milton says (P. L. XI, 1, 269):

> "Must I leave thee, Paradise? thus leave
> "Thee, native soil; these happy walks and
> shades."

The ordinance means, to depart from, to abandon for the time, to go away from the immediate charge and supervision of the animal or animals so left. It is penal in its nature and cannot be extended beyond its plain words and its ordinary common sense meaning. No one in the ordinary walks of life would say that a teamster, while tying up his load, had left his team. If the ordinance had said that no one should let loose of the lines by which his horses are held without first securely locking the wheels the meaning would be very different; but if the respondent's contention is correct the driver who should attach his lines to the seat or lever of the brake, and get down on the ground to lock the wheels, would be guilty of leaving his team, at least while going from his seat to the wheels. Such is not the meaning of the ordinance.

In Wasmer v. Del., Lacka. & W. R. R. Co., 80 N. Y. 212, 36 Am. Rep. 608, the ordinance of the city made it unlawful for any person to leave a horse in the street unless securely tied. The court, in passing upon the meaning of the ordinance, said: "It cannot be supposed that it was intended by this ordinance to require all vendors or peddlers of commodities in the streets to tie their horses or have some one hold them while they are momentarily engaged in delivering the commodities to persons in the streets or at the doors of the houses along the streets. Nor can it be supposed that it was intended to inflict a penalty upon every person who should fail to tie or hold his horses in the streets while standing near them. The ordinance was manifestly intended to reach the cases of persons who might leave their horses in the streets not tied, and go away from them out of sight, or to such a distance as to lose that control which persons may usually exercise over horses when near them."

In Oddie v. Mendenhall, 84 Minn. 58, 86 N. W. 881, the ordinance provided that it should be "unlawful for any person to leave any horse attached to a vehicle in a street without fastening such animal in the manner provided for herein." The court said: "A reasonable construction must be given to this ordinance. Its object was evidently to prevent drivers from leaving horses standing in the streets without control. It cannot be held that this ordinance must be construed to require a person getting out of a wagon or carriage to hitch the horse attached thereto, even though occupants of the carriage remain therein." See, also, Monroe v. Hartford, etc., Co., 76 Conn. 201, 56 Atl. 498; Rowe v. Reneer, 30 Ky. Law Rep. 545, 99 S. W. 250.

It is incumbent upon a party seeking to recover against a defendant by reason of alleged negligence to prove such negligence, and this proof may be either direct, or by the proof of facts and circumstances from which negligence may be inferred. In this case there is no attempt to prove any fact or circumstance, as to the Morton Company, except the fact that its team attached to the dray was standing on one of the public streets of the city and county of San Francisco, and that the driver of the team was not holding the lines, but was with the dray or truck engaged in fastening the load, and near to and within easy access to the team. In such case we cannot hold that the Morton Company is liable under the ordinance. As to the Bocarde Company, other errors are alleged, which we will consider in their order.

The court excluded certain testimony offered by the Bocarde Company for the purpose of showing the space between the horses of the Morton Company and the tracks of the Southern Pacific Railroad Company to the south on King street. It is claimed by the Bocarde Company that the offered testimony was material, and that it should have been permitted in order to show that there was plenty of room for its team to pass between the team of the Morton Company and the railroad track. While, in our opinion, it would have been better for the court to have admitted the testimony and to have allowed the cross-examination more scope in order that the jury might be fully informed upon each and every phase of the case, yet we do not think the rulings of sufficient importance to justify a reversal of the case. The witness Ryan testified to this point, and when asked by counsel what was the space, answered "I think the width of this room." The question as to the space was fully covered by the evidence of the witnesses Rich, Free, and Archibold. Not only this, but there is testimony in the record amply sufficient to sustain the finding of the jury that the Bocarde Company's team was negligently driven into the team of the Morton Company, thus causing it to back, and in such case it is not very material as to whether the space was 8 feet or 15 feet in width. If the driver of the Bocarde team had plenty of space and yet drove into or against the horses of the Morton team, it would tend to show a still greater degree of negligence.

The court did not err in excluding the testimony of experts as to how near in the exercise of care and skill the driver of a team can approach the heads of the horses of another team and drive past without danger, or as to the custom or peculiarities of horses in settling back in their breeching. The question was not one relating to science, art, or trade. As to how near the driver of one team can approach the horses' heads of another team without danger necessarily depends upon a variety of circumstances, such as the location, the kind of team being driven, and the kind of team being approached, and the kind of vehicle to which the team is attached. These were matters of general, every day knowledge, observation, and experience, and the jurors hearing the evidence and all the facts were as capable of forming correct conclusions as any so-called experts could be. We all know that most animals will shrink or retire from approaching danger, and that a team of horses upon being run into or struck by the harness or wagon of an approaching team would be very likely to pull back or retire so as to avert the danger.

It was not error for the court to allow the plaintiff to amend his complaint by alleging, as an act of negligence on the part of the Morton Company, that it drove its truck without having attached thereto a suitable chain for locking the wheels. Ryan v. Oakland Gas Light, etc., Co., 10 Cal. App. 484, 102 Pac. 558. Not only this, but the Bocarde Company has no right to complain of an amendment tending to show negligence on the part of the Morton Company.

The Bocarde Company was not injured by the refusal of the court to instruct the jury that "men in governing their conduct, in the absence of knowledge to the contrary, are entitled to assume that others have not violated the law." The proposition as stated in the abstract may be correct, but it has no application to the facts here. It was evidently intended to be considered in connection with the claim that the driver of the Morton team had left his dray without locking the wheels; but, as has been before stated, the driver had not left his team within the meaning of the ordinance. The court gave other instructions fully and fairly covering every material phase of the case, and as favorable to the Bocarde Company as it was entitled to under the law.

The instruction numbered 36, requested by the Bocarde Company, was properly refused. The evidence did not warrant it, as it did not show that the Morton Company had omitted to perform any duty imposed by ordinance.

The findings of the jury in regard to the special issues submitted to it are not inconsistent with each other or with the general verdict. It was found upon sufficient evidence that the driver of the Bocarde team carelessly and negligently drove his team in front of the horses of the Morton Company; that this caused the horses of the Morton Company to back, and that this was the proximate cause of the injury to deceased. The finding to the effect that if the Morton Company had supplied its dray with a suitable chain, and that if the chain had been used, and the wheels of the Morton truck locked, the accident would not have occurred is not material, nor does it in any way tend to excuse the negligence of the Bocarde Company. Unless the Morton Company was guilty of negligence by reason of the violation of the ordinance, the condition and equipment of its dray was wholly immaterial.

We conclude that the judgment and orders as to the Morton Company must be reversed, and as to the Bocarde Company affirmed, and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

13 Cal. App. 117

In re OVERTON'S ESTATE. (Civ. 609.)

(Court of Appeal, Third District, California. April 1, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 197*)—ALLOWANCE TO WIDOW—DISCONTINUANCE OF ALLOWANCE—APPEAL.

Under Code Civ. Proc. § 1466, requiring the court to make a reasonable allowance for the widow out of a decedent's estate, and providing that, when so made, the order becomes a final judgment in her favor for that amount, and section 963, subd. 3, giving an appeal from an order against or in favor of setting apart property or making an allowance for a widow or child, no appeal lies from an order discontinuing an allowance to a widow.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 197.*]

2. Appeal and Error (§ 1*)—Right to Appeal—Origin.

The right to appeal comes from the statute, and not from any unauthorized action of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

3. Executors and Administrators (§ 197*)—Allowance to Widow.

Under Code Civ. Proc. § 1466, requiring the court to make reasonable allowance for the widow out of a decedent's estate, where the court retained its power over the order by the provision, "until the further order of this court," it was its duty and within its power, on proper showing, to reduce or discontinue the allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 197.*]

Appeal from Superior Court, Butte County; John E. Gray, Judge.

In the matter of the estate of Agrippa L. Overton, deceased. From an order discontinuing her allowance, the widow of decedent appeals. Appeal dismissed.

Park Henshaw, for appellant. Richard White and Lon Bond, for respondent.

CHIPMAN, P. J. On June 1, 1908, the superior court made an order allowing the surviving widow $50 per month from the date of the death of decedent for her maintenance and support, "and to continue until the further order of this court." On November 28, 1908, H. L. Overton, on behalf of himself and certain other children and heirs at law of deceased, devisees, and legatees of the will of decedent, filed a petition praying for the discontinuance of said allowance. On December 1, 1908, the petition came on to be heard, and the court on that day made an order granting the petition "discontinuing any family allowance to the said widow in said estate." The widow appeals from this order on the ground, as stated in her brief, that under section 1466, Code Civ. Proc., the court "must make such reasonable allowance out of the estate for the widow," etc., and that, when so made, the order "becomes a final judgment in her favor for that amount"; that, no appeal having been taken from that order and the time for appeal having passed, the power of the court over its order was at an end and "the superior court was without jurisdiction to review the order."

Respondent makes the point that the order is not appealable, which we think is well taken. Subdivision 3, § 963, Code Civ. Proc., gives an appeal from an order "against or in favor of setting apart property, or making an allowance for a widow or child." No appeal is given from an order discontinuing an allowance. If the court was without jurisdiction to make the order complained of, its power could be tested by certiorari, but not by appeal. Code Civ. Proc. § 1068. Appellant attempts to meet the point by the suggestion that, as the effect of the order is to deprive her of the allowance, it is equivalent to an order refusing to grant an allowance. We cannot so understand the Code section. It refers to the original order granting or refusing the allowance prayed for. In analogous cases the Supreme Court has denied the appealability of such orders as the one here. In Estate of Smith, 51 Cal. 563, an appeal from an order refusing to set aside an order of sale (an appealable order) was dismissed. Like action was taken in Estate of Dunne, 53 Cal. 631, where the order appealed from was an order setting aside a former order allowing an account. So, also, in Estate of Hickey, 121 Cal. 378, 53 Pac. 818, where the order appealed from vacated a prior order settling a final account. Likewise, so held in Estate of Cahill, 142 Cal. 628, 76 Pac. 383, where the order appealed from was an order refusing to vacate an order setting apart a homestead.

It is not a sufficient answer to the motion to dismiss the appeal that the lower court had no authority to make the order appealed from. The right to appeal comes from the statute, and not from any unauthorized action of the court. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

The court retained its power over the order by the provision "until the further order of this court." Upon proper showing it became its duty, and it was within its power, to reduce or discontinue the allowance. Estate of Montgomery, 60 Cal. 648; In re Stevens, 83 Cal. 322, 326, 23 Pac. 379, 17 Am. St. Rep. 252; Estate of Freud, 131 Cal. 667, 674, 63 Pac. 1080, 82 Am. St. Rep. 407. See Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Bell v. Bell, 2 Cal. App. 338, 341, 83 Pac. 814.

The appeal is dismissed.

We concur: HART, J.; BURNETT, J.

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13 Cal. App. 108

WAYMAN INV. CO. v. WESSINGER & WAGNER. (Civ. 714.)

(Court of Appeal, First District, California. March 30, 1910. Rehearing Denied April 28, 1910; Denied by Supreme Court May 26, 1910.)

1. Contracts (§ 138*)—Invalidity—Illegal Consideration—Violation of Law.

A contract founded on an illegal consideration, or having for its purpose a violation of law, is void and may not be enforced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. LANDLORD AND TENANT (§ 4*) — LEASE — ILLEGALITY—RIGHT TO SUE FOR RENT.

The leasing and giving possession for an agreed rental of a building, originally constructed in violation of an ordinance establishing fire limits and regulating construction of buildings, does not involve any violation of law so as to render the lease void and unenforceable.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 4.*]

3. CONTRACTS (§ 7*)—ENFORCEMENT—EFFECT OF VIOLATION OF LAW.

That property has been acquired in violation of some law does not rob it of its character as such, nor prevent its becoming the subject of legitimate contracts which may be enforced in courts of law.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 7.*]

4. CONTRACTS (§ 137*)—ENFORCEMENT—EFFECT OF VIOLATION OF LAW.

Though illegal features are indirectly connected with the transaction involved in a suit, plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without aid of the illegal agreement; the test being whether he requires such aid to establish his case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701–712; Dec. Dig. § 137.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the Wayman Investment Company against Wessinger & Wagner, executors. From a judgment for plaintiff, defendants appeal. Affirmed.

Sterling Carr, for appellants. J. M. & H. L. Rothchild, for respondent.

HALL, J. Appeal from judgment in favor of plaintiff for the sum of $300, rental for certain premises leased by plaintiff to defendants by a written lease. The lease was executed in September, 1906, and the defendants entered into possession of the demised premises, and have ever since continued in possession, but refuse to pay the agreed rental falling due March 12, 1908, solely upon the ground that the building which they leased and the possession of which they have enjoyed, and apparently still retain, was erected in violation of the provision of the ordinance establishing fire limits and regulating the construction of buildings.

It is contended by appellant that, because the erection of the building was a violation of such ordinance punishable by a fine, the consideration for the contract of lease between plaintiff and defendants was illegal, and the contract in consequence void. That a contract founded upon an illegal consideration, or having for its purpose a violation of the law, is void and may not be enforced cannot be denied. Such are the cases cited by appellant. But to the proposition that the leasing and giving possession of a building, originally illegally constructed, for an agreed rental involves any violation of law, we cannot agree. The ordinance does not in terms prohibit the leasing of such a building, and the lease in this case was for no illegal purpose.

This case is analogous to Sharp v. Taylor, 41 Eng. Rep. 1153, 22 Eng. Ch. 801. The action was for an accounting between joint owners of an American vessel. The owners were British subjects, and, in violation of an act of Parliament, had caused the vessel to be registered in the name of an American owner in order that she could be used in commerce between American and British ports. The Lord Chancellor said: "The next point is that plaintiff's claim is in violation of the English ship registry acts. * * * But the answer to the objection appears to me this: That the plaintiff does not ask to enforce any agreement adverse to the provision of the act of Parliament. He is not seeking compensation and payment for any illegal voyage; that matter was disposed of when Taylor received the money; and the plaintiff is now only seeking for payment of his share of realized profits. The violation of the law suggested was not any fraud upon the revenue, or omission to pay what might be due, but, at most, an evasion of a parliamentary provision supposed to be beneficial to the shipowners of this country, an evil, if any, which must remain the same whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor."

So in the case at bar the violation of the ordinance had been accomplished. The evil had been done before the lease was executed. It was perhaps within the power of the municipality to cause the building to be removed. But until this was done it remained the property of plaintiff, and defendants certainly had no right to take and enjoy the possession thereof under a lease and not be bound by the terms thereof. A different question would be presented if the action was by the builder to recover for having constructed the building; but to permit the defendants in this case to take and enjoy the possession of plaintiff's building without paying therefor as they agreed would be to encourage the grossest breach of fair dealing in the business world. McDonald v. Lund, 13 Wash. 412, 43 Pac. 348. The mere fact that certain property has been acquired in violation of some law does not rob it of its character of property, nor prevent it from being the subject of legitimate contracts which may be enforced in courts of law. Roselle v. Beckemeir, 134 Mo. 380, 35 S. W. 1132; Andrews v. New Orleans, etc., Ass'n, 74 Miss. 362, 20 South. 837, 60 Am. St. Rep. 509; Minnesota, etc., Co. v. Whitebreast, etc., Co., 56 Ill. App. 248; Brooks v. Martin, 69 U. S. 70, 17 L. Ed. 732; Planters' Bank v. Union, 83 U. S. 483, 21 L. Ed. 473. "Although there may be some illegal features indirectly connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid the illegal agreement. The test of whether the demand can be enforced at law is whether the plaintiff requires the aid of the illegal contract to establish his case." Minnesota Lumber Co. v. Whitebreast Coal Co., supra.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The contract relied upon by the plaintiff in this case was entirely independent of and had no connection with the violation of the ordinance involved in the construction of the building. It is a matter of the history of San Francisco that after the great fire of April, 1906, by tacit consent of the public authorities property owners were allowed to construct buildings within the fire limits without regard to the fire ordinance. It was the only practicable method of providing facilities whereby thousands of citizens might resume useful and necessary business and callings. These defendants having availed themselves of one of such buildings to conduct their legitimate business, it would be a perversion of justice for a court of law to sanction their evasion of the payment of the agreed rent. We do not think the law requires it.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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13 Cal. App. 111

KIEFHABER LUMBER CO. v. CONSOLIDATED LUMBER CO. (Civ. 768.)

(Court of Appeal, Second District, California. March 31, 1910.)

PAYMENT (§ 85*)—OVERPAYMENT—RECOVERY.

Within a territory, the retail lumber business of which, as between defendant, a wholesale lumber company, and N., a retail lumber company, was allotted to N., a sale to a third person was made by one who was president of N. and sales agent of defendant. The transaction was treated between N. and defendant as a retail sale, and, while the shipment was direct to the customer, the charge was made to N. The sale to the customer was made at less than the regular rate, and, in ignorance of this fact, the N. Company paid defendant's bill which was at the regular rate. *Held*, that N. was entitled to reimbursement from defendant for the excess thus paid to defendant through its error in making out the bill; the contract of sale being really a sale to N. by defendant.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272–281, 336; Dec. Dig. § 85.*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Kiefhaber Lumber Company against the Consolidated Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Middlecoff, H. M. Willis, and Percy R. Wilson, for appellant. E. C. Campbell, for respondent.

ALLEN, P. J. The facts as found by the court are these: Defendant, a corporation, was engaged in the wholesale lumber business at Los Angeles. The Newport Lumber Company, a corporation, was engaged in the retail lumber business at Redlands in San Bernardino county. The principal amount of the capital stock of the latter company was owned by the former. The defendant company sold to the Newport Company a bill of lumber which was by the defendant shipped directly to the consumer, but charged, under a business arrangement existing between the two corporations, to the Newport Company. In billing the lumber to the Newport Company, a charge of $446.29 in excess of the contract price at which the lumber was sold appeared. The Newport Company, without discovering such error, paid to defendant the amount of the bill as rendered to defendant. Thereafter, the Newport Company sold and assigned to plaintiff its claim on account of such excess payment so made by mistake, no part of which has ever been repaid. The court rendered judgment in favor of plaintiff, from which judgment and an order denying a new trial defendant appeals.

The issues presented by the pleadings involve not only the fact of sale and delivery of the lumber as found by the court, but the payment of the sum through mistake, as well as the assignment of the claim, if any existed. An affirmative defense was presented by defendant's answer, to the effect that any claim on account of overcharge in the transaction was not included in the sale and assignment of the assets of such company to plaintiff. The court found against defendant as to each and all of the allegations of its answer. The specifications of error all relate to the insufficiency of the evidence to support the various findings.

Considering the findings with reference to the sale and the fact that an error existed in the billing of the lumber, we find evidence in the record tending to show that one Nofziger, the active agent in the contract of sale on behalf of the lumber company, was the president of the Newport Company, as well as the sales agent of the defendant, but the retail lumber business in Redlands and vicinity as between the two corporations had been allotted as territory in which the Newport Company was to carry on its retail business; that the material connected with the controversy had been contracted by Nofziger at a fixed price less than the listed retail price at which lumber was billed to the Newport Company, and, notwithstanding the direct shipment to the consumer, the transaction was treated between the two corporations as a retail sale in the territory of the Newport Company, and, in keeping with their business transactions, the charge by defendant was made directly to the Newport Company and the Newport Company, in ignorance of the contract made with the consumer, credited the defendant with the list price, and charged the consumer therewith. After payment by the Newport Company to defendant, the Newport Company undertook to collect the amount of the bill, when the error was discovered, and Nofziger, admitting the mistake, directed the Newport Company to credit the consumer with the excess above the contract price and charge back to the Consolidated Company the amount of such error, and a settlement was made by the Newport Company with the consumer accordingly.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We think, under the circumstances narrated, the Newport Company, being in a sense a collection agency for the defendant, could only be held chargeable with the actual contract price of the material shipped to the consumer, and having no knowledge of the error, and being restricted in the amount of its collection from the consumer to the actual contract price, was entitled to reimbursement from the defendant of the amount of such error occasioned by defendant's act. The contract, under the circumstances, was correctly interpreted by the trial court as a sale to the Newport Company. The written bill of sale subsequently made by the Newport Company to the plaintiff comprehended a transfer of all of its assets, including this claim against defendant.

Treating the amendment to defendant's answer, in which is alleged the mistake in the bill of sale, as a pleading sufficient to raise an issue entitling defendant to a correction thereof, the court determined that it was not satisfied that such mistake existed, and found against the defendant in relation thereto, and from the evidence the court was warranted in such finding.

The record presents a case which, in our opinion, demands upon the part of defendant that it reimburse the assignee of the Newport Company, plaintiff herein, to the extent of the error so occasioned by the Consolidated Company; and we find no error in the record warranting a reversal of the judgment or of the order, and the same are affirmed.

We concur: SHAW, J.; TAGGART, J.

13 Cal. App. 88

ROSS v. FRANK. (Civ. 649.)

(Court of Appeal, First District, California. March 24, 1910.)

1. Sales (§ 72*)—Contract—Construction—"Orchard Run"—"Test Accepted at 53."

Plaintiff contracted to sell all the prunes on his trees, estimated at 35 tons, more or less, the contract reciting: "For prunes running orchard run (60 to the pound) when dried, $95 per ton (with variations of $1.00 per point up or down). All prunes to be good merchantable quality. Test accepted at 53." The words in parentheses were erased when the contract was executed. *Held*, that by the words "orchard run" was meant all the prunes in the orchard, without reference to size in grading, and the phrase "Test accepted at 53" meant that the prunes had been tested and accepted, and that the result was 53 to the pound, and did not mean that defendant should be liable only for such prunes as conformed to the test.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 197–202; Dec. Dig. § 72.*]

2. Sales (§ 181*) — Contract — Evidence to Aid Construction.

Under a contract for the sale of prunes, evidence *held* to show that the parties intended the prunes to be taken as they came from the orchard, and that defendant had tested the prunes and accepted them at the test made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 488; Dec. Dig. § 181.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by J. W. Ross against George Frank, doing business under the firm name of Frank & Co. Judgment for defendant, and, from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Walter G. Fitzgerald and John P. Fitzgerald, for appellant. Will M. Beggs, for respondent.

COOPER, P. J. This action was brought by plaintiff to recover a balance claimed to be due for his crop of prunes for the year 1905 sold and delivered to defendant. The defendant recovered judgment, and this appeal is by plaintiff from the order denying his motion for a new trial.

It is conceded that the findings of the court and the judgment are the result of the construction given by the trial court to the written contract for the sale of the prunes which, with the erasures and interlineations, is as follows:

"H. C. Newby, Purchasing Agent. Gilroy, R. D. 26, and Coyote, Cal. Prune Purchasing Contract. Made in Duplicate. No. 70. Gilroy, Rural 25 Cal., Sept. 7, 19—. This contract made and entered into the above date by and between J. G. Ross and H. C. Newby of Santa Clara County, Cal. Witnesseth: That for and in consideration of the sum of One (1.00) dollars in hand paid, the receipt whereof is hereby acknowledged, the said Ross has sold to the said H. C. Newby, and said H. C. Newby has bought of the said Ross all of the French prunes now on the trees or being picked and dried from the Ross Orchard on the Soap Lake Road at Prunedale, estimated at about 35 tons more or less when dried, on the following terms and conditions: Terms, cash on delivery at the Geo. Frank & Co. Packing House at San Jose, Cal. For prunes running *Orchard Run* (60 to the pound) when dried, ninety-five $95 dollars per ton (with variations of one $1.00 dollar per point up or down), sacks to be furnished by the purchaser. All prunes to be of good merchantable quality, well dried, and delivered on or before Nov. 1st, 1905, and jointly scaled, according to the above terms, when ready to ship. *Test Accepted at 53.* J. George Ross, Seller. H. C. Newby, Purchaser. Remarks: Purchaser to pay freight charges."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"San Jose, Cal., Sept. 9, 1905. We hereby agree and contract to receive and pay for all the prunes mentioned and named in the purchaser's contract on receipt of the same at our packing house at San Jose, Cal., according to the terms, prices and conditions herein set forth, and to furnish the sack for shipping the prunes to our packing house. Geo. Frank & Co., by Geo. Frank."

The contract was prepared upon a printed form used by defendant in making contracts for the purchase of prunes, and the words in italics were written in the contract at the time it was executed, and at the same time the words in parentheses were erased by running a pen through them, so that they were intentionally taken from the printed contract. It is said that 60 to the pound, or a test of 60, means 60 dried prunes to the pound as a basis; that "with variations of one dollar per point up or down" means $1 per ton more when the prunes run less than the basis of 60 to the pound, and $1 per ton less when they run more than 60 to the pound; so that prunes that would run 65 to the pound would be worth $5 less per ton, and if they ran 55 to the pound they would be worth $5 more per ton, with 60 as a basis. This, however, is not material except in aiding us to arrive at the meaning of the contract.

The trial court held that the phrase, "Test accepted at 53" was as matter of law a warranty that the defendant was not liable at the rate of $95 per ton except for such portion of the plaintiff's crop as would test 53 according to the tests as herein stated. We do not so construe the contract. The contract was a sale of all plaintiff's French prunes on the trees, or being picked and dried from the Ross orchard. The words "orchard run" were ex industria written in the contract. The provisions as to the basis of 60 to the pound and as to variations of $1 per point up and down were intentionally erased from the contract. By the words "orchard run" was meant all the French prunes in the orchard without any references to size in grading. It was intended that the entire crop of prunes, whether above or below the test of 53, was to be paid for at the rate of $95 per ton. The only warranty in the contract was that the prunes were to "be of good merchantable quality well dried." It is not claimed that they did not comply with the contract in this regard. The phrase "Test accepted at 53" meant that the prunes had been tested and accepted, and that the result of the test was 53 to the pound. The agent of defendant examined the prunes, tested them, and stated the result of his test, but he purchased for defendant all the prunes of good merchantable quality well dried. The whole crop, whether 35 tons more or less, was purchased by the ton. The whole crop, whether 53 to the pound more or less, was purchased, and it was so intended. No provision was made as to a greater price for superior prunes, or prunes that would run less than 53, nor for a less price for prunes that should run more. One price for all sizes is the express provision of the contract. The words in the contract, "and jointly scaled, according to the above terms, when ready to ship," were in the printed contract, and would apply provided the prunes had been sold on the basis of 60, "variation of one dollar per point up and down"; but, as the provision to which the words would apply was erased, the provision is without meaning as to the contract which the parties really made.

Respondent's counsel says in his brief that about the only question in the case is as to whether or not the trial court properly construed the contract, and it was proper for the court to, and the court did, admit evidence of the circumstances under which the contract was made, and the preliminary oral conversation leading up to it. We have examined the evidence so admitted, and it confirms the views so expressed as to the intentions of the parties set forth in the contract. The plaintiff testified that he went with Newby, the defendant's purchasing agent, who came to his ranch a number of times, and that he assisted Newby in making tests of the prunes; that they examined the prunes thoroughly, and, after such examination, he sold the entire crop at $95 per ton; that the part of the contract as to a basis and as to a variation from the basis was by agreement stricken out; and that the prunes were sold for "$95 per ton orchard run; that is, just as they came from the orchard without any grading." Newby, the agent, who was defendant's own witness, testified that, when he went to see plaintiff, he told plaintiff that he "would pay 3½ base; that is $95 a ton for 55"—that plaintiff replied that "he would like to sell the fruit, but wanted $95 a ton straight for it;" that he told plaintiff that, if the prunes would test 55, he would give him $95 per ton for it; that he had his scales with him and went over the lot, digging down in the bins, taking about 35 tests; that the plaintiff had also taken about a similar number of tests which he had written down in a book; that he took all the tests so made by himself and all the tests made by plaintiff and averaged them; that they averaged 53; that plaintiff said he thought the prunes would hold up to the test, and that he (witness) thought so, too. The witness further said: "'Test accepted' means that you had already tested the fruit, and this fruit we did test, as it did run 53. I scratched out the part 'variation' as we had made the test because the part I did test ran fifty-three, and I am a good tester. * * * 'Orchard run' means all the fruit in the orchard and that it is an ungraded lot of fruit. Sometimes in buying we don't take tests. I was to take the entire crop of merchantable fruit."

The defendant testified that the reason he did not receive the prunes was because they did not run 53, but ran about 63, and that, when plaintiff came to the packing house, he told plaintiff that the prunes were not running 53, and plaintiff replied, "It did not make any difference, as they were all bought at the flat rate of $95 per ton."

It may be further remarked that some allowance was evidently made in making the test, because Newby testified that he was willing to pay $95 per ton for prunes that would test 55; and as he only agreed to pay $95, according to his own testimony, they would have been worth $97 per ton if they had held up to the test of 53, being two points up.

The order is reversed.

We concur: HALL, J.; KERRIGAN, J.

13 Cal. App. 119

EVANS DITCH CO. et al. v. LAKESIDE DITCH CO. et al. (Civ. 649.)

(Court of Appeal, Third District, California. April 1, 1910. Rehearing Denied by Supreme Court May 28, 1910.)

1. Waters and Water Courses (§ 152*)—Appropriation of Waters for Irrigation Purposes—Evidence—Sufficiency.

Evidence *held* to justify a finding that the use of the waters of a stream for irrigation purposes by one and his predecessors in title was open, notorious, exclusive, and adverse.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

2. Waters and Water Courses (§ 152*) — Adverse User of Waters.

The question whether the use of the waters of a stream is adverse or with implied license of the owner of the servient estate is one of fact, to be determined in the light of surrounding circumstances.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

3. Waters and Water Courses (§ 133*)—Adverse User of Water.

One appropriating the waters of a stream under a claim of right may do so by means of an artificial and a natural channel; and in this respect there is no difference between an appropriation of water under a claim of right for the requisite time to ripen into a title by prescription, and the case of an appropriation specifically provided for in Civ. Code, §§ 1415–1421, providing for the appropriation of water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 133.*]

4. Waters and Water Courses (§ 152*)—Adverse User of Water.

Evidence *held* to justify a finding that the appropriation of the waters of a stream and the use thereof were in behalf of and for the benefit of a party suing to restrain the diversion of the waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

5. Waters and Water Courses (§ 152*)—Adverse User of Water.

Under Code Civ. Proc. § 1963, subd. 11, asserting the presumption of ownership from the fact of possession, one in possession of ditches and water rights when another obstructs the flow of water is presumptively the owner of the ditches and water rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

6. Waters and Water Courses (§ 142*)—Adverse User of Water.

A river divided into two channels, K. and S., between which a natural channel, opening into K., existed. An artificial channel was dug connecting S. with the natural channel, and, by means thereof, the waters of S. were diverted to K. for use below the mouth of the natural channel. The person who so used the waters owned the ditches connecting with K., together with the water rights belonging thereto. *Held*, that the right to the use of the water flowing through the natural channel into K. was an appurtenance to the ditches, and the water right followed the ownership of the ditches.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 142.*]

7. Waters and Water Courses (§ 140*)—Prior Appropriators.

A river divided into two branches, K. and S., between which a natural channel opening into K. existed. An artificial channel was dug, connecting S. with the natural channel, and, by means thereof, the waters of S. were diverted to K. for use below the mouth of the natural channel. When the water was low in S. river at the point of diversion, it would not reach the point of an attempted diversion by another. *Held*, that the upper appropriator of the waters was a prior appropriator as against the one who attempted to divert the waters of S.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 140.*]

8. Waters and Water Courses (§ 152*)—Appropriation of Water—Extent.

Where the evidence of the amount of water appropriated by a party was admitted without objection, and a competent hydraulic engineer testified to making measurements and calculations, and he reached a conclusion as to the amount of water, and there was no conflicting testimony, the court properly acted on the evidence.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

9. Evidence (§ 546*)—Opinion Evidence—Competency of Experts.

In determining the competency of an expert, the trial court has a wide discretion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

10. Evidence (§ 545*)—Opinion Evidence—Competency of Experts.

Where a question asked an expert is objected to on the ground that he has not shown himself qualified, the party producing the expert should go into the facts disclosing the ability of the expert to testify as such.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2360–2362; Dec. Dig. § 545.*]

11. Evidence (§ 471*)—Opinion Evidence—Conclusion of Witness.

A question calling for the opinion of a witness on a question of fact is properly disallowed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471;* Witnesses, Cent. Dig. §§ 833–836.]

12. Trial (§ 89*)—Striking Evidence—Testimony Not Responsive to Questions.

An answer not responsive to the question asked is properly stricken.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228–234; Dec. Dig. § 89.*]

13. Witnesses (§ 245*)—Erroneous Exclusion of Evidence.

An objection to a question previously answered is properly sustained.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

14. Waters and Water Courses (§ 152*) — Appropriation—Prescriptive Rights.

To establish by prescription title to water appropriated for irrigation purposes, it is necessary to show that the use of the water was under a claim of right, and this may be shown by the acts, declarations, and relation of the parties to the controversy.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

15. Evidence (§ 273*) — Declarations — Intent — Appropriation — Prescriptive Rights—Claim of Right.

Where a party claimed title by prescription to water appropriated for irrigation purposes, under a claim of right, a witness with knowledge of the facts could testify that the party, during the time he used the water, had openly declared that he claimed a right to the use of it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108–1120; Dec. Dig. § 273;* Adverse Possession, Cent. Dig. § 670.]

16. Appeal and Error (§ 1051*)—Harmless Error — Erroneous Admission of Evidence.

Where only one conclusion could be drawn from the facts to which a witness testified, the error, if any, in permitting the witness to state such conclusion as his opinion, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Evans Ditch Company and others against the Lakeside Ditch Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Lamberson & Lamberson, Frank H. Short, and C. L. Russell, for appellants. E. O. Larkin and Hannah & Miller, for respondents.

BURNETT, J. The Kaweah river, as stated by appellants, has its source in the Sierra Nevada Mountains in the eastern portion of Tulare county, and flows in a generally western direction to Tulare Lake. At a point known as "McKay Point," where the stream emerges from the foothills, it divides into two branches, the southern one of which retains the name Kaweah and the northern one taking the name of the "St. Johns river." Between these two streams there is also a natural channel called "Lane slough" emptying into said Kaweah river. About the year 1877 an artificial channel or ditch was dug connecting St. Johns river with said slough and by means thereof water was diverted from said St. Johns to the said Kaweah river. The plaintiffs are appropriators from the latter stream below the mouth of said slough, and the defendants are appropriators from the St. Johns below the point where it was tapped by said ditch. In February, 1906, the plaintiffs brought this action to secure a mandatory injunction requiring the defendants to remove all obstructions that prevent the flow of water from the said St. Johns into Lane slough and "to permit the free flow of the waters from said St. Johns river through the same to the said Kaweah river" and for general relief. The defendants admitted that they "dammed up the said canal or ditch where the same was taken out of said St. Johns river and interfered with and prevented the flow of water through the same"; but it is claimed that they were entitled to said water, and that plaintiffs had no interest whatever in the same, and that it had been wrongfully diverted by parties who were "not in privity or acting for or on behalf of plaintiffs or any of them."

The finding of the court upon which the controversy really hinges is: "That in the year 1877 the predecessors in interest of said plaintiffs entered upon the N. E. ¼ of the S. E. ¼ of section 2, township 18 S., range 26 E., M. D. M. in said county of Tulare, and excavated and dug and made a canal or ditch leading out of said St. Johns river at said point into the bed or channel of said Lane slough and by means of said canal or ditch and the said slough diverted from said river 99.60 cubic feet per second of the waters thereof, for the irrigation of their lands lying along the line of the respective ditches of plaintiffs; that, at the commencement of this action, plaintiffs claimed the right to use and divert 60 cubic feet per second of said waters of said river for said purposes, and plaintiffs or their grantors or predecessors in interest did each and every year after the year 1877, up to the 23d day of March, 1902 (when defendants filled up said ditch), divert and use for said purposes, under claim of right so to do, openly, notoriously, continuously, peaceably, exclusively, hostile to, and with the knowledge and acquiescence of defendants and each and all of them, and adversely to them, and each of them, 60 cubic feet per second of said waters of said St. Johns river, through and by means of said ditch or canal, and the channel of said Lane slough, at all times when there was not more than 200 cubic feet per second of water flowing in the channel of said St. Johns river at the head of said canal or ditch on said section 2."

It is contended by appellants that this finding is utterly unsupported, in that the evidence fails to show: (1) That the plaintiffs are the successors in interest of the persons who dug the ditch in question; (2) that the use of said water by plaintiffs or their predecessors was such as the statute requires in order to ripen into a title by prescription; (3) that there was any transfer of the title to the Lane slough, or the ditch or water rights connected therewith, from the original owners to plaintiffs or any of them.

Some of the other findings are assailed also; but it is recognized that said finding 5 is the vital one in controversy, and as to this finding the principal point of attack upon which appellants rely is shown in the following quotation from their brief: "Upon the issues made by these allegations of the complaint and the denial thereof by the defendants, the principal portion of the evidence in this case was introduced. The whole subject of the statute of limitations as applied to an adverse diversion of water was gone into, and it seems that the plaintiffs did not make a case which would comply with any of the rules laid down by this and other courts of last resort, under the statute of limitations. The actions of the plaintiffs and defendants resulted in producing nothing more than a scrambling possessession which fluctuated from day to day during the irrigation season and was not limited to any particular time, except that some of the witnesses testified that when there was plenty of water for everybody they did not interfere with the running of the water through this ditch, and of course that kind of use by the plaintiffs would not be an invasion of the rights of the defendants."

But in the consideration of this pivotal question and of others less important we are confronted by a stipulation entered into by the parties and filed as a record at the beginning of the trial, as follows: "It is hereby stipulated between the parties to the above-entitled action, and for the purposes of the trial of said action, that the plaintiffs in said action are respectively the owners of the respective ditches mentioned in the complaint herein, and that the said plaintiffs and their predecessors in interest, as alleged in the complaint herein, have each severally diverted, and used, during the times mentioned in said complaint, the respective quantities of water into the said respective ditches, as alleged in said complaint, when there was that much water flowing in the said Kaweah river or Mill creek at the respective heads of the said ditches." It is not disputed that the water diverted from the St. Johns river through the aforesaid ditch dug in 1877 and the said Lane slough flowed into the Kaweah river above the heads of said ditches referred to in said stipulation, and that it continued in said river till it reached said ditches. Attaching, therefore, the ordinary signification to the plain and unambiguous language of the stipulation, it would seem to mean that the plaintiffs and their predecessors have used during the time mentioned in the complaint, to wit, "for more than 20 years last past," the water "turned into said Lane slough at or near its head in the said St. Johns river by means of head gates, dams, and other artificial structures" amounting to "as much as 60 cubic feet per second," and this was "diverted and conducted down the channel of said Kaweah river and Mill creek and turned into the heads of their respective ditches," and it "was used by plaintiffs during said time for the irrigation of agricultural lands lying along the line of said respective ditches, and for watering live stock kept thereon and for other useful and beneficial purposes," and its use "has at all said times been made under claim of right so to do with the knowledge and acquiescence of said defendants and each of them, uninterruptedly, openly, notoriously, and hostile to said defendants and each of them and continuously and adversely to each of them."

Appellants claim, however, that this is extending the scope of said stipulation beyond the intention and construction of the parties. They say that: "If the parties had stipulated to that effect, there would have been nothing in the case to try. That was the whole point in the case; whether or not the plaintiffs had acquired the right to divert any water from the St. Johns river into Lane slough by means of this ditch, and if they had done so for 20 years there could be no doubt of their having acquired the right, but the stipulation does not purport to deal with that question in any manner whatever. That was the contested point in the case." While the language of the stipulation is unmistakable as to the use by plaintiffs and their predecessors of the quantity of water alleged in the complaint for 20 years, there is some plausibility in the contention that it was not intended by defendants to admit that this use was under a claim of right and hostile to the interests of appellants. In other words, when the parties stipulated that the plaintiffs and their predecessors "used, during the times mentioned in said complaint, the respective quantities of water into the said respective ditches, as alleged in said complaint," the expression "as alleged in said complaint" was designed to apply to the quantity of water, and not the manner in which it had been used. This harmonizes with the declaration of one of the counsel for appellants made during the trial that: "The stipulation is that the water claimed to be diverted by the plaintiffs from the Kaweah were diverted by the plaintiffs at the time and in the manner stated when there was that much water in the river. Of course, that don't include anything about authorization or anything of that kind. It includes all that this witness could testify to with reference to the diversion of water from the river because it includes all that there is in the pleadings about the diversion of water from the river." While the foregoing statement is probably not as clear as it would be if made more deliberately, it seems that the point was intended to be emphasized that the authority or right to the use of the water was the question not covered by the stipulation, and therefore a proper subject of inquiry. Respondents must also have so understood the stipulation, as they proceeded to introduce evidence to support their claim of the adverse character of the use. Thi evidence, it is earnestly insisted by appellants, falls far short of meeting the requirement of the law. We feel assured, however, that, giving it the most favorable consideration, from said evidence a rational inference may be drawn that the use of said water by plaintiffs and their predecessors was open, notorious, exclusive, continuous, and under a claim of right and therefore "adverse," as that term is generally used.

The testimony showing these elements of title by prescription is given by a number of witnesses. It may be that no single witness has testified to a sufficient number of facts to warrant the conclusion of the court below, as the opportunities for observation on the part of the various witnesses were somewhat circumscribed; but in the aggregate the testimony is a sufficient foundation to support the finding. Alma Hall testified: "I am acquainted with Lane slough. My first acquaintance with it, I couldn't tell you when, but in 1877 was the first time I was there on any particular occasion. In 1877 I went up there and hauled some lumber and put a headgate in about 100 yards from the St. Johns and stayed there, I guess, about a week, cleaning out the brush and logs and things and grubbing vines. I went up there, I think, on Monday and worked until Saturday afternoon, cleaning and grubbing vines and drift and logs very near down to the Kaweah river. I was back there again in 1879. We went back to turn in some water in Lane slough or to strengthen the wing dam that was turning in the water. * * * When I got up there the wing dam had washed out in spots, so it wasn't turning any water into the slough. There was water running in there without the wing dam. I suppose it was probably a foot deep in the channel of Lane slough, something near that. I think we increased the flow of the water about one-third after we fixed the dam. Frank Duran was there in the interest of the Oakes ditch. John O'Connor was there, I suppose, for the Evans ditch. I was up there again in 1898. I was up and down it different times just passing through that county over Lane slough. I always saw water in Lane slough when there was water in the St. Johns river opposite. Some times it would be pretty small; sometimes quite a stream. The water went into the Kaweah river."

Peter L. Fenwick was intimately acquainted with Lane slough in the years 1882 and 1883 and saw the water running through it during those years. "It came from the St. Johns river. There was a time when a large stream was running through there and there were other times when the stream was very small; just owing to the quantity of water that was in the river how much would come down through the ditch. It emptied into the Kaweah river." He further declared that the headgate was never interfered with. The wasteways were pulled out sometimes, but he did not know who did it. He testified to a conversation he had in 1883 with Mr. Johnson, the president of the Lakeside Ditch Company. He says: "They were there at the head of Lane slough at the same time I was. There was quite a little stream of water in the river, and the slough was as full as could be; they didn't do anything. I heard the parties were coming up, and I met them by Cutler's Bridge. We went up the river together. When we got up to Lane slough, one young fellow jumped down and says, 'Here, boys, is where she is goin',' and went out to pull out my waste boards. I just reached down and tapped him on the shoulder and says, 'What are you going to do?' He says, 'I am going to take out these boards.' I says, 'No, don't you do it.' Says he, 'Why?' I says, 'That's my property.' Mr. Johnson came up then and says, 'Mr. Fenwick, ain't you joking?' I says: 'No, I am not. If this is your water, you go down to Visalia and make me know that this is your water, then you needn't come up here at all. I will come back and turn it to you.'" He further declared that Mr. Johnson told the young man who attempted to move the boards to let them alone, and that they never molested any of the boards while the witness was there.

James Evans testified that he was at Lane slough in 1878 in the summer time. "I think there was about 3½ feet of water in Lane slough and probably 18 or 20 or 30 feet wide. There was a good stiff stream. There was a headgate in at that time. The headgate was 16 feet wide and about 8 feet deep. It was about 20 feet long. In 1883 I was there. I went up there to see about ditch matters, for the Burch ditch, the Watson ditch, the Evans ditch, and the Oakes ditch. There was a small quantity of water running in Lane slough. That was in October during the dry season. There was very little water in the St. Johns or anywhere in there." He testified to being there also in November, 1883, and January, 1884. On the latter date he went for the purpose of closing the headgate, as there was too much water flowing through. "I would go there after that maybe twice or three times in a month for about 12 years off and on. There would be sometimes a month or two, or two or three months, that I wouldn't go there; but I always went there in the fall of the year when the water was low. I was an owner in the Evans ditch until 1891. I was doing work for the Watson and Burch ditches. I was working for another company, the Kaweah & Mill Creek Company. I went back there usually both in the spring and fall. Between 1884 and 1891, when there was water in the river, there was water in Lane slough, and, if there was any water in the St. Johns river, Lane's slough after 1886 would draw the low water of the St. Johns, and all that water run into Kaweah river at the end of Lane Slough. I think I was up there in the year 1885 probably 12 or 15 times. I did not observe that any one had interfered with the flow of the water in the Lane slough in any way that season. I never knew of any such thing taking place. I never heard about it. There was a dam put in above the gate in 1885 across the channel that led down to Lane slough. It cut off part of the water. The dam went clear across the stream, but the water run over the dam. The dam was put in there by consent. Mr. Dodge and Mr. Watson came and asked if they could put an obstruction in there after the gate wouldn't hold, so as to get more water down the St. Johns. They said they were short of water and there was too much water going down the Kaweah. They said the Kaweah river had a good deal more water in it than the St. Johns, and Lane slough was drawing a big stream of water, and they asked if they could put a dam across the head. The headgate wouldn't work, and they said that, if they could put a dam in at the head of Lane slough until the run of water was over, then they would take it out. Sam Evans and myself went up there when the water got down pretty low, and I took a team, and we pulled a portion of the dam out that day, and we didn't get through, so I got one of the Dokes to pull the other part of the dam out."

C. P. Majors testified that for three years from 1894 to 1897 he did work at different times for the Watson ditch and "the other ditches here, the plaintiffs in this action. I was superintendent of the Kaweah and Mill creek at the same time. I was familiar with Lane slough all the time during those three years. Sometimes Lane slough was pretty full; other times it was not. I kept water in it all the time, turned it all down Lane slough when it was low. I did that by putting in a sand dam. When we put in the sand dam in the St. Johns, why of course it all came down Lane slough except seepage. I talked with John Parr (superintendent of St. Johns River Association) at different times. He was taking water down the St. Johns. He told me he wished I would let part of it go down for a few days, then I could shut all out, and I did so, changed it there."

W. G. Pennebaker was familiar with Lane slough from 1892 to 1897, and he testified that: "Lane slough always drew water from the St. Johns whenever there was any there. No one came up there while I was there and interfered with our taking water from Lane slough on any occasion. I never knew of any dam being put across Lane slough during the time I was going to and fro from its head. I have no knowledge of it at any other time. I don't remember of ever seeing it."

There was much other testimony of similar import. The witnesses are positive as to the continuous diversion of the water from the St. Johns river for more than 20 years. What has been quoted shows conclusively that it was under a claim of right as the parties diverting it exercised the usual acts of ownership. The diversion was open and notorious, effected by means of artificial contrivances which not only could be seen, but were actually seen by representatives of appellants. The court below, from this long-continued use, might have presumed the knowledge and acquiescence of appellants; but it had the direct statements of the witnesses clearly revealing such knowledge and acquiescence. As the question of taxes is not involved, no element of title by prescription is wanting.

Complaint is made that the testimony as to interference is negative in its character, that from the declaration of the various witnesses for plaintiffs as to their want of knowledge or information concerning any opposition of defendants, it does not follow that the said diversion of the water was not challenged. It is not contended that the evidence is conclusive as to plaintiffs' claim; but it must be apparent that their showing, giving it full credit as we must is as complete as is practicable or as is required to support the inference that the water was diverted for at least five years under a claim of right and without any interference or opposition on the part of appellants, but with their full knowledge and acquiescence.

The question whether or not the user is adverse or with the implied license of the owner of the servient estate is one of fact to be determined in the light of all the surrounding circumstances. Thomas v. England, 71 Cal. 456, 12 Pac. 491. In Franz v. Mendoca, 131 Cal. 205, 63 Pac. 361, it is held that, "where the user of a way is shown to have been continuous for the full period of limitation, unexplained, without anything in the evidence or in the circumstances of the case to indicate the contrary, it may be presumed that it was under a claim of right and adverse to the owners of the land." See, also, Gurnsey v. Antelope Creek, etc., Water Co., 6 Cal. App. 391, 92 Pac. 326, and cases therein cited.

The result is not affected by the circumstance that the diversion was made by means of an artificial and a natural channel. As said in Lower Tule, etc., Co. v. Angiola, etc., Co., 149 Cal. 498, 86 Pac. 1081: "* * * A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression, which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other."

In this respect there can be manifestly no difference between the appropriation of water under a claim of right and for the requisite time to ripen into a title by prescription and the case of the appropriation specifically provided for in the Civil Code (sections 1415–1421).

But if we interpret said stipulation of the parties as applying only to the waters in the Kaweah river at McKay Point above the mouth of said Lane slough, as contended for by appellants, there is no ground upon which we would be warranted in reversing the judgment of the lower court. Upon this theory of the stipulation it would be necessary for plaintiffs to prove that the use of the water diverted from the St. Johns river by means of said ditch and slough was under a claim of right for the statutory period, which we have already considered, and was enjoyed by plaintiffs or for their benefit or by their predecessors in interest, or else that they were prior appropriators of said waters together with the amount of said waters so appropriated. This is required by reason of the general denials of the answer and the specific allegation as to want of privity to which we have already referred, and "that the said canal or ditch so excavated and made from the said St. Johns river to said Lane slough was not and never has been a natural water course and the plaintiffs herein have never diverted any water whatsoever from the said St. Johns river through or by means of said canal or ditch."

As to the proposition that the use was for the benefit of respondents, it is pointed out in their brief that: "On the 3d day of November, 1877, the owners of the respective ditches now owned by plaintiffs organized themselves into a corporation known as the 'Kaweah & Mill Creek Water Company,' and filed articles of incorporation thereof on said day. One of the main purposes of this corporation 'was to keep water in the Kaweah and Mill creek channel; the route to be adopted to be through Lane slough and any new cut the company may deem expedient to keep water in said Kaweah and Mill creek channel for irrigation and manufacturing purposes.' This company also acquired title on October 27, 1877, to the E. ½ of the S. E. ¼ of section 2, township 18 S., range 26 E., upon which land according to the answer the canal or ditch was dug through which the water of the St. Johns river was diverted." James Evans testified that "this land was in possession of the Kaweah & Mill Creek Water Company ever since the 11th day of May, 1882, and under its control for and on behalf of plaintiffs in this action up to the time that he left in 1891; that he came back in 1892 and was here until 1894 and it was still under their control; that said company didn't act for anybody else besides plaintiffs." Alma Hall, a witness for plaintiffs, testified that in 1877 he went up to the head of Lane slough with Mads Johnson, Frank Duran, John O'Connor, and others in the month of November, to get water down through said slough; that they were three days. Three of them used scrapers, O'Connor for the Evans ditch and the others for the Oakes ditch. He further testified that the Kaweah & Mill Creek Water Company was turning water down for the benefit of the Evans, Watson, Fleming, Persian, Evans Extension, Oakes, and Burch ditches.

From the foregoing and other testimony, some of which we have hereinbefore quoted, the court was entirely justified in concluding that the diversion of the water and its use were in behalf and for the benefit of plaintiffs. Moreover, as suggested by respondents, "plaintiffs had possession of their ditches and water rights in March, 1902, when defendants obstructed the flow of the water into Lane slough, and are presumed to own such ditches and water rights in the absence of a showing by defendants to the contrary. Subdivision 11, § 1963, Code Civ. Proc.; McGovern v. Mowry, 91 Cal. 383 [27 Pac. 746]; Zilmer v. Gerichten, 111 Cal. 73 [43 Pac. 408]; Kellogg v. King, 114 Cal. 383 [46 Pac. 166, 55 Am. St. Rep. 74]; Utt v. Frey, 106 Cal. 396 [39 Pac. 807]." Furthermore, it was admitted that plaintiffs own the ditches connecting with the Kaweah river and Mill creek, together with the water rights thereunto belonging. But it is clear that the right to the use of the water flowing through said Lane slough into said river is an appurtenance to said ditches. The water right therefore would follow the ownership of the ditches to plaintiffs.

In this connection it is to be observed that there was evidence also that, when the water was low in the St. Johns river at the said point of diversion into Lane slough, it would not reach the head of the Lakeside ditch by seepage or otherwise. It could not have been and was not used, therefore, by appellants. Hence the respondents would be prior appropriators, and appellants stand in the attitude of trespassers.

The evidence as to the amount of water appropriated was admitted without objection, and we cannot say that the trial court was not justified in acting upon it.

L. E. McCabe, a competent hydraulic engineer, testified to making measurements and calculations, and he reached the conclusion that "with the wing dam in there would be 64.38 cubic feet per second running into the slough." This evidence was probably the best that was available, and, since no counter showing was made by defendants, the court could scarcely have disregarded the testimony of McCabe.

Certain rulings of the court as to evidence are assailed; but, even if erroneous, they are not of sufficient importance to justify a reversal of the judgment.

Alma Hall was asked on cross-examination this question: "Did you at any time attempt to take that dam out of Lane slough, and were you prevented by these Lakeside people from doing so?" In his direct examination he had said nothing about this particular dam, and hence the ruling was probably correct; but, at any rate, he substantially answered it by stating that he did take out part of the dam during that summer, and he did not remember of seeing any of the Lakeside people up there during that year.

Burton Smith, a witness for the defendants, was asked this question: "Then, from the amount of water you saw there, you estimated it to be about seven cubic feet per second? A. Yes, sir." To the question counsel for plaintiffs objected on the ground that the witness had not shown himself qualified to measure water. The objection was sustained, and the answer was stricken out. In determining the competency of an expert witness, the trial court has quite a wide discretion, and we are not prepared to say that it was abused in the present instance, although the witness had stated that "I had been accustomed to measure the water myself and to measuring and determining the water flowing in a stream and ascertaining the amount of cubic feet per second." In view of the objection, however, that was made, appellant should have gone more particularly into the facts disclosing the ability of the witness to estimate with some degree of accuracy the amount of water carried by the stream. But again, the question seems to have related to a particular date when the stream was observed by the witness, and there is no controversy that at times no water at all was flowing into the slough from the St. Johns, and necessarily a very small quantity at other periods, and the answer of the witness would manifestly have not assisted the court in determining the maximum amount to which respondents were entitled.

The question: "Is it not a fact that from 1885 to the time you quit having anything to do with the conducting of water through Lane slough that you took through Lane slough, and were permitted to take through Lane slough, only enough water as in your judgment and in the judgment of the people representing the Lakeside Ditch Company and the St. Johns River Association was sufficient to equalize the water so that half of the water coming down the Kaweah river would run in the St. Johns river and half of it in the Kaweah river?" addressed to James Evans, manifestly called for his opinion and was properly disallowed. His cross-examination took a wide range and included every pertinent fact throwing any light upon the question whether the appropriation of the water was in pursuance of any understanding or otherwise.

The action of the court was clearly right in striking out as not responsive the answer of witness Bryan, "Well the division was made there to keep the water in the Lakeside ditch as long as the water would reach the head of the ditch," to the question, "What was the division made then?" This did not call for the opinion of the witness as to the purpose for which the division was made.

The same suggestion will apply to William Dougherty's answer to the question: "What were you doing there at McKay Point that year?"

Alma Hall was asked the question on cross-examination: "In 1896 isn't it a fact that there was plenty of water in the Kaweah and Mill creek for all these ditches which are plaintiffs' in this action without any water in Lane slough?" An objection was sustained on the ground that it was not proper cross-examination. In support of the ruling, it is contended by respondents "that he was put on in rebuttal for the sole purpose of contradicting defendants' witnesses in regard to the interference of plaintiffs' use of the water, and this question was not properly directed to that fact"; but, whether this is so or not, the question called for an opinion of the witness, and, besides, he had previously answered it by stating that at times there was, and at other times there was not, plenty of water "without the water from Lane slough."

James Evans was asked on redirect examination: "I suppose you know that these ditch companies, plaintiffs in this action, claimed that water all that time, claimed the right to use it?" It was objected on the ground "that the same was immaterial, irrelevant, and incompetent, and not redirect examination." The objection was overruled, and the witness answered, "Yes, sir." In order to establish a title by "prescription," it was necessary, as we have seen, that the use was under a claim of right. This would ordinarily be shown by the acts, declarations, and relation of the parties to the controversy. If the plaintiffs, during the time they were using the water, had openly declared that they claimed a right to the use of it, a witness with knowledge of that claim would be competent to testify to it. This may have been the position of Evans, and upon that assumption the question was proper. If the answer simply reflected his opinion from the acts of the parties, appellants should have shown that fact by further examination of the witness. Again, no other conclusion could have been drawn from the facts to which he testified. Hence the ruling, if erroneous, was without prejudice.

There are some other points made by appellants; but they are all of minor importance and do not justify any further attention. As already indicated, it is admitted by appellants that the decisive question in the case is the finding as to the use of the water in the requisite manner and for the statutory period to establish a title by prescription.

As we read the record, there can be no possible doubt as to this point, and the judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 96

PEOPLE v. MARTIN. (No. 188.)

(Court of Appeal, First District, California. March 30, 1910.)

1. Homicide (§§ 109, 126*)—Justification—Necessity.

At common law, though the right of self-defense against imminent and immediate danger to life or limb from an aggressor existed, such right did not extend to the killing of an innocent third person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 138, 139, 191; Dec. Dig. §§ 109, 126.*]

2. Homicide (§ 115*)—Justification—Self-Defense—Imminent Danger.

Under Pen. Code, § 197, making homicide justifiable when permitted in self-defense or in defense of a wife or husband, parent, child, master, mistress or servant, when there is reasonable ground to apprehend a design to commit felony or to do some great bodily injury, and imminent danger of such design being accomplished; and section 692, providing that lawful resistance to the commission of a public offense may be made by the party about to be injured, and section 693, authorizing resistance to prevent an offense against one's person or his family or some member thereof, or to prevent an illegal attempt by force to take or injure property in his lawful possession, the right of self-defense can only be exercised to prevent an imminent danger of an offense about to be committed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 155–157; Dec. Dig. § 115.*]

3. Criminal Law (§ 38*)—Justification—Duress.

Pen. Code, § 26, excepting from the class of persons capable of committing crimes those who commit the act under threats or menaces sufficient to show that they had reasonable cause to believe and did believe their lives would be endangered if they refused, does not excuse the commission of a felony against the property of an innocent third person because the person doing the deed had reason to fear, not an immediate danger to his life, but a future and remote danger.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 43; Dec. Dig. § 38.*]

4. Infants (§ 67*)—Crimes—Justification—Duress—Insufficiency.

That a person committing a deed and claiming that it was done under compulsion was an infant does not affect the construction of Pen. Code, § 26, excepting from the class of persons capable of committing crimes those who commit the act under fear of danger to their lives, as to the question whether the fear must be of imminent danger or may be of remote danger.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 173; Dec. Dig. § 67.*]

5. Criminal Law (§ 507½*)—Evidence—Accomplices.

Where a witness committed the act of which defendant is accused under the direction of defendant, evidence that the witness had committed various other felonies under threats from defendant, introduced to show that the act of the witness, being under fear of danger to his life, was not criminal, and that he was therefore not an accomplice, was inadmissible, where the fear under which witness claimed to have acted in the present case was not of immediate danger, but of future and remote danger.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 507½.*]

6. Criminal Law (§ 1169*)—Appeal—Harmless Error—Admission of Evidence.

Error in the admission of evidence of previous acts by a witness under threats from defendant was not cured by similar testimony introduced by defendant where such testimony did not cover nearly all the matters erroneously admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3138–3140; Dec. Dig. § 1169.*]

7. Criminal Law (§ 351*)—Evidence—Relevancy.

In a prosecution for depositing and exploding dynamite near a residence, evidence of the possession by defendant at the time of her arrest 10 months after the crime of which she was charged of various poisons, none of which had any connection with the crime charged, was not admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778–785; Dec. Dig. § 351.*]

8. Criminal Law (§ 338*) — Evidence of Other Offenses—Admissibility.

In a prosecution for depositing and exploding dynamite near a residence, evidence of obscene letters and writings of defendant, in no way relating to the crime charged, was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752–757, 788, 789, 801, 855; Dec. Dig. § 338.*]

9. Criminal Law (§ 369*) — Evidence of Other Offenses—Admissibility.

In a prosecution for depositing and exploding dynamite near a residence, evidence of the brutal treatment of a witness who committed the act under the direction of defendant, and as to defendant's guilty connection with numerous other felonies and misdemeanors, were not relevant to the question of her guilt of the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

10. Criminal Law (§ 921*)—New Trial—Ground—Admission of Evidence.

Where irrelevant testimony is admitted, and is of such character as necessarily to be prejudicial to defendant, a new trial must be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2206–2209; Dec. Dig. § 921.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Isabella Martin was convicted of having deposited and exploded dynamite near a residence, and she appeals. Reversed, and remanded for new trial.

A. L. Frick and Burton J. Wyman, for appellant. Attorney General Webb, for the People.

HALL, J. The defendant was charged, under section 601 of the Penal Code, with having, on the 19th day of March, 1907, at the county of Alameda, deposited and exploded dynamite at and near the house of Frank B. Ogden. Upon her trial she was found guilty, as charged, by the verdict of the jury, and before judgment moved for a new trial. Her motion was denied, and judgment pronounced of imprisonment for the term of her natural life. From the judgment and order she in due time appealed to this court. The record upon appeal consists of the judgment roll and a full transcript of the reporter's notes of all the proceedings before the trial court, and is contained in five volumes, consisting of 2770 pages of printed matter. The labor of this court, however, has been greatly lessened by the very systematic and lawyer-like manner in which counsel upon both sides have briefed the case. No attack is made by appellant upon the sufficiency of the evidence to support the verdict, nor upon the correctness of the instructions to the jury. Appellant relies for a reversal solely upon the rulings of the court in admitting evidence and in refusing to strike out evidence that had been admitted over defendant's objections.

The crime with which defendant was charged was not committed by her in person, but was in fact committed by John B. Martin at her instigation, and, as it is claimed, by reason of her coercion. John B. Martin was at the time of the commission of the crime 16 years of age, and though he had been reared by defendant from babyhood, he was not her child. He was the principal witness for the prosecution, and testified in detail to all the circumstances of the commission of the crime, from which it appears that defendant had for a considerable time before the commission of the crime contemplated the deed, and with the aid of the witness had made careful preparation therefor. Her motive grew out of the result of some litigation which she had had in a department of the superior court of Alameda county presided over by the Hon. Frank B. Ogden, although the action was not finally tried before Judge Ogden. The witness and defendant discussed the contemplated crime, months before its commission, at Weaverville in Trinity county, where defendant had a home and certain mining properties. Early in January, 1907, they came to Oakland, Alameda county, where defendant owned a home and other property. Under the house belonging to defendant, and in which she and the witness took up their residence, was stored a quantity of dynamite. This was by the witness taken from under the house by the direction of defendant, and placed upon a shelf to dry. Subsequently a portion of it, about twelve sticks, was made into a bomb, by the witness and defendant, for the purpose of dynamiting the residence of Judge Ogden. A long fuse was furnished by defendant and carefully prepared for subsequent use. A bicycle was rented by defendant to enable the witness to quickly escape from the scene of the intended crime. Careful preparations were made to enable an alibi to be proved for the witness in case they were suspected or charged with the crime, and on the night of the 19th day of March, 1907, the witness, at the direction of defendant, took the bomb and fuse to the residence of Judge Ogden, about a mile distant from the residence of defendant, in which she remained, and after observing that the residence of Judge Ogden was then occupied by members of his family (wife, four children and a maid) placed the bomb upon the front porch of the house, carefully adjusted the fuse, lighted the same, mounted his wheel and rode away to his home, where the defendant awaited his coming. The explosion occurred before the witness reached his home; and though badly injuring the dwelling of Judge Ogden, did no harm to the unsuspecting members of the household sheltered therein, other than such as may have arisen from fright and nervous shock at the dastardly crime attempted against their home and possibly lives.

During the progress of the trial the prosecution was permitted to prove, not only by the witness John B. Martin, but by other witnesses as well, brutal and cruel treatment of John B. Martin by the defendant. Also the prosecution was allowed to introduce evidence by the witness John B. Martin of numerous thefts committed by him at the instigation of and for the benefit of defendant; also that the defendant, prior to the Ogden dynamiting, planned and caused the witness to carry out or attempt six different felonies, to wit, three cases of arson in 1901, and three attempts to dynamite the residence of Wm. J. Dingee in 1904. Also evidence was allowed over the objection of defendant that after the Ogden affair defendant purchased cyanide of potassium (a deadly poison) and planned to have the witness place the same in a reservoir at Weaverville used to supply drinking water; and also in 1908 planned to have the witness dynamite the residence of Judge George Samuels at Oakland. (The point that this occurred subsequent to the Ogden affair was waived.)

All this evidence, and some other of similar import, was admitted over objections of defendant, and retained over her several motions to strike out, upon the theory that it tended to prove that the witness John M. Martin was not an accomplice of the defendant in the crime for which she was on trial, and therefore his testimony as a matter of law would support a conviction without corroboration. This theory is in turn predicated upon the theory that, although the witness with his own hands dynamited the Ogden residence when over a mile distant from the person of defendant, he was guilty of no crime in so doing because, as it is claimed by respondent, he committed the act under threats or menaces of defendant, sufficient to show that he had reasonable cause to believe and did believe that his life would be endangered unless he committed the deed. It is contended that the evidence objected to was admissible as tending to show the reasonableness of such belief and the existence thereof. The entire superstructure of respondent's contention is based upon the construction placed by respondent upon section 26 of the Penal Code, which, so far as applicable to the matter under discussion, is as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Eighth. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The vital point of difference between appellant and respondent as to the effect of this section of the Code is this: That appellant insists that the danger to the life of the person claiming the protection of the statute must be, or reasonably appear to be, imminent and immediately impending, while respondent claims that such danger is sufficient to excuse from criminal responsibility for any crime however heinous, not punishable with death, if committed under threats causing a reasonable belief on the part of the person threatened that a refusal would endanger his life either immediately or at some time in the future. To make this clear it is now necessary to state the testimony given by the witness John B. Martin as to the threats and the fear under which it is claimed he committed the crime for which defendant was convicted. We quote from the transcript: "Q. Why did you take this bomb prepared by you and Mrs. Martin, and place it on Judge Ogden's premises? A. Because I was forced to. Q. How were you forced to? A. By threats Mrs. Martin made. Q. What did she say, what threats did she make? A. She said if I didn't place the bomb in Judge Ogden's porch she would have me arrested for burning the house, take me up to Trinity county, hit me over the head with a sledge hammer, put a stick of powder under me and blow me up, and come into town and say it was an accident, and they would believe it. Q. I will ask you what was your feeling towards Mrs. Martin on the 19th day of March, 1907, Mrs. Martin, this defendant? A. I was afraid of her. I was afraid that she would kill me if I didn't carry out such deeds as she told me to." It further appeared from his testimony that this threat was made several weeks before the crime was committed, and before the bomb was made. On cross-examination the witness, in response to the question, "Then you want to be understood now, do you, that the fear which you had of what she would do if you did not explode the Ogden bomb was, not that she would kill you or attempt to kill you in Oakland, but she would get you up in Weaverville and kill you there. That is correct, is it?" answered, "It is." In other words, it was made perfectly clear and certain that the witness did not act under any fear of immediate or imminent danger of his life, but only under a fear that at some future time and at a place hundreds of miles away from the scene of the contemplated crime his life would be in danger from the defendant. Unless such a fear —a fear of a future and remote danger to life—will exempt a person from responsibility for any crime (not punishable with death), committed against the person or property of an innocent third person, all this testimony introduced under the theory that it tended to show the existence and reasonableness of the fear under which it is claimed the witness and perpetrator of the crime acted, was inadmissible.

We do not understand respondent to claim that, at the common law, such a fear of future and remote danger to life would excuse the commission of a felony. The contention of respondent is based entirely upon the wording of section 26 of the Penal Code. At common law, the right of self-defense against imminent and immediate danger to life or limb from an aggressor existed. It only existed, however, to prevent death or bodily injury that was imminent, and could only be exercised against the person threatening the injury. It did not extend to the killing of an innocent third person. It has ever been the rule that necessity is no excuse for killing an innocent person. Blackstone says: "And therefore, though a man be violently assaulted and hath no other possible means of escaping death, but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant, for the law of nature and self-defense, its primary canon, have made him his own protector." 4 Blackstone (Cooley) § 30. In Arp v. State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137, it is said: "The authorities seem to be conclusive that, at common law, no man can excuse himself under the plea of necessity or compulsion for taking the life of an innocent person."

So, too, while the statute of this state recognizes and sanctions the right of self-defense against an aggressor, the right can only be exercised to prevent an imminent danger or an offense about to be committed. Thus homicide is justifiable "when committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished." Pen. Code, § 197. "Lawful resistance to the commission of a public offense may be made: (1) By the party about to be injured." Pen. Code, § 692. "Resistance sufficient to prevent the offense may be made by the party about to be injured: (1) To prevent an offense against his person, or his family or some member thereof; (2) to prevent an illegal attempt by force to take or injure property in his lawful possession." Pen. Code, § 693.

If the right of self-defense and forcible resistance against an aggressor exists only in the presence of imminent danger or when an offense is about to be committed, it would be an anomalous condition of the law that would justify or excuse the commission of a felony against the person or property of an entirely innocent person because the person doing the deed had reason to fear and did fear, not an imminent and immediate danger to his life, but a future and remote danger, and one that in the very nature of things could be readily averted by innocent methods.

The fact that in this case the person committing the deed, and claiming that it was done under a compulsion that excuses him from the criminality of the act, is a minor cuts no figure in the proper construction of the statute. It is general and applicable to persons of any age. While the language is not as exact as it might be, it must be given a reasonable meaning so as to effectuate the design of the Legislature and to promote justice. We would be loath to believe that the Legislature intended to excuse one from responsibility for atrocious felonies committed against the property or person of an innocent person, under a fear, by whatever threats induced, that a refusal would in the future and at some remote place endanger his life. Such a danger in the very nature of things could be easily avoided by innocent methods. It would require very explicit language to induce us to believe that the Legislature intended to lay down any such monstrous and unjust rule as that any person should be excused from responsibility for an infamous crime when committed under the fear of future and remote danger to life which in the nature of things could be easily avoided. We agree with the views expressed by the court in Bain v. State, 67 Miss. 557, 7 South. 408, when it said: "We can conceive of cases in which an act, criminal in its nature, may be committed by one under such circumstances of coercion as to free him from criminality. The impending danger, however, should be present, imminent and not to be avoided. * * * The social system would be subverted, and there would be no protection for persons or property, if the fear of man, needlessly and cravenly entertained, should be held to justify or excuse breaches of the law." So, too, in People v. Repke, 103 Mich. 459, 61 N. W. 861, it was said: "Threats of future injury do not excuse any offense. The necessity which will excuse a man for breach of law must be instant and imminent."

Respondent has cited no case that supports its contention. There are none. Burns v. State, 89 Ga. 527, 15 S. E. 748, a case arising under a statute similar to ours, lays down the rule directly contrary to the contention of respondent in the case at bar. The report of the Georgia case is somewhat meager, and can only be fully understood by a somewhat careful study of the case. The decision of the court is in the form of a syllabus, preceding the statement of the case. Under the Code of that state (section 4303 [Code 1882]) it is provided that: "A person committing a crime or misdemeanor under threats or menaces, which sufficiently show that his life or member was in danger, or that he had reasonable cause to believe and did actually believe, that his life or member was in danger, shall not be found guilty; and such threats and menaces being proved and established, the person compelling by said threats and menaces the commission of the offense shall be considered a principal, and suffer the same punishment as if he had perpetrated the offense." The first part of this section excusing the person coerced is not materially different from our statute so far as it relates to the imminency of the danger. The defendant Burns was convicted of murder, and the principal witness against him was his stepmother. It is apparent from the statement of the points involved, and the instructions given and refused, that this witness had previously given false testimony at the coroner's inquest, and which she claimed was given under coercion, and also that she had testified to a state of facts upon the final trial which would make her an accomplice unless she acted under coercion and fear. Upon each point the trial court gave an instruction which ignored the necessity of the fear being of a present impending danger, and refused to give a requested one including this element. The court said: "According to section 4303 of the Code, in order for duress or fear produced by threats or menaces to be a valid legal excuse for doing anything which would otherwise be criminal, the act must have been done under such threats or menaces as show that the life or member was in danger, or that there was reasonable cause to believe and actual belief that there was such danger. *The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act.* Thus, where the forbidden act is perjury by a witness at a coroner's inquest, the danger of death or dismemberment at some future time, in the absence of all danger at the time of testifying, will not excuse. * * * A person who aids and assists in the commission of a crime, or in measures taken to conceal it and protect the criminal, *is not relieved from criminality as an accomplice* on account of fear excited by threats or menaces, unless the danger be to life or member, *nor unless that danger be present and immediate* as above announced touching fear under the influence of which perjury is committed." (Italics are ours.) We understand this case as clearly holding that a person is not relieved of the responsibility for a criminal act because he acted through fear produced by threats, unless the fear was of immediate and imminent danger. The case is cited as authority for this doctrine in the commissioners' note to the Penal Code of Georgia (adopted in 1895) under section 41, which is a re-enactment of section 4303, and also in the notes to Arp v. State, in 19 L. R. A. 359. We think the Georgia case is directly in point, and is grounded in sound reason and enlightened justice.

Inasmuch as it is clear that the witness John B. Martin had no fear of immediate and imminent danger to his life, but only a fear that defendant, at some future time and at some remote place, would kill him, all the evidence now under consideration, admitted as tending to show the existence and reasonableness of such fear, was improper. None of it should have been admitted, and all of it should have been stricken out.

Neither were the errors thus committed cured by the subsequent introduction by defendant of the testimony of Johnion to the effect that John B. Martin had confessed to him to committing some of the same crimes and implicating the defendant therein. The circumstances under which this testimony was introduced bear little resemblance to the facts in the case of People v. Silvers, 6 Cal. App. 69, 92 Pac. 506, cited by respondent; but aside from this the Johnion testimony did not cover anywhere near all the matter erroneously admitted.

Other evidence equally objectionable, tending to show the possession by defendant at the time of her arrest (which occurred about 10 months subsequent to the commission of the crime for which she was being tried) of various poisons, none of which had any connection with the crime committed at the Ogden residence, was admitted over the objection of defendant.

Evidence of obscene letters and writings of defendant in no way relating to the dynamiting of the Ogden house was admitted. This evidence was very prejudicial to defendant, as it tended to show her to be a most depraved and vicious woman. However depraved or vicious she might be, she was entitled to be tried only for the crime charged against her; and upon the issue presented by her plea of not guilty only such testimony as was relevant to such issue should have been admitted.

The evidence as to her brutal treatment of the witness John B. Martin, and as to her guilty connection with the numerous felonies and misdemeanors, had no relevancy to the question as to whether or not she was guilty of the crime of dynamiting the house of Judge Ogden. It is not pretended that it tended to prove that she committed the crime for which she was being tried. Its ostensible purpose was to prove that John B. Martin was not criminally responsible for his acts in placing and exploding the bomb at the Ogden home. But as we have shown, it was not admissible for this purpose. Its character was such as to greatly prejudice the defendant with the jury. The defendant had the right to have all such irrelevant matter excluded from the jury. When, as in this case, irrelevant testimony has been admitted, and is of such a character as necessarily to be prejudicial to defendant, a new trial must be granted. People v. Carpenter, 136 Cal. 393, 68 Pac. 1027; People v. Williams, 127 Cal. 216, 59 Pac. 581; People v. Arlington, 123 Cal. 356, 55 Pac. 1003; People v. Lynch, 122 Cal. 503, 55 Pac. 248.

Complaint is also made that defendant was compelled to answer questions upon cross-examination not relating to matters about which she had testified in chief. In some respect this complaint seems to be well founded, but as to most of the questions the answers were such as to preclude any inference of prejudice thereby. In view of the necessity for a new trial, we only feel it necessary upon this point to call attention to the rule for cross-examination of defendant as laid down in People v. Gallagher, 100 Cal. 466, 35 Pac. 80, People v. Arrighini, 122 Cal. 121, 54 Pac. 591, and People v. Schmitz, 7 Cal. App. 359, 94 Pac. 407, 419.

The judgment and order are reversed, and the action remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

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157 Cal. 692

CARLSON v. SHEEHAN. (S. F. 5,124.)

(Supreme Court of California. May 11, 1910.)

1. Work and Labor (§ 14*)—Effect of Express Contract—Performance Prevented.

Where complete performance of a contract has been prevented by the fault of defendant, plaintiff may sue for the value of what he has done under the contract.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29–33; Dec. Dig. § 14.*]

2. Contracts (§ 303*) — Construction — Building Contract.

Plaintiff contracted with defendant to put up a building for a specified sum on defendant's lot. When the contract was made, defendant was grading off the lot, and plaintiff saw the condition of the banks on each side, and knew the character of the soil. The building was to occupy the entire width of the lot, and defendant did not own the adjoining property. Plaintiff did not believe the banks would stand without support, and there was some negotiation between the parties for a concrete wall, but no agreement was made. Defendant told plaintiff that he had contracted with the graders to slope off the banks, but that the contract was not in writing, and they had refused to do it. After the building was partially constructed, heavy rain caused the banks to slide, crushing in the sides of the building, and damaging it materially. Defendant refused to pay for the restoration of the building to its former condition, and plaintiff refused to complete the building and sued for a balance for work done and materials furnished. Civ. Code, § 1511, provides that, where a person agrees to do a thing for a specified sum to be paid on full performance, he is not entitled to any part of the same unless he has done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, etc. Section 1512 provides that, if performance is prevented by the party who is to make such payment, the person doing the work is entitled to payment as for full performance. *Held*, that there was nothing done by defendant to prevent plaintiff from completing the building or which justified rescission by him, and that plaintiff could not recover a balance due and unpaid for work done and materials furnished.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 303.*]

3. Work and Labor (§ 14*)—Effect of Contract—Violation of Intermediate Covenant.

If one party breaks an intermediate covenant of an executory agreement, the other party may treat the entire contract as rescinded, and recover in quantum meruit for the value of the work he has done.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29–33; Dec. Dig. § 14.*]

4. Contracts (§ 303*)—Excuses for Failure to Perform.

Mere difficulty or unusual or unexpected expense will not excuse a party to a contract in failing to perform the same.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1409; Dec. Dig. § 303.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by O. E. Carlson against Maurice Sheehan. From a judgment on a nonsuit, plaintiff appeals. Affirmed.

Tum Suden & Tum Suden, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

SHAW, J. Plaintiff brought this action to recover the sum of $1,715, alleged to be the balance due and unpaid for work done and materials furnished by plaintiff for defendant in constructing a building at defendant's special instance and request. After the plaintiff had introduced his evidence upon the trial, the court, on motion of the defendant, ordered a nonsuit. The plaintiff appeals from the judgment thereupon rendered.

The plaintiff and defendant entered into a contract, whereby the plaintiff agreed to erect a building upon a lot belonging to the defendant for the sum of $3,680. The plaintiff completed the building in part only, and the defendant paid him $2,100 upon the contract. The remainder was to be paid on and after completion. The cost of finishing the uncompleted part of the building would have been about $500. The claim of the plaintiff is that he was prevented or excused from completing the building according to the agreement by the conduct of the defendant. The object of the suit is to recover the difference between the value of the work done at the contract rate and the amount paid by the defendant.

We do not think there is any merit in the contention of the respondent that a recovery cannot be had upon the common count for the value of the work and material, and that the plaintiff should have averred the special contract, the sum agreed to be paid, the performance by himself, and nonpayment by defendant. Such a rule may apply where a contract has been performed by the plaintiff, but, where complete performance has been prevented by the fault of the defendant, the plaintiff may sue for the value of that which he has done under it.

The lot on which the building was erected was 25 feet in width fronting on Market street and 125 feet in depth. The building was a two-story frame structure covering the entire width of the lot and running back 70 feet. The defendant did not own the adjoining lot on either side. At the time the work was begun on the contract, the lot had been graded down lower than the natural surface of the adjoining lot, leaving high vertical banks of earth on each side. These banks were unprotected by retaining walls or otherwise, and were liable to slide down upon the lot and against any building erected thereon in case of heavy rains. The contract was made on September 2, 1906, and plaintiff began the work about the first of October. At the time of making the contract, the defendant was grading the lot to prepare it for the building. Plaintiff saw the condition of the banks on each side, and knew the character of the soil. He did not believe the banks would stand without support, and there was some negotiation between him and defendant about putting in a concrete retaining wall four feet high to protect them from caving or sliding in upon the building, but there was no agreement regarding it. It was agreed that plaintiff should put in a wooden bulkhead in the rear five feet in height. The defendant told plaintiff that he had contracted with the graders to slope off the banks on each side, but that the contract was not in writing, and they had refused to do it. Counsel for plaintiff earnestly insist that this was said at the time of executing the contract, and that it constituted an inducement or consideration therefor from which an agreement by the defendant to slope off the banks would be implied. Giving to the evidence the full force which is to be attributed to it on a motion for nonsuit, we cannot so construe it. The conversation referred to, in which this was said, occurred after the contract was signed and before the work was begun. The statement itself indicates that it was made after the lot was graded and the context confirms this conclusion. There is nothing to show that Carlson signed the contract in reliance upon, or in consideration of, any agreement of Sheehan to slope off the banks.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The work was begun by Carlson with full knowledge of the conditions and without any protest or objection by him on account of any danger of a landslide from the adjoining banks. When the building was nearly finished, there were heavy rains which caused the said banks to slide in on the building, crushing in the sides thereof, and damaging it to such an extent that it would require an expense of $400 to restore it to its former condition. The defendant thereupon undertook to clear away the earth, so that plaintiff could complete the building and directed the plaintiff to stop further work until the earth was removed. This occupied several months. When it was done, the defendant requested that plaintiff proceed with the work to completion. Plaintiff demanded that defendant pay the expense necessary to restore the building to the condition it was in before the slide occurred. The defendant refused to do this, and thereupon the plaintiff refused to complete the building. The decision of the case depends on the question whether or not the plaintiff was justified in his refusal to go on with the work, under the facts stated.

Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy, as specified in section 1511 of the Civil Code. If performance is prevented by the party who is to make such payment, the person doing the things is entitled to payment as for full performance. Civ. Code, § 1512. And, if one party breaks an intermediate covenant of an executory agreement, the other party may treat the entire contract as rescinded, and recover in quantum meruit for the value of the work he has done under it. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164. There was nothing done by Sheehan in the present case which had the effect of preventing Carlson from completing the building, or which justified a rescission by him. At the time the contract was signed the grading was in progress. There is no evidence that Sheehan then agreed that he would have the banks of the adjoining lots, which he did not own, sloped off so as to prevent the earth from falling on his own lot, or from sliding against the building to be erected thereon. He would have no right to do that; and his only lawful means of protecting his lot, without the consent of the adjoining owners, was to erect a retaining wall or bulkhead upon his own side of the boundary line. Carlson saw the situation in which the lot would be left when the grading was done, and he knew the character of the soil. With this knowledge he executed the contract without exacting any stipulation for his protection from the consequences of any caving of the banks which might occur during the erection of the building. Before he began the work, he saw that the banks were vertical and Sheehan explained the reason, but did not agree to do anything to avoid or prevent the danger. Carlson must be presumed to have undertaken the performance of the contract at his own risk of interference by landslides from the adjoining lots. It may be admitted that there was an implied agreement that Sheehan would complete the grading to the desired level and that he was bound to remove the earth which, from natural causes, fell upon the lot after the work was begun and interfered with its completion. If this obligation existed, he discharged it by removing the fallen earth. But he had made no agreement that he would repair any damage to the building from a slide or cave occurring while the work was in progress. There was no such obligation resting upon him by implication of law. Carlson was bound to perform his contract and he was not absolved therefrom by the natural obstacles intervening, unless they rendered performance practically impossible. Mere difficulty or unusual or unexpected expense would not excuse him. 9 Cyc. 625; Klauber v. San Diego St. Co., 95 Cal. 357, 30 Pac. 555; Wilmington, etc., Co. v. O'Neil, 98 Cal. 5, 32 Pac. 705; Sample v. Fresno F. Co., 129 Cal. 228, 61 Pac. 1085; Wilson v. Alcatraz A. Co., 142 Cal. 188, 75 Pac. 787. The only reason given by Carlson for refusing to go on was that after the landslide Sheehan would not agree to allow him extra compensation for the expense he would be put to in restoring the building to its previous condition. This restoration was necessary to complete his own undertaking and he had no right to demand that Sheehan should pay him for it. The refusal of Sheehan to do so was no excuse for noncompletion by Carlson.

It is claimed that further performance was excused by reason of a statement by the defendant, after the injury, to the effect that he would not let Carlson go on with the work unless he restored the building to its proper condition as called for by the contract. It is plain that all that Sheehan meant by this was that he would not consider the building completed nor accept it unless it was so restored. Carlson himself, on cross-examination, fully explained that the only reason why he did not complete the building was that Sheehan would not restore the building himself nor pay the cost thereof.

The District Court of Appeal for the First District to which this case was transferred affirmed the judgment. A transfer was then made to this court to further consider the evidence concerning the asserted agreement or obligation of Sheehan to slope off the adjoining banks. We are satisfied that both the district court and the superior court were correct in their conclusions.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

157 Cal. 667

CRANE v. DERRICK. (S. F. 4,871).

(Supreme Court of California. May 9, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 206*)—CLAIMS—CARE OF DECEASED BY SON—UNDERSTANDING BETWEEN CHILDREN OF DECEASED.

The right of a son to recover of his mother's administrator for caring for her is not affected by the fact that when he took her to his home it was the understanding between him and her other children that he should have the use of her property as compensation for caring for her.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 206.*]

2. EXECUTORS AND ADMINISTRATORS (§ 206*)—CARE OF DECEASED BY SON—IMPLIED PROMISE.

Though under Civ. Code, § 206, a son has no legal duty to maintain his mother, she having property of her own, his right to recover of her estate for support and care given by him to her depends on whether there was an implied promise on her part to pay him therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

3. EXECUTORS AND ADMINISTRATORS (§ 206*)—CLAIMS—CARE OF DECEASED BY SON—IMPLIED PROMISE.

That a son may recover of his mother's estate for support and care of her on the ground of an implied promise, the circumstances must have been such as to warrant the inference that it was the expectation of both parties, existing while the relation existed, that compensation should be made; as no circumstances occurring afterwards can convert that into an implied promise which was not so before.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS—CARE OF DECEASED BY SON—IMPLIED PROMISE—EVIDENCE.

Evidence, in an action for recovery by a son of his mother's administrator for her support, *held* to warrant a finding that there was no implied contract that he should be compensated.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 221.*]

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by W. W. Crane, special administrator of Anna J. Gilson, deceased, substituted in place of her, against George H. Derrick. Judgment for plaintiff. Defendant appeals. Affirmed.

G. W. Langan and Asa V. Mendenhall, for appellant. W. B. Rinehart, Samuel Bell McKee, and McKee & Tasheira, for respondent.

ANGELLOTTI, J. This action was brought by Anna J. Gilson against the defendant for an accounting as to property owned by her and in his possession and to recover the sum found due on such accounting. An accounting was had, resulting in a judgment in favor of plaintiff for $3,195.76. This is an appeal from said judgment. During the pendency of the appeal, Mrs. Gilson died, and her special administrator has been substituted as plaintiff.

It is stipulated that the only question to be determined on this appeal is as to the correctness of the action of the trial court in disallowing certain claims made by defendant against Mrs. Gilson, aggregating $986.62, for board, lodging, and care of plaintiff at certain specified times between May 1, 1903, and May 1, 1906, at the rate of $40 per month; the same being: (1) From May 1, 1903, to October 3, 1903, $162.66; (2) from January 8, 1904, to May 15, 1904, $169.30; (3) from December 20, 1904, to May 1, 1906, $654.66. There is no dispute as to the claim being correct in amount, nor as to the fact that the board, lodging, and care were furnished to Mrs. Gilson. There was no express contract as to such board, lodging, or care, and Mrs. Gilson could be held liable therefor, if at all, only upon an implied contract. Ordinarily, of course, the law will imply a promise on the part of the recipient of services to pay for them. Plaintiff's claim is that no such promise is implied in this case in view of the circumstances under which the services were performed.

Mrs. Gilson was the mother of defendant. In May, 1902, she was about 70 years of age. She was then residing in Reno, Nev., and had been residing there for about 20 years. She owned property aggregating in value about $10,000; a portion thereof being real property in Reno. Defendant was engaged in the practice of medicine in Oakland, Cal., where he had a large and lucrative practice. Defendant's wife was also a licensed physician. They were apparently living in very comfortable circumstances. His mother becoming very ill, and apparently incompetent to care for herself and her property, he went to Reno, and, having been appointed guardian of her person and estate, brought her to his home in Oakland, where she remained until October 3, 1903. She did not remember at all about being taken to Oakland, but found herself there when she "came to, so as to know" where she was. During this period of her stay at defendant's house she was very feeble, and defendant and his wife furnished everything necessary for her maintenance, "care, room, board, such medical advice as was necessary, special massage at times by an assistant in the office, and at times with a horse and buggy—anything that we could do to make her comfortable and happy." In short, she was treated in every respect as an invalid mother would ordinarily be treated in the household of her son. She returned to Reno about October 3, 1903, but came back to defendant's house January 8, 1904, and remained there as a member of his household until May 15, 1904, and again from December 20, 1904, until May 1, 1906. During both of these periods she was better able to care for herself than during the first period. At all times she was treated as a member of the household, and defendant testified that "she had everything that could be furnished to make her comfortable and happy." It is not denied that there was never any understanding between Mrs. Gilson and defendant that defendant was to receive any compensation for such maintenance and services, or that there never was any intimation on his part to her that he expected compensation. It must be taken as true, in view of the conclusion of the trial court, that defendant told his mother on several occasions that she was welcome to a home with him. Defendant made the same statement in a letter written to his brother in October, 1903.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On the settlement of his final account as guardian of his mother's person and estate by the Nevada court May 22, 1903, defendant was allowed $50 per month as compensation for caring for his ward and managing her estate, having asked for the same in his report, and Mrs. Gilson having signed a written request, attached to the account and report, that the account be settled as presented and the requests contained in the report be granted. There was, however, evidence sufficient to support a conclusion on the part of the trial court that Mrs. Gilson, by reason of her then condition, did not realize that defendant was making any charge for her care or maintenance in his home.

It is uncontradicted that the understanding between defendant and his brother and sister at the time he first took his mother to his home was that he should have the use of Mrs. Gilson's property as compensation for her care. Mrs. Gilson, however, never knew anything about this understanding, and, of course, it was in no way binding on her, however much it may be morally binding on his brother and sister as heirs of the mother, now that she is dead.

Counsel for defendant rely strongly on the fact that there was no duty imposed by the law on defendant to maintain his mother to the extent of his ability; section 206 of the Civil Code prescribing such duty on the part of a child being limited by its terms to cases where the relative (father, mother, or child) is poor and unable to maintain himself by work. Manifestly the mother could not by any process of law have compelled support at the hands of her son. That fact, however, is of no importance here. The question on this appeal is simply whether the facts we have stated sufficiently support the conclusion of the trial court that there was no implied promise on the part of the mother to compensate her son for the support and care given.

In Moulin v. Columbet, 22 Cal. 508, this court, after speaking of the well-settled general rule that a promise to pay for services rendered and accepted is implied, said: "Such undoubtedly is the general rule upon this question. It is founded, however, upon a mere presumption of law, and is liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances, from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby." One of the most familiar classes of cases of the kind last mentioned is that where a claim is asserted by a child against his parent or by a parent against his child for services of the kind here involved. As was well said in Murdock v. Murdock, 7 Cal. 513: "There is, perhaps, no class of cases, assumed to be based upon implied contracts, that has more embarrassed courts and juries than cases arising between relations. These cases are always unfortunate, and, from the delicacy of the relationship existing among the parties, it is often extremely difficult to arrive at their true intention. There is so great a variety in the circumstances of different cases that it is difficult to lay down general rules." The conclusion that one is to pay for services rendered him by another is a common sense one to which the mind naturally comes in ordinary cases "from a knowledge of the circumstances of the particular case and the ordinary dealings between man and man." But when the services are rendered between members of the same household or between those most closely related by blood, "we find other motives than the desire of gain which may prompt the exchange of mutual benefits between them." Page v. Page, 73 N. H. 305, 61 Atl. 356. It has been said many times that the question is one that must be determined on the circumstances of the particular case; the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered or the support was furnished. See 21 Am. & Eng. Ency. of Law (2d Ed.) p. 1061; Murdock v. Murdock, supra; Friermuth v. Friermuth, 46 Cal. 42, 45. In the consideration of such circumstances, the degree of the relationship may strengthen or diminish the implication that the services are acts of gratuitous kindness and affection, according to its proximity or remoteness. 1 Beach on Law of Contracts, § 653. Our own decisions appear to support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made. Murdock v. Murdock, supra; Friermuth v. Friermuth, supra. And it is emphatically declared in Murdock v. Murdock, supra, that it is the expectations of the parties existing while the relation continued that is to control, and that no circumstance occurring afterwards can convert that into an implied contract that was not so before.

It appears clear to us that we would not be warranted in holding that the conclusion of the learned trial judge on this matter was without sufficient support in the evidence. A son finding his aged mother dangerously ill and unable to care for herself, being himself comfortably situated and abundantly able financially to do so, takes her to his home and makes her a member of his household, there treating her in all respects as an affectionate son would treat his mother, and repeatedly assuring her that she was always welcome to a home with him, and never intimating that she was expected to or should in justice pay him for board, lodging, or care. It seems to us that the natural inference of any reasonable person would be that neither of the parties would expect for a moment that pecuniary compensation by one to the other was contemplated by either, and certainly that the son was prompted by no such sordid motive in thus caring for his mother, even though she had property amounting in value to $10,000, and had been living in another place for some years. It is to the credit of the defendant that the record fails to indicate any such expectation on his part as that of being paid by his mother, quite clearly indicating to the contrary, as we read it, that the claim was due solely to the unfortunate differences subsequently occurring. Doubtless defendant expected, and in view of his understanding with his brother and sister properly expected, that, in the event of his mother's death, the agreement between them would be observed; but the trial court was fully warranted in concluding that he did not render the services under any expectation that his mother should render him any compensation.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

157 Cal. 663

PEOPLE v. BRIGHT. (Sac. 1,564.)

(Supreme Court of California. May 9, 1910.)

1. Indictment and Information (§ 137*)—Motion to Quash—Disqualification of Grand Juror.

Under Pen. Code, § 896, authorizing the challenging of a grand juror on the ground that a state of mind exists on his part in reference to the case, or to either party, which would prevent him from acting impartially, and section 995, requiring the setting aside of an indictment against one not previously held to answer, on any ground which would have been good ground for challenge to any individual grand juror, the court must set aside an indictment of accused not previously held to answer, where an individual grand juror was disqualified because of a state of mind on his part in reference to accused, where the juror took part in the consideration of the charge against accused or the deliberations of the grand jury within section 900.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480–487; Dec. Dig. § 137.*]

2. Indictment and Information (§ 137*)—Deliberations of Grand Jury—Statutes.

Pen. Code, § 900, providing that, where a challenge of a grand juror is allowed, he cannot be present in the consideration of the charge against accused who interposed the challenge or the deliberations of the grand jury thereon, prescribes the rule to determine whether a disqualified grand juror participated in the matter of an indictment within section 995, requiring the court to set aside an indictment against one not previously held to answer on any ground which would have been good ground of challenge to any individual juror.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480–487; Dec. Dig. § 137.*]

3. Indictment and Information (§ 137*)—Deliberations—Consideration.

Under Pen. Code, § 900, providing that, where a challenge to an individual grand juror is allowed, he cannot be present in the consideration of a charge against accused who interposed the challenge or the deliberations of the grand jury thereon, when considered in connection with section 925, providing that no person must be permitted to be present during the expression of the opinions of the grand jurors or giving their votes on any matter before them, and section 995, authorizing the setting aside of an indictment where a person is permitted to be present during the session of the grand jury and when the charge embraced in the indictment is under consideration, and section 922, requiring a grand juror to declare his knowledge of the commission of a public offense to his fellow jurors who must investigate the case, a disqualified grand juror has no right as such to be present at or to take any part in the investigation of the charge, and a disqualified juror who was present and acted as a member of the grand jury during all the time it was investigating the charge against accused, including the examination of witnesses, and who interrogated some of the witnesses, took part in the consideration of the charge, authorizing the setting aside of the indictment, though he was not present at any time during the actual deliberation of the grand jury on the question whether an indictment should be found.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

4. Indictment and Information (§ 15*)—Resubmission of Case to Grand Jury.

The district attorney, desiring to prosecute a criminal case on the merits after the court had set aside the indictment on the ground of the disqualification of a grand juror, should obtain a direction from the court for the resubmission of the case to the same or another grand jury, and accused may then be indicted again, or a new prosecution may be instituted before a committing magistrate as authorized by Pen. Code, § 997.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 83-88; Dec. Dig. § 15.*]

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

R. L. Bright was indicted for a felony, and, from an order setting aside the indictment, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and E. W. Holland, Dist. Atty., for the People. J. B. Curtin, for respondent.

ANGELLOTTI, J. This is an appeal from an order of the superior court of Tuolumne county granting a motion to set aside an indictment found by the grand jury of that county against defendant, charging him with a felony. The appeal was properly taken to the District Court of Appeal, and has come to this court under an order granting a hearing herein after decision by the District Court of Appeal.

The defendant had not been held to answer before the finding of the indictment. The motion to set aside the indictment was based on the ground that one of the grand jurors, Charles E. Blanchard, had such a state of mind in reference to the cause as would prevent him from acting impartially and without prejudice to the substantial rights of the defendant. Our Penal Code provides that an indictment must be set aside by the trial court, on motion of the defendant, "when the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror" (section 995), and that a challenge to an individual grand juror may be interposed on the ground "that a state of mind exists on his part in reference to the case, or to either party, which would prevent him from acting impartially and without prejudice to the substantial rights of the party challenging," with the same proviso as to opinions founded on public rumor, statements in public journals, or common notoriety as exists in regard to trial jurors (section 896). Where it is found on such a motion made by a defendant, who had not been held to answer prior to indictment, that the individual grand juror was disqualified to act by reason of this statutory provision, and that the challenge is good, the trial court is bound to set aside the indictment (People v. Landis, 139 Cal. 426, 73 Pac. 153), provided, of course, such juror has taken part in the consideration of the charge against the defendant, or the deliberations of the grand jury therein. Pen. Code, § 900.

It cannot be seriously disputed that the trial court was warranted in concluding that the grand juror was disqualified by reason of this provision of the statute. On the hearing of the motion the juror frankly admitted the existence at the time of the impanelment of the grand jury and throughout the proceedings leading to the return of the indictment of a state of mind on his part with reference to the case that would prevent him from acting impartially, and in recognition of this condition retired from the grand jury room when the grand jury was about to vote upon the question of indictment and was not present at and did not participate in such vote.

The question then is whether the disqualified grand juror participated in the matter of this indictment in a manner prohibited by the statute. Although not present at any time during the actual deliberations of the grand jury upon the question whether an indictment should be found, he testified that he was present and did "take an active part in all of the matters leading up to this indictment, saving and excepting the deliberations as to whether they would find for or against the indictment." He further said that he was present and acted as a member of the grand jury during all of the time that it was investigating the charge against defendant, including the examination of witnesses, and that he interrogated some of the witnesses before that body.

There can be no doubt that section 900 of the Penal Code prescribes the rule applicable in determining the question before us. If this is not so, it would appear to be necessary to hold that under section 995 the court is compelled to grant the motion to set aside the indictment whenever a grand juror is shown to have been disqualified, even though he took no part in the matter of the particular indictment. The contrary, however, is the only reasonable view and is settled by the decisions. See People v. Simmons, 119 Cal.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3, 50 Pac. 844. Section 900 of the Penal Code is the only provision declaring the effect of an established disqualification. That section provides that, "if a challenge to an individual grand juror is allowed, he cannot be present or take part in the consideration of a charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon."

What does this statute mean when it says that such a grand juror "cannot be present or take part in the consideration of the charge"? Followed as this is by the words "or the deliberations of the grand jury thereon," it would appear to necessarily include something in addition to the mere discussion after the evidence has been received of the question whether an indictment should be found and the actual taking of a vote on that question. An example of the language deemed necessary by the Legislature where it was intended to confine the prohibition to the taking of the vote is to be found in section 925 of the Penal Code, prescribing the officers who may be present during sessions of the grand jury and the purposes for which they may be present, and explicitly providing that "no person must be permitted to be present during the expression of their opinions, or giving their votes upon any matter before them." Again, it is provided, in section 995 of the Penal Code, as one of the grounds upon which the indictment must be set aside on motion, as follows: "Where a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section nine hundred and twenty-five"—which section, as we have already seen, permits the presence of any other person only during the investigation prior to deliberation and voting, and expressly prohibits the presence of any person during the expression of their opinions by the jurors and the giving of their votes. We are clearly of the opinion that the word "consideration," in section 900 of the Penal Code, means the investigation of the charge. Under this provision the disqualified grand juror has no right as such to be present at or to take any part in the investigation of the charge. His sole function and duty in that regard is that prescribed by section 922 of the Penal Code, viz., "to declare" the fact of an offense of which he has knowledge "to his fellow jurors, who must thereupon investigate the same." In such investigation the disqualified grand juror cannot be present as a member of the jury, and the only capacity in which he can be present, in view of the provisions of section 925 of the Penal Code, is that of witness during the actual taking of his own testimony, if the same be required by his fellow jurors.

We may question the wisdom of some of our statutory provisions relative to grand jurors and the grounds upon which an indictment shall be set aside; but it is our duty to comply with their mandatory requirements. We cannot doubt that this juror, disqualified under the provisions of those statutes to take part in the consideration of the charge against this defendant, did take part in such consideration, and that the trial court but followed the law in sustaining the motion to dismiss. If it had been desired to prosecute this case on its merits, the simple remedy of the district attorney would have been to obtain a direction from the trial court that the case be resubmitted to the same or another grand jury. The defendant could then have been indicted again, or a new prosecution could have been instituted before a committing magistrate. Section 997, Pen. Code.

The order of the superior court is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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13 Cal. App. 133

McGOWAN v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 843.)

(Court of Appeal, Second District, California. April 2, 1910.)

CERTIORARI (§ 15*)—NATURE AND SCOPE OF REMEDY.

Where the superior court arbitrarily dismisses an appeal from a justice of the peace, a writ of review will not be granted, as the erroneous dismissal of an appeal is no more jurisdictional than erroneously deciding the merits of the cause.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 27; Dec. Dig. § 15.*]

Application by John H. McGowan against the Superior Court of the State of California, County of Los Angeles, W. P. James, Judge, and another, for a writ of review. Application for writ denied.

Hanson, Hackler & Heath, for petitioner.

PER CURIAM. Assuming that the matters and facts set forth in the petition disclose arbitrary action on the part of the superior court in dismissing an appeal regularly taken from a justice's court upon questions of both law and fact, and which appeal was then pending in said superior court, by which order it divested itself of jurisdiction and prevented appellant from having a hearing of such cause upon its merits, we are then confronted with the precise question involved in Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8, wherein our Supreme Court has said, referring to the superior court: "It has jurisdiction to hear a motion to dismiss the appeal as fully as it has jurisdiction to hear and determine the cause upon its merits, and to erroneously dismiss the appeal is no more jurisdictional than to erroneously decide the merits of the cause." While we are much impressed with the reasoning employed in the former case of Hall v. Superior Court, 68 Cal. 25, 8 Pac. 509, wherein it is said, "That court [the superior court] can neither give to itself jurisdiction by holding an insufficient undertaking sufficient, nor divest itself of jurisdiction by holding a sufficient bond insufficient," nevertheless, we feel ourselves bound by the subsequent ruling in Buckley v. Superior Court, which, while the opinion of a divided court, has never as yet been directly overruled or modified. Adopting, then, as we feel ourselves bound to do under the circumstances, the rule laid down in the later case, this application must be denied.

Application for writ denied.

18 Cal. App. 152

CHIAFULLO v. SCHWAB. (Civ. 719.)

(Court of Appeal, Third District, California. April 1, 1910.)

APPEAL AND ERROR (§ 786*)—COSTS (§ 260*)—APPEAL FOR DELAY—DISMISSAL.

Where more than 40 days elapsed since the taking of the appeal, and no transcript of appeal was prepared, served, or filed, and no excuse was given for the delay, and appellant failed to appear at the hearing of a motion to dismiss, it would be assumed that the appeal was taken for delay, and it would be dismissed, and damages assessed against appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3128; Dec. Dig. § 786;* Costs, Cent. Dig. §§ 985, 986; Dec. Dig. § 260.*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Frank Chiafullo, by his guardian ad litem, Antonio Chiafullo, against Moses Schwab. From the judgment, defendant appeals. Appeal dismissed.

Brittan & Raish, for appellant. W. H. Carlin, for respondent.

BURNETT, J. This is a motion to dismiss the appeal on the ground "that more than 40 days have elapsed since the taking of said appeal, and no transcript on appeal has been prepared, served, or filed"; and respondent also asks the court to assess damages for the "taking of a vexatious appeal for delay." The notice of appeal was given and filed on January 13, 1910, and an undertaking was filed on the same day. Nothing further seems to have been done in the prosecution of the appeal, and no excuse is offered for the delay. The notice of the motion to dismiss was given on March 6th, and appellant did not appear at the hearing. Under the circumstances, we must assume that the purpose of appellant in taking the appeal was as stated by respondent.

The appeal is therefore dismissed, with damages against appellant assessed at $30.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 115

TROY LAUNDRY MACHINERY CO., Limited, v. DRIVERS' INDEPENDENT LAUNDRY CO. (Civ. 776.)

(Court of Appeal, Second District, California. March 31, 1910.)

APPEAL AND ERROR (§ 771*)—TIME (§ 10*)—POINTS AND AUTHORITIES—TIME TO FILE—COMPUTATION OF TIME.

The transcript on appeal was filed December 6, 1909, and the period of 30 days allowed appellant by Superior Court rule 2, subd. 4 (78 Pac. vii), for filing points and authorities expired on January 5, 1910, but they were not filed within that time. Respondent's attorney, however, died on December 30, 1909, and on February 16, 1910, respondent selected another attorney, and served notice of his appointment and of a motion to dismiss the appeal for failure to file points and authorities within the time allowed. *Held*, that this action rendered it unnecessary for appellant to give the notice to respondent to appoint another attorney or appear in person, prescribed in Code Civ. Proc. § 286, by virtue of which all proceedings were suspended from the death of respondent's attorney till another was appointed or respondent appeared personally, and hence appellant had six days from and after February 16, 1910, within which to file points and authorities, and this period expiring on February 22d, which, being a holiday, should be excluded in the computation, the time was extended to February 23, 1910, on which date they were filed in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3105; Dec. Dig. § 771;* Time, Cent. Dig. § 48; Dec. Dig § 10.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Troy Laundry Machinery Company, Limited, against the Drivers' Independent Laundry Company. From a judgment for defendant, plaintiff appealed, and defendant moves to dimiss the appeal. Motion denied.

D. Z. Gardiner and Millsap & Sparks, for appellant. Horace S. Wilson and Constan Jensen, for respondent.

SHAW, J. Motion to dismiss appeal from judgment upon the ground that appellant failed to file its points and authorities within the time prescribed by the rules of this court. Subdivision 4, rule 2 (78 Pac. vii).

The transcript was filed December 6, 1909, and the period of 30 days allowed to appellant for filing its points and authorities expired on January 5, 1910. The points and authorities, however, were not filed until February 23, 1910. The reason for the delay, as appears from appellant's affidavit filed in opposition to the motion, was that respondent's attorney died on December 30, 1909, at which time appellant had 6 days within which to file its points and authorities. Upon the death of an attorney all further proceedings against the party for whom he was acting as attorney are stayed until such time (unless he of his own motion appoint another attorney) as the adverse party shall by written notice require him to appoint another attorney or appear in person. Section 286, Code Civ. Proc. By virtue of the provisions of this section all proceedings in the prosecution of the appeal were suspended from the date when respondent's attorney died until such time as respondent voluntarily, or in response to proceedings instituted by the adverse party, as provided by said section 286, appointed another attorney or appeared personally. On February 16, 1910, respondent selected another attorney, notice of the appointment of whom was on the same day, together with a motion to dismiss the appeal, served upon appellant. This action on the part of respondent in appointing an attorney rendered it unnecessary for appellant to give the notice prescribed in section 286, supra. Nicol v. San Francisco, 130 Cal. 288, 62 Pac. 513. Appellant, therefore, had 6 days remaining from and after February 16, 1910, within which to file its points and authorities. This period expired on February 22d, which, being a holiday (section 10, Code Civ. Proc.), should be excluded in the computation (section 12, Code Civ. Proc.), thus extending the time to February 23, 1910, on which date the points and authorities were filed. Under the circumstances of this case they were filed in time.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The motion to dismiss is denied.

We concur: ALLEN, P. J.; TAGGART, J.

13 Cal. App. 92

In re KEARNEY'S ESTATE. (Civ. 768.)

(Court of Appeal, First District, California. March 28, 1910.)

1. APPEAL AND ERROR (§ 907*)—REVIEW—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTIONS.

In case of appeal on the judgment roll without a bill of exceptions, all presumptions are in favor of the regularity of the judgment of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

2. APPEAL AND ERROR (§ 904*)—REVIEW—RECORD—PRESUMPTIONS.

It will be presumed on appeal from a decree of distribution of an estate that the executor was personally notified of the application therefor, where the decree recites his appearance by attorney at the hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3671; Dec. Dig. § 904.]

3. EVIDENCE (§ 43*)—JUDICIAL NOTICE.

At the hearing of a petition for partial distribution of an estate, the court need not take judicial notice of another petition on file, and continue the hearing, so both can be heard at the same time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 63; Dec. Dig. § 43.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

In the matter of the estate of M. Theodore Kearney, deceased. From a decree of partial distribution to the Regents of the University of California, Margaret Zeeder appeals. Affirmed.

W. M. Cannon, for appellant. F. A. Cutler, for respondent Regents of University. Morrison, Cope & Brobeck, for respondent Mercantile Trust Co.

COOPER, P. J. This appeal is from a decree of partial distribution, and is brought here on what is termed the judgment roll without a bill of exceptions. In such case all presumptions are in favor of the regularity of the judgment and decree of the trial court.

The record contains the will of deceased filed in the clerk's office in May, 1906. By its provisions the entire estate is left to the Regents of the University of California, a corporation. It is further provided therein that the deceased did not desire that any portion of his estate should go to his heirs if any heirs should survive him; and that in case, by reason of the provisions of section 1313 of the Civil Code or otherwise, all of his property could not be distributed to the Regents of the University, then all such residue to be given to W. H. Crocker and other parties named in the will, and appellant was not one of such parties. In November, 1906, the petition for partial distribution to the said Regents of the University was filed. An order was duly made, designating a time and place for hearing said petition, and the clerk of the court gave notice to all persons interested to appear at said time and place so designated and show cause, if any they had, why such decree should not be made. The time designated in the notice was December 10, 1906, and the notice was posted in three of the most public places in the county at least 10 days before the time so set for hearing.

The next information given by the record is as to the filing of a petition for partial distribution to herself by the appellant on the 18th day of March, 1909, in which it is alleged that she is the assignee of one Dennis Kearney, and that said Dennis Kearney was the sole surviving heir at law of said M. Theodore Kearney, deceased. The court thereupon, on the filing of such petition by appellant, made an order, fixing the 26th day of March, 1909, as the time for hearing appellant's petition for partial distribution which order directed notice of the time and place to be personally served upon the Mercantile Trust Company, the executor of the will of deceased. On the 19th day of March, 1909, the court made the decree of partial distribution herein appealed from, by which it distributed the greater portion of the said estate to the Regents of the University of California in accordance with the will. This decree recites, and finds, that no one appeared or opposed the petition for such distribution; that the

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deceased left no legal heirs surviving him; that the Regents of the University of California, a corporation, is the sole devisee. The record not only fails to show that any objection of any kind was made by the appellant to the petition of the Regents of the University, but it does not show that notice of the petition filed by appellant was personally served upon the executor of the will of deceased or upon the Regents of the University, or that they or either of them had any notice of it at the time the petition of the Regents of the University came on for hearing. It is shown that the notice of appellant's petition for partial distribution was personally served on the executor on the 19th day of March, 1909, but such fact is perfectly consistent with the fact that such service was made after the decree complained of had been made and signed. In fact, it is perfectly consistent with the record here that the petition of appellant had been withdrawn at the time of the decree to the Regents of the University so made. There is nothing to show what the evidence was on the hearing of the petition, or that appellant had any interest in the estate, or that her assignor was an heir at law of the deceased. It is claimed that notice of the application for partial distribution was not given personally to the executor. It is sufficient that the decree recites that the executor appeared at the hearing by its attorney. We must presume that it was personally served, and whether it was or not the appearance by its attorney is conclusive as to the executor having received notice. Estate of Johnson, 45 Cal. 257; Abila v. Padilla, 14 Cal. 103.

It is next claimed that, the petition of appellant being on file at the time the petition of the Regents of the University came on for hearing, it was the duty of the court to take judicial notice of such petition, and to continue the hearing so that both petitions could be heard at the same time. We are cited to no authority supporting such proposition, and we do not know of any, nor in our opinion was it the duty of the trial judge to act as attorney for the appellant or for either of the parties. The appellant had notice of the application made by the Regents of the University, and had not appeared or filed any answer or objections to such petition.

We must therefore affirm the decree, and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

13 Cal. App. 136

REED v. HICKEY et al. (Civ. 683.)

(Court of Appeal, Third District, California. April 1, 1910.)

1. Mines and Minerals (§ 53*)—Sale or Option—Contract.

A contract reciting plaintiff's ownership of a mine, and that defendants are desirous of an option to purchase it for the agreed purchase price of $36,000, based on the privilege of 60 days from date in which to prospect by sinking a shaft at a certain point, providing that, in consideration of the performance of the terms of the contract by defendants, plaintiff covenants and agrees to sell and convey the mine to defendants, at any time within said 60 days, on payments and conditions as follows: The payments provided being $10,000 on or before 60 days after date, and other payments to make up the price within the year following; providing that all pay gravel taken out by defendants during said 60 days' option shall belong to plaintiff; that improvements placed on the premises by defendants during said 60 days for prospecting shall belong to plaintiff on failure of defendants to make the first payment provided for; that on payment of the first installment within said 60 days plaintiff will execute and deposit a deed in escrow, to be delivered on payment of the balance of the purchase money, but to be returned to plaintiff in case of default in any of the payments or violation of the terms or conditions of the agreement; that on receipt of the first payment plaintiff will turn over to defendants the property and all apparatus owned and used by him in working the mine, and thereupon defendants shall have the right of mining the property for their own benefit; and that a default in payment of an installment at the stipulated time, or a default in other matters stipulated to be done by defendants, shall at once abrogate the agreement, and its provisions shall no longer bind plaintiff, and he may re-enter and assume possession of the mining property and all improvements made or placed thereon by defendants, and the same and all payments on account of purchase price shall be forfeited to plaintiff as liquidated damages for use and occupation of the property—is not a continuing option, renewed as each payment is made and continuing until the next payment, but on the first payment being made it becomes a contract of sale.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.*]

2. Vendor and Purchaser (§ 23*)—Contracts—Signing by One Party—Entry and Payments by Other Party.

Though a contract, constituting an agreement by plaintiff to sell land to defendants, is signed only by plaintiff, defendants by going into possession of the property, and making payments under the contract, accept its terms, and become bound by it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 28; Dec. Dig. § 23.*]

3. Contracts (§ 10*)—Mutuality.

Though the vendees by their breach of the contract of sale deprive themselves of the right to specific performance, mutuality of the contract is not thereby destroyed, so as to take from the vendor the right to recover the unpaid amounts due under the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–23; Dec. Dig. § 10.*]

4. Vendor and Purchaser (§ 302*)—Contracts—Remedy for Default in Payment.

A contract of sale of land providing that default in payment of an installment shall abrogate it, and the vendor may re-enter and assume possession, and all improvements put on the property by the vendees, and all payments on account of purchase price, shall be forfeited to the vendor as liquidated damages for use and occupation of the property, does not limit the vendor to his right of repossessing himself of the property, but he may recover the unpaid installments.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 845, 850; Dec. Dig. § 302.*]

Appeal from Superior Court, Calaveras County; N. D. Arnot, Judge.

Action by Ira Hill Reed against John J. Hickey and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Solinsky & Wehe and John Hancock, for appellants. Nicol & Orr, Snyder & Snyder, and Ira Hill Reed, for respondent.

CHIPMAN, P. J. This is an action to recover the balance of the consideration mentioned in a certain contract for the sale of certain placer mining property situated in Calaveras county. Plaintiff had judgment, from which and from the order denying their motion for a new trial defendants appeal. The question now here rests chiefly upon the interpretation to be given to the agreement in the light of the circumstances surrounding the parties and their conduct and acts at the execution of the agreement and subsequent thereto.

It is set forth in the complaint that on April 29, 1907, and for many years prior thereto, plaintiff was the owner of the property in question, called the "Reed Drift Mine"; that on that day one J. E. King was and had been the agent of defendants in negotiating for a contract for the sale and purchase of said mine, and upon that day plaintiff entered into an agreement in writing with said King, for said defendants, the material provisions of which are as follows: Reciting the fact of plaintiff's ownership and setting forth a description of the mine, the contract recites that second party "is desirous of an option to purchase said property for the agreed purchase price of $36,000, based upon the privilege of sixty days from date in which to prospect by sinking a shaft from the surface and drifting therefrom to ascertain the course and extent of the lead on which said party of the first part is now breasting and milling the gravel taken out." It is then provided that in consideration of the faithful performance of the terms of the contract by the second party, as thereinafter set forth, first party "covenants and agrees to sell and convey the said Reed mine to said party of the second part, at any time within said sixty days from the date of these presents, upon payments and conditions as follows." These conditions provide for a payment of $10,000 on or before June 29, 1907; $6,500 to be paid on or before September 29, 1907; $6,500 on or before December 29, 1907; $6,500 on or before March 29, 1908; the full and final payment of $6,500 to be paid on or before June 29, 1908. The contract then fixes the point upon the mine at which the prospecting shaft is to be sunk, and provides that "until the expiration of the sixty days' option hereby granted the right to continue the uninterrupted working and operating of said mine by said party of the first part and to the proceeds of the gravel taken out is agreed to and that the said privilege of prospecting by said party of the second part shall in no manner interrupt or interfere with the working of said mine by said party of the first part"; and "all pay gravel taken out by the party of the second part while prospecting during the said period of sixty days shall belong to said party of the first part"; that all buildings, improvements, and appliances placed upon the premises by second party "during said period of sixty days granted for prospecting" are to belong to said first party upon failure of second party to make the first payment provided for. It is then provided that upon payment of the first installment within said period of 60 days from date first party will at once make and execute a good and sufficient conveyance of said mine, and deposit the same in escrow with the Bank of California, with instructions to hold the same during the life of the said agreement, and deliver the same upon "payment of the balance of said purchase price at the times as herein stipulated, but if default be made in making any of said payments or any violation of the terms or conditions of this agreement to return said deed to the party of the first part." It was further agreed that upon receipt of the first payment party of the first part "will at once turn over and surrender possession of said property to said party of the second part with the hoist, mill, and all tools and appliances owned by him and heretofore used in working said mine; * * * and thereupon said party of the second part shall have the right and privilege of entering upon and into said Reed mine and of mining, prospecting and developing the same, and of taking out and working the gravel or any other mineral deposit, and extracting the gold contained therein for his own use and benefit." It is next provided that second party shall do the prospect work in a good and workmanlike manner at his own cost and expense, and contains certain provisions for protecting first party against liens or unpaid labor and materials. The contract also gives to the first party the privilege of access to the mine and mill in order that he may know the character of the work being done and the extent of the pay gravel extracted. Time is expressly made the essence of the agreement and it is provided "that a default in payment of either or any of the installments of said purchase price at the times and in the manner stated, or the failure to make monthly payments of the operating expenses in working said mine or to file with the party of the first part, on the tenth day of each month a statement of such running expenses with vouchers, within a reasonable time thereafter, showing the payment thereof, shall at once abrogate this agreement and its provisions shall no longer bind the party of the first part and he may at once re-enter and assume possession and control of the whole of said described mining property, together with any and all machinery, buildings, tools, lumber, material, appliances and improvements either made or placed thereon by said party of the second part and the same, together with all payments of money on account of said purchase price, shall be forfeited to said party of the first part as liquidated damages for the use and occupation of said property, * * * and all such machinery, buildings, tools, lumber, materials, appliances, and improvements, together with any and all such payments made of said purchase price, shall revert to and belong to said party of the first part without legal recourse by said party of the second part."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is averred that said King entered into said contract with plaintiff as the representative of defendants and for them and as their agent, and he, said King, immediately after the execution of said contract, assigned and transferred all right therein and interest thereto to said defendants Hickey and Lamb; and they, said defendants Hickey and Lamb, thereupon entered into and upon said mine and commenced prospecting therein; that on May 18, 1907, defendants notified plaintiff of their exercise of the option to purchase said mine at the price of $36,000, payable to plaintiff in installments, at the times and in the amounts as in the said agreement specified, and on that day paid to plaintiff on account of said purchase price the sum of $10,000, and then demanded that plaintiff at once make and execute to them a deed of the said mine and deposit the same with the Bank of California, with instructions to hold said deed during the life of the agreement and to deliver the same to the defendants upon the payment made at said bank of the balance of said purchase price; that on said day, in response to said demand of defendants and in compliance with said agreement, plaintiff did make, execute and duly acknowledge a good and sufficient deed of said mine to defendants and deposit said deed with said bank with instructions to deliver the same to defendants upon the payment of the balance of said purchase price, as provided in said agreement, and said deed has ever since been and is now in and held by said bank under said instructions, ready for delivery to defendants upon the payment of the remainder of said purchase price; that upon said day plaintiff and defendants entered into an agreement in writing supplementary to the agreement hereinbefore set forth, by which it was agreed that plaintiff should remove all incumbrances upon said mine on or before September 29, 1907, and that if all such incumbrances were not so removed the defendants should not be obligated to pay the second installment or any other installments until the title to said mine was clear of incumbrances, and it is averred that plaintiff did, prior to September 29th, cause to be removed from said premises all incumbrances and the title thereto was on that day and ever since has been and still is clear of all incumbrances. It is next averred that on May 18, 1907, defendants entered into full and sole possession of all of said mine, and commenced active mining operations therein, and so continued in the possession and the mining thereof, and during such mining operations extracted gold-bearing deposits therefrom of the value of upwards of $40,000, all of which defendants appropriated to their own use, and that upon August 29, 1907, defendants paid to plaintiff, upon said purchase price of said mine, the further sum of $6,500, and that no other payments on account of said purchase price have been made and there is unpaid the sum of $19,500. All the foregoing averments of the complaint are found by the court to be true, except it is found that the amount of gold extracted from the mine by defendants was $33,540.55, and in that connection the court found that defendants had expended the sum of $23,069.45. The date of the second payment is found to have been September 29th instead of August 29th, as averred and as provided by the said agreement.

It was further alleged and found by the court that defendants promised and agreed to pay plaintiff the said purchase price in installments of the amounts and at the times specified in said agreement of April 29, 1907; that subsequent to said date, at the request of defendants, plaintiff in writing extended the time for the payment of the third installment from December 29, 1907, to January 28, 1908, but defendants failed and refused to pay said sum on or before said January 28th, and have since refused to pay said sum or any part thereof. That defendants continued in sole possession of the mine and extracting gold-bearing deposits therefrom until January 28, 1908, at which date they suspended mining operations and notified plaintiff that they refused to pay said sum of $6,500, payable, as aforesaid, on January 28th, and refused to proceed with said agreement or to keep or perform its terms or to make plaintiff any further payments on account of the unpaid purchase price of said mining claim; that on said 28th day of January defendants suspended work, and attempted to surrender possession of the mining claim to plaintiff, claiming that they were relieved from any further payments on account of the purchase price agreed to be paid for said mine, but plaintiff refused to accept surrender of said mining property, and demanded that the defendants keep and perform their said agreement for the purchase of the said mine and to pay plaintiff the remaining portion of said purchase price, to wit, the sum of $19,500, which said sum or any part thereof defendants refused to pay; that plaintiff has fully kept and performed all the conditions of the agreement on his part, and, ever since the making of said agreement, has been able, ready, and willing, and is now ready, able, and willing, to cause delivery of said deed to be made to said defendants upon the payment to him of the purchase price of said mining property. It was also alleged in the complaint and found by the court that the said mine is a gravel mine operating through shafts, drifts, and tunnels run from the surface, and to prevent injury thereto it is necessary that the same be drained and kept drained, the tunnels and drifts to be timbered and kept timbered and in proper repair, and the mine drained and kept free from water, and that unless such care is given the said mine it will be destroyed, and great and irreparable injury and damages will be done thereto. The complaint also alleges that plaintiff has a lien upon the said property and the right to resort to the same in satisfaction of his said claims, and also avers that in order to preserve the said property a receiver should be appointed to take charge thereof. The court makes no findings upon these averments, and they seem not to have formed an issue in the case and need not be further noticed.

A general and special demurrer to the complaint was overruled, and defendants filed an amended answer denying many of the averments of the complaint, but admitting the execution by said King of the contract set forth in the complaint and its assignment to defendants; they aver that they took no part in the negotiations relating to the contract of purchase, and took possession only as the assignee of said King, "and with the understanding that the same was a bare option giving them the right to purchase the said property upon the payment of the purchase price as mentioned therein, and subject only to the condition that if the purchase price was not paid as therein provided that they should have to surrender the possession of the said property and forfeit all rights thereto and all payments theretofore made; and that they never, at any time, promised to pay any part of said purchase price or to become indebted to said plaintiff in any sum of money whatever." They also allege that they were led to believe by plaintiff himself that said contract was a mere option and contained no personal obligation to pay any part of said purchase price except as a condition of the getting of a deed, and then only at the option of the holder, and that plaintiff has always treated the same as a mere option. They deny that the said King entered into said contract as the representative of said defendants or either of them. They deny that they notified plaintiff of their exercise of the option to purchase said mine, and allege that they merely took possession of said property under the assignment of said contract and paid the sum of $10,000 in accordance with its terms. The court found the foregoing averments of the answer to be untrue. The answer sets forth the escrow agreement, and avers that the deed therein referred to was not to be regarded as the deed of plaintiff and was not to be delivered to defendants "unless they should exercise their option to pay the balance of said purchase price, and that said deed never was made or executed to these defendants, or either of them, and that it was always understood that the forfeiture provided in said contract was the only recourse which said plaintiff should have against these defendants, or either of them"; and upon this construction of the escrow agreement it is denied that plaintiff, in compliance with the demand of defendants, or either of them, executed the deed referred to in the complaint. This escrow agreement is dated May 18, 1907, executed by plaintiff, and recites the delivery to the bank of a grant, bargain, and sale deed by plaintiff and his wife to defendants, conveying certain property and mining claims therein described, and directing the bank to hold the deed in escrow under instructions calling for all of the various payments, excepting the first installment, at the dates as mentioned in said contract of purchase and sale, and, upon payment of the same, "You will deliver the said inclosed deed to said John J. Hickey and Charley Lamb or their assigns, upon their order." It recites also that these instructions were given pursuant to an agreement entered into between the plaintiff and King on April 29, 1907, which was thereafter assigned to defendants, and also in pursuance to the terms of a supplemental agreement of May 18th between plaintiff and defendants in which it is recited that plaintiff has covenanted to convey good title to said properties, and to have an abstract of title prepared by a law firm named on or before September 29, 1907; and it is provided that "if said abstractors should certify that the title to said property is clear in all respects and on or before the said 29th day of September, 1907, the said sum of $6,500 is not paid to my account, or if any of the other installments are not paid as hereinbefore provided, the said inclosed deed is to be redelivered to me at my request; if, however, said abstractors certify that the title to said property is not clear then said deed is to remain with your institution until a further order is made upon you, signed jointly by myself and John J. Hickey and Charley Lamb or their assigns." The court found against the defendants upon their averments as to the execution of the deed and the conditions upon which it was executed, as defendants alleged to have understood it, and found the escrow instructions to be as set forth above.

The answer denies that the supplementary agreement of May 18, 1907, was as set forth in the complaint, and avers that such supplementary agreement was entered into by plaintiff and defendant Hickey, and it is set forth in the answer. It recites the contract between plaintiff and said King; that King has assigned his right and interest therein to the party of the second part (John J. Hickey); that party of the second part has this day paid to the first party the sum of $10,000 in accordance with the terms and conditions of said agreement, and states that, "Whereas, the said party of the second part is desirous that all incumbrance of all kinds whatsoever shall be removed from the property and premises particularly described in the said agreement: Now, therefore, in consideration of the premises and of the payment of the sum of $10,000 as hereinbefore provided, the said party of the first part agrees to remove all of said incumbrances against the said Reed Drift mine in said annexed agreement particularly described, on or before the 29th day of September, 1907, the date of the payment of the second installment of said purchase price, and in the event that all of said incumbrances are not removed on or before the 29th day of September, 1907, then the said party of the second part hereto shall not be obligated to pay the said second installment on said date and shall not be required to pay said second installment or any future installment of said purchase price until the title to said herein described property and premises is absolutely clear of all incumbrances whatsoever." It is then averred in the answer that at the time of the execution of this supplementary agreement the plaintiff stated "that he would remove the incumbrances so that in case that said defendants exercised the option of making any future payment the property would be free and clear from such incumbrances, and promised that the option for making any future payments would be extended until such time as such incumbrances were removed, and to put the matter beyond question promised to put the same in writing, whereupon the said instrument was executed, and at the time that it was executed it was understood between all parties thereto that the same was not to add any condition whatever to the said original contract of said 29th day of April, 1907, set out in said complaint, but was merely to be an extension of the time within which said defendants might exercise the option to make any future payments, and in so far as the said instrument as written includes any further promise or condition, if it be construed to contain such, it was entered into by mutual mistake of said parties thereto, and was not intended to be such, and it was so understood by said plaintiff and said defendants, and it was never understood by any of the parties to said agreements that any of said payments should be binding upon said defendants or either of them, but that each payment was to be made or not at their option, and that said instrument last mentioned and said contract set out in said complaint were not intended to be a contract of purchase at all but merely an option, as aforesaid, and that said plaintiff during all of the negotiations pending the execution of said instruments led defendants and each of them to believe that the same was an option."

The finding of the court is squarely against the aforesaid averments as to the supplemental agreement and as to the understanding between the parties, and the court finds that there was no mutual or other mistake made by the parties in reference to said supplemental contract.

It is also averred in the answer that plaintiff was a lawyer, and defendants relied upon his knowledge of said matters and upon his said representations in respect to the construction to be placed upon said instruments and each of them. The court found that plaintiff was a lawyer but that it was not true as to the other of these averments.

The findings of the court have support in the evidence, from which it appeared: That said King was known by plaintiff and defendants to be a mining promoter, and that in obtaining the contract in question he was acting for defendants, who were partners in the enterprise, each acting for both, and was in fact to receive compensation for his services from both plaintiff and defendants. On April 21, 1907, King first spoke to plaintiff about having defendants in view as possible purchasers of the property, if sufficient time was given to prospect it, and plaintiff then gave King a written memorandum in which he stated: "If on next Friday, April 26, 1907, Joseph King, with a Mr. Lamb, will visit the Reed mine, that I will agree to sell the latter the said property at the agreed price of $36,000, and this offer to hold good for ten days after said Lamb appears upon the ground,"—to which was attached a further memorandum to the effect that if King effected a sale he would be "entitled to a commission of ten per cent. pro rata on payments of said purchase price as made." Some time before this King had met defendant Lamb at Stockton, and informed him of the property, and that plaintiff would give a 60-day option for prospecting. Lamb said he would see his partner (admittedly defendant Hickey), and a short time thereafter and prior to April 29, 1907, both defendants visited the mine and commenced prospecting. King and defendant had an understanding prior to the making of the contract of April 29th, as to its disposition when made, and King's compensation by defendants for obtaining it was agreed to, and was later reduced to writing, by which they were to pay him 5 per cent. on the purchase price of $36,000. It appeared that the day following the execution of the contract defendant Hickey made objection to certain words relating to the removal of machinery put upon the property by defendants, and they were erased. From the time defendants went upon the property, prior to April 29 and until May 18, 1907, they continued to investigate and prospect the mine at their own expense. During this time plaintiff was working the mine and had developed better paying gravel and was taking out from $1,000 to $2,000 per week which was known to defendants. Without waiting the 60 days given in the contract for prospecting the mine defendants informed plaintiff, on May 18th, that they held the contract and were "ready to do business." Hickey and King met at the office of defendants' attorney, Hancock, on May 18th, and plaintiff was present. Plaintiff testified that Hickey and Hancock said "they were ready to buy the mine—make the purchase. Mr. Hancock requested me to sign a deed. Mr. Hancock said the parties—that Mr. Hickey, before they would accept it, would expect a good title to the mine, and that he wanted time to prepare it, and that he would arrange it." The mine was incumbered at the time and defendants wanted the title cleared on or before the next payment. Mr. Hancock prepared the deed, the so-called supplementary agreement of May 18th to clear the property of debt and also the escrow instructions mentioned in the pleadings and plaintiff executed the documents as agreed upon, and he subsequently paid off the incumbrances and cleared up the title and deposited the abstract in the Bank of California, as required of him, showing the title to be clear. On May 18th, when the matters just mentioned were concluded, defendants paid the first installment of $10,000; plaintiff cleaned up his mill and workings, and surrendered full possession to defendants, who commenced at once mining operations at the point where plaintiff had been working, and, as shown by their books, defendant took out of the mine the sum found by the court ($33,540.55) and appropriated it to their own use; they continued working the mine, and on September 28, 1907, paid the second installment of the purchase price. The third installment fell due December 29, 1907, but at defendants' request an extension of the time in which to make this payment was given them and plaintiff and defendants entered into a written agreement extending the time to January 28, 1908, changing the paragraph of the original contract to read: "Third. Six thousand five hundred (6,500) dollars to be paid on or before the 28th day of January, 1908." On January 28, 1908, defendants notified plaintiff in writing in which they said: "We hereby give you notice that on this 28th day of December, 1907, we surrender and give up and do hereby deliver to you possession of your property," etc. Plaintiff replied, refusing to accept the surrender of the property and demanding payment of the unpaid amounts due. So far as appears, defendants at no time until January 28, 1908, claimed that they were holding the property under a mere option to purchase.

Respondent claims that the contract of April 29th was one of sale and purchase, and while it gave defendants an option for a definite time and specific purpose, to wit, 60 days in which to prospect and determine whether they would purchase, that upon the acceptance of the offer of sale thereby made to defendants, the payment by them of the first installment of the purchase price, entry into possession of the property after demand for the execution and delivery in escrow of a good and sufficient deed, it ceased to be a mere option, and became and continued to be a valid binding contract, obligatory according to its terms, upon both parties thereto, and that plaintiff, having fully performed on his part, has his action for the unpaid purchase price of his property. The judgment of the court was that plaintiff recover from defendants the sum of $19,500 and costs of suit, and that on payment thereof to plaintiff "defendants shall be entitled to have and receive from the Bank of California the deed placed with said bank in escrow by plaintiff as in the findings herein set forth." It seems to us free from doubt that the findings and judgment are fully sustained by the evidence and that respondent's view of the contract is correct.

Appellants contend that the contract was a continuing option which was renewed as each payment was made, and continued until the next payment. We cannot agree to this interpretation of the contract. By its terms the option was limited to 60 days, during which time the vendees had the right only to prospect the mine at a particular point, but any gold taken out was to belong to the vendor. When, however, the vendees became satisfied, as they appear to have been from the results of the vendor's working of the mine during the continuance of the option period, that they preferred to work the mine for profit rather than be confined to prospecting it, they changed their attitude as prospectors and became operators and workers of the mine; they ceased prospecting at the point designated; announced their intention to purchase; paid the first installment a month before it was due, after requiring the vendor to cease mining and to surrender full possession to them with the privilege of retaining all the gold mined by them; and the evidence is that $20,000 was taken out up to the time the second payment became due. It is unreasonable to suppose that the vendor intended, when he surrendered possession to the vendees, to permit them to appropriate all the gold they might mine, and yet not be obligated to make the payments agreed to be made. Under such a construction of the contract, the supplementary agreement, and the instructions as to the escrow, the vendees could have decided on September 28th not to take the mine, and without making the second payment could have retained the $20,000 taken out. We do not think that the contract compels or would reasonably warrant such a construction. The so-called supplemental agreement refers to the payments as to be made upon the "purchase price," and it provided that if the vendor failed to remove the incumbrances by a stated time the vendees should "not be obliged to pay the said second installment * * * or any future installment of said purchase price until the title to said described property and premises is absolutely clear of all incumbrances whatsoever." The implication here is very strong that the vendees would be and were obligated to pay the installments as they became due if the title was made clear. And they so acted when the second installment fell due. Of course, the vendor could have made the improvident contract contended for by the vendees, but we do not think he so intended or that the contract made by him can reasonably be so construed. The "agreed purchase price" was expressly mentioned as $36,000, based upon a 60-day option in which to prospect the mine, and the agreement was "to sell and convey the said Reed mine to second party, at any time within sixty days * * * upon payments and conditions as follows." Nowhere in these conditions is any mention of an option, but throughout the contract the payments to be made are upon the "purchase price." Before the 60 days expired the vendees availed themselves of the right to purchase, and there is nothing in the record to show that they did so merely as optionees with a continuing right to buy or not to buy as they might elect. Their entire conduct, as well as that of the vendor, shows that they were acting as purchasers.

Appellants speak of the contract as unilateral and for that reason not binding upon them to purchase. It does not follow that because plaintiff alone executed the contract it is not binding upon defendants. If the contract was an agreement to sell and not a mere option, as we think is true, and defendants went into possession and made payments under it, such acts were a sufficient acceptance of its terms, and defendants became bound by it. Benson v. Shotwell, 87 Cal. 49, 53, 25 Pac. 249. Besides, defendants signed the so-called supplemental agreement; i. e., defendant Hickey signed it for defendants, which evidenced a further acceptance of the contract of April 29th. Appellants cite Gordon v. Swan, 43 Cal. 564, as decisive of their contention. We do not so understand that case. The contract there was for the sale of the entire stock of a corporation to defendants. The contract recited that the corporation was the owner of a vein of copper ore; that the first parties were desirous of selling their respective shares; that the parties of the second part (defendants) were "desirous of making improvements on the said mine, and erecting smelting works for the purpose of reducing the ores of said mine, and of eventually making a purchase of the shares of stock of the parties of the first part and of the mine, if the tests which they shall cause to be made prove satisfactory." The purchasers were to pay $50,000 at the end of six months from the date of the agreement and possession given, and similarly two further payments of $50,000 at intervals of six months, failing in which they were to forfeit their improvements made in and about the mine, and thereupon first parties were to take peaceable possession. The court said: "It cannot be claimed that it was the true import of the contract that this large sum of money was to be paid for a brief possession of the mine, or for the privilege of erecting furnaces and testing the value of the ore. * * * It seems to be clear, from the terms of the instrument, that the purchase should be at defendants' option. It recites that the defendants are desirous 'of eventually making a purchase of the shares of stock * * * and of the mine, *if the tests which they shall cause to be made prove satisfactory.*'" In that case the defendants had a comparatively brief time in which to make a large outlay of money for the purpose of testing the mine, and their only right was to go into possession for that purpose. It was not possible in this character of mine to do this at a profit or to work the mine for profit. Had they made their test and at the end of six months informed the vendors of their intention to purchase and had paid the first installment of $50,000, we would have had a case somewhat similar to the present one and the conclusion of the court might have been different.

Some suggestion is made by defendants that because of their breach of the contract they could not have enforced its specific performance and hence its mutuality was destroyed. We see no merit in this contention. Mutuality of contract does not require the same remedies under it. Defendants could not by their depriving themselves of the right to specific performance take from plaintiff his right to recover the unpaid amounts due under the contract. Where both are bound by the agreement either may pursue such remedies for its enforcement as are open to him and these need not be identical. Nor was plaintiff confined to his remedy of repossessing himself of his mine upon defendants' breach, and after defendants may have extracted a large quantity of gold from it to its possible exhaustion. Wilcoxon v. Stitt, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310; Brickell v. Atlas Insurance Co., 10 Cal. App. 17, 101 Pac. 16.

Some alleged errors of law are called to our attention, but defendants say in their brief that "a decision on them favorable to appellants would be of but little avail should the court hold against appellants as to the construction of the agreement, for if it is held that the contract evidenced a promise to pay the balance of $19,500, such decision will end the case." For this reason "appellants do not seriously urge the objections."

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

157 Cal. 686

DANIELSON v. SYKES. (L. A. 2,413.)

(Supreme Court of California. May 11, 1910.)

1. Easements (§ 17*)—Implication—Sale of Platted Land.

Where a tract is laid out into lots and streets, and lots are sold by reference to a map, the purchaser has a private easement in the streets opposite his lots, independent of their dedication to public use, and such easement is not confined to the street upon which the lot abuts and those leading therefrom to a public highway or place, so that where a private alley, shown on the plat, lay directly opposite plaintiff's lot on the opposite side of the street and led to a railroad right of way, and toward a beach, and had been used by plaintiff and others as a footpath, the alley was appurtenant to plaintiff's lot, and he could enjoin its obstruction, though it may never be used as a public way to the railroad depot.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 47; Dec. Dig. § 17.*]

2. Easements (§ 17*)—Private Way—Implication.

Where streets are laid out on the ground, but no map is made, and lots are sold upon representation that such streets exist, the purchaser's easement in the streets rests on equitable estoppel, not being based upon the grant, as where lots are sold with reference to a map.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 47; Dec. Dig. § 17.*]

3. Easements (§ 61*)—Obstruction—Injunction.

If an obstruction to a private easement is continuous, exclusive, and under a claim of right so that the easement will finally be destroyed by adverse possession, the obstruction will be enjoined, though it has caused no substantial damage.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 134, 135; Dec. Dig. § 61.*]

4. Easements (§ 61*)—Obstruction—Injunction—Grounds of Relief—Inadequacy of Legal Remedy.

Where trespasses upon a private easement are continuous so that the current damage is small, equity will enjoin such trespasses on the ground that the legal remedy for damages is inadequate.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 137; Dec. Dig. § 61.*]

Department 1. Appeal from Superior Court, Santa Barbara County; James W. Taggart, Judge.

Action by Hattie C. Danielson against Richard Sykes. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Reversed.

Canfield & Starbuck, for appellant. Richards & Carrier, for respondent.

SHAW, J. The plaintiff sued to enjoin the defendant from obstructing an alleged street or way, which she claims is appurtenant to her lands. Issues were joined, there was a trial by the court, and the injunction was refused. From the judgment and from an order denying a new trial, the plaintiff appeals.

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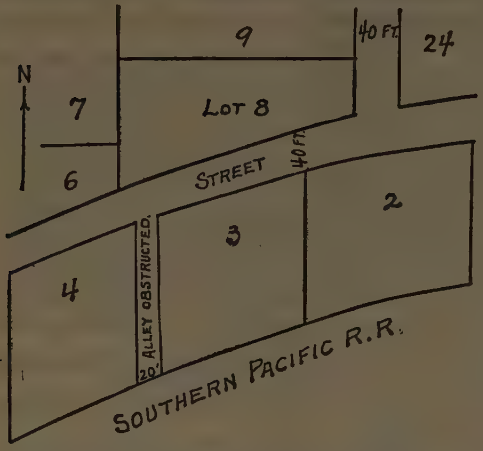
*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

The plaintiff is the owner of lot 8 in a subdivision of land into lots and streets. Its situation with reference to the way in question, the streets, and the adjoining lots is shown by the following diagram:



The tract, comprising about 16 acres, was subdivided in 1893, and the lots were sold by the owner thereof to divers persons who have erected dwelling houses thereon. It constitutes a part of the seaside resort known as "Miramar" in Santa Barbara county. The plaintiff is in possession of lots 8 and 9, and occupies a house on lot 9, the two lots being used in connection with the house as a place of residence. The alley in question lies between lots 3 and 4 and is directly opposite to lot 8. It extends south to the south line of the tract, leading from the street in front of lot 8 to the track and right of way of the Southern Pacific railroad, not far from Miramar station. The defendant obtained from the successor of the original owner of the tract a conveyance of lot 4 and also of the ground included in the adjoining alley. Thereupon he built a fence across the northern end of the alley where it enters the street and has ever since maintained the fence and occupied the alley as a part of his premises, completely preventing the use of the alley by plaintiff or others as a way. The plaintiff began this action to enjoin the continuance of the obstruction. The findings state the facts aforesaid, but further state that the alley was of no use or benefit to the plaintiff, that its closing caused plaintiff no damage, and, hence, that she was not entitled to an injunction.

It is a thoroughly established proposition in this state that, when one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested except by due process of law. Kittle v. Pfeiffer, 22 Cal. 490; Petitpierre v. Maguire, 155 Cal. 250, 100 Pac. 690; Prescott v. Edwards, 117 Cal. 304, 49 Pac. 178, 59 Am. St. Rep. 186; Schaufele v. Doyle, 86 Cal. 109, 24 Pac. 834; Eachus v. Los Angeles, etc., Co., 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149; Cushing-Wetmore Co. v. Gray, 152 Cal. 122, 92 Pac. 70, 125 Am. St. Rep. 47; Williams v. Los Angeles, etc., Co., 150 Cal. 594, 89 Pac. 330; King v. Dugan, 150 Cal. 263, 88 Pac. 925; Archer v. Salines, 93 Cal. 49, 28 Pac. 839, 16 L. R. A. 145; Grogan v. Haywards (C. C.) 4 Fed. 163; Gormley v. Clark, 134 U. S. 350, 10 Sup. Ct. 554, 33 L Ed. 909. It is claimed on behalf of the defendants that this private right of way is limited to the use necessary for ingress and egress and that it embraces only the street which abuts upon the particular lot in question and such other streets as may lead therefrom to some public highway or public place. There are decisions in other states which place these limits upon the private easements, and in section 247 of Jones on Easements the rule is so stated. The decisions in this state do not recognize such distinction, and we do not think it is founded in good reason.

When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys, it necessarily implies or expresses a design that such passageways shall be used in connection with the lots, and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off. The making and filing of such a plat duly signed and acknowledged by the owner, as was the case here, is equivalent to a declaration that such right is attached to each lot as an appurtenance. A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot. Such we understand to be the true foundation for the rule first above stated. Where streets are laid out and exhibited on the ground and no map is made, but lots are sold upon the representation that such streets exist, the appurtenant right to use the streets is not expressed in the grant, and in such cases it is declared to rest upon the doctrine of equitable estoppel. Prescott v. Edwards, supra. If this implied grant is the foundation of the doctrine in question where the sale is by reference to a map, it is difficult to perceive any ground for a distinction which would limit the appurtenant way to the streets necessary for access to the outside world. It is obvious that the convenience of the use of the way over the side streets, as compared with those leading to general public highways, is merely a matter of degree, and that it does not affect the technical right. The decisions of other states, for the most part, make no such distinction. The cases which suggest or hold that no such appurtenance is given in side streets are those in which time had shown that the scheme of subdivision and settlement as a part of a town or village had failed, in whole or in part, or where the lots on the closed streets were unoccupied, and where such lots and interlying streets were used for agriculture or other purposes incompatible with use for dwellings or business, and which rendered such streets useless, or where the lot in question was so remote from the closed street that the damage was infinitesimal, and the remedy by injunction was considered inapplicable on the ground that the law does not regard trifles. The prevailing doctrine, however, seems to be that the technical right extends to all the streets, and that it will be enforced in equity with respect to all the streets which the particular lot owner has occasion to use, but that the closing of a remote street which can be of no material benefit to the particular lot in question will not in general be enjoined.

In the present case the alley lies directly opposite plaintiff's lot, it leads toward the ocean beach, and it gives access to the right of way and track of the railroad. This may or may not at the present time be open to the general public for passage to the station, but such passage may be allowed in the future, and in that event the alley would be more valuable to the lot. The defendant has no right to permanently close the alley because of any uncertainty on this point. The plaintiff is entitled to whatever benefit may exist from the prospect that such use may be permitted in the future. The evidence shows that it has been so used in the past.

There is a finding that the alley has not been used for passage to and from the streets of the tract, or the houses thereon, to or from said railroad right of way. This is contrary to the evidence. It appears without contradiction that it had been used by the plaintiff and others for passage on foot to such an extent that there was a path made which was distinctly visible. It is established by the findings and the evidence that the alley was of sufficient benefit to the plaintiff as a private appurtenance to the lot to support a complaint for an injunction to prevent its obstruction. The conclusion that it is of no use or benefit to plaintiff or to her land, and that its closure causes her no injury, is not sustained by the facts proven.

The rule is that if an obstruction to a private easement is continuous, exclusive, and under claim of right, so that it will eventually destroy the easement by adverse possession thereof, an injunction will be granted against such obstruction, although substantial damage has not yet been caused by the obstruction. In such a case the damage will be substantial when the adverse occupation has extinguished the right of way. This is sufficient to justify the injunction to prevent the continued occupation which would eventually operate to take a right in real property from the true owner. Mendelson v. McCabe, 144 Cal. 232, 77 Pac. 915, 103 Am. St. Rep. 78, and cases there cited. This case also decides that where such trespasses are of a continuing nature, and the damage for each day's obstruction is insignificant, the remedy of successive actions at law for such damages is inadequate, and equity will interpose by injunction.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(157 Cal. 698)

BETTENCOURT v. SHEEHY. (S. F. 5,303.)

(Supreme Court of California. May 13, 1910.)

1. INTOXICATING LIQUORS (§ 329*)—RETAIL SALES—REGULATIONS.

Act March 20, 1874 (St. 1873–74, c. 345), prohibiting recovery of more than $5 for a sale of intoxicants at retail or by the drink, applies to both retail sales and sales by the drink.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 474; Dec. Dig. § 329.*]

2. STATUTES (§ 211*)—MARGINAL NOTES—EFFECT.

Marginal notes to sections of the original Codes, like the headnotes to the chapters, articles, and titles, are parts of the statute limiting and defining the sections to which they refer.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.*]

3. INTOXICATING LIQUORS (§ 329*)—CONSTRUCTION—REFERENCE TO OTHER STATUTES—"RETAIL."

In view of the classification of sales of intoxicants in less quantities than one quart as "retail" sales, by the marginal note to Pol. Code 1872, § 3381, which imposed a license tax on such sales, the Legislature is presumed to have intended that the same meaning be given the word "retail" in Act March 20, 1874 (St. 1873–74, c. 345), prohibiting recovery of more than $5 for a sale of intoxicants at retail.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 329.*

For other definitions, see Words and Phrases, vol. 7, pp. 6193, 6194; vol. 8, p. 7789.]

4. INTOXICATING LIQUORS (§ 23*)—REGULATION OF SALE—VALIDITY OF STATUTE.

Act March 20, 1874 (St. 1873–74, c. 345), prohibiting a recovery of more than $5 for a sale of intoxicants at retail or by the drink, can only be sustained as a regulation of the retail liquor business in the lawful exercise of the state's police power.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 29; Dec. Dig. § 23.*]

In Bank. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by F. J. Bettencourt against Jeremiah J. Sheehy. Transferred to Supreme

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Court on plaintiff's appeal from the judgment. Modified and affirmed.

Wyckoff & Gardner and C. F. Lacey, for appellant. Geo. P. Burke and P. E. Zabala, for respondent.

ANGELLOTTI, J. This is an action by plaintiff, who conducts a grocery and merchandise store in Watsonville, against defendant, to recover the balance due on a running account for goods sold to him for one Kitigawa. There was found to be due plaintiff on this account the sum of $323.10, which included items aggregating $54.30 for wines and whisky sold to defendant for Kitigawa. None of said wine or whisky was sold to be drunk on the store premises, and none of it was drunk there. It was sold in amounts of gallons and half gallons, being drawn from barrels into demijohns, and was all taken away from the premises in such demijohns by Kitigawa. The trial court, being of the opinion that a recovery for any greater amount than $5 for said liquor was prohibited by the act of the Legislature entitled, "An act to prohibit the collection of accounts for liquors sold at retail," approved March 20, 1874 (St. 1873–74, p. 509, c. 345), gave judgment in favor of plaintiff for $273.80. Plaintiff appealed from such judgment to the District Court of Appeal, and the appeal was subsequently transferred to this court for determination.

The only question involved is whether the act hereinbefore referred to includes such transactions as those above detailed. The act is as follows:

"Section 1. The purchase of, or the sale and delivery of any spirituous or malt liquors, wines, or cider, by retail, or by the drink, is hereby declared to be an invalid consideration for any promise to pay, or assumpsit of account therefor, when the amount of such account or demand exceeds five dollars.

"Sec. 2. No court shall, in any action at law, render judgment for a greater amount than five dollars, for the sale at retail, or by the drink, of any spirituous or malt liquors, wine, or cider, together with costs."

We cannot accede to the claim of learned counsel for plaintiff that the words "or by the drink" are to be taken simply as limiting the effect of the words "by retail" and "at retail" as used in the act. It is true, of course, that a sale by the drink is necessarily a sale "by retail," and that it was entirely unnecessary to specify sales "by the drink" if all sales at retail were intended to be included, for the provisions as to sales "at retail" necessarily included sales by the drink. But, if sales by the drink were the only sales intended to be included, why say anything at all about sales "at retail"? A provision as to sales "by the drink" would have sufficed. The theory that the intention was by the words "or by the drink" simply to explain what was meant by the words "by retail" is not consistent with the language used, and to that alone must we look for the intention of the Legislature. If there had been any such intention, it might have been indicated by a provision defining the word "retail" as used in the act, or even less artistically by the words "that is" in place of the word "or" before the words "by the drink." But we would be indulging in the merest surmise, unsupported by any language in the act or by any rule of statutory construction, if we concluded that the intention was as claimed by learned counsel. The act by its terms is clearly applicable to sales at "retail" and sales "by the drink," and we can attribute the presence of the latter words only to a superabundance of caution on the part of the legislators, who may have feared that some subtle distinction resulting in the exclusion of the vendor by the drink from the provisions of the act might be found between the two classes.

The remaining question is what was meant by the word "retail" as used in the act. It cannot well be disputed that the sales of liquor made by plaintiff were sales at "retail" within the ordinary and common acceptation of that term as applied to sales of merchandise generally. As to sales of intoxicating liquor, however, as said in Black on Intoxicating Liquors, § 23, as a general rule the statutes have undertaken to regulate the distinction between the terms "retail" and "wholesale" by prescribing that sales of less than a given quantity should be considered sales at retail, and thus to give to the word "retail," as applied to the liquor traffic, a meaning generally accepted in the state. This distinction is usually to be found in acts imposing a license tax or regulating the business of liquor selling. We are of the opinion that at the time of the adoption of the act of March 20, 1874, the word "retail" as applied to the liquor traffic must be held to have acquired a fixed and definite meaning by reason of the statute relative to licenses to be obtained by persons engaged in the sale of spirituous, malt or fermented liquor or wine. Section 3381 of the Political Code, in the article devoted to the classification and amount of license taxes, provided that every person who sells such liquors or wines "in less quantities than one quart" must obtain a license, paying therefor an amount in proportion to the amount of sales. No license tax was imposed on vendors of such liquor in quantities of one quart or more except as they might fall within other provisions relating to merchants generally. As to such merchants the provision was absolute that no sale of liquors or wine could be made in less quantities than one quart. This section was a part of the original Political Code adopted in 1872. The marginal note to section 3381 contained in the original edition made and certified by the Code commissioners under authority from the Legislature was: "Retail liquor licenses." Transactions in such liquors were thus divided into two classes, to one of which, viz., sales in less quantities than one quart, the name of "retail" was given by the statute itself, for the marginal notes to the sections of the original Codes cannot be distinguished in principle from the head notes to the chapters, articles, and titles. As to these it has been held that they are parts of the statute limiting and defining the sections to which they refer, and that to refuse to give effect to them according to their import would be to make the law, not to administer it. Sharon v. Sharon, 75 Cal. 16, 16 Pac. 345; Barnes v. Jones, 51 Cal. 306; Keyes v. Cyrus, 100 Cal. 325, 34 Pac. 722, 38 Am. St. Rep. 296. We are satisfied that, under this classification, the word "retail" must be held to have such a definite and fixed meaning in relation to the liquor traffic, viz., as referring only to sales in quantities less than one quart, that it must be presumed to have been used by the Legislature with that meaning in the act under consideration. That the distinction is made in sections relating to license taxes does not assist defendant. The two statutes are in a sense in pari materia. The imposition of a license tax upon retail liquor dealers has always been considered a regulation of the business as well as a provision for revenue, and for that reason the license tax on such dealers has always been larger in amount than the tax imposed on the ordinary merchandise business. The act involved in this case was also in the nature of a regulation of the same business; the object being to prevent sales on credit by one engaged therein. It is only upon the theory that it was such a regulation enacted in the lawful exercise of the police power of the state that it can be upheld as a valid law at all. Thus we have two statutes regulating the sales of liquors at retail, the statute of 1872 regulating it by the imposition of a license tax and prescribing, at least for the purposes of such regulation, what shall constitute a sale at retail, and the statute of 1874 regulating the business of selling liquors by retail by prohibiting the collection of any amount exceeding $5 on any balance due on account of such sales. It is only reasonable to assume that the word "retail" was used in the later act as intended to include only such transactions as were intended to be regulated by the prior act. The cases of Beiser v. State of Georgia, 79 Ga. 329, 4 S. E. 257, and Roberson v. City of Lambertville, 38 N. J. Law, 71, sustain our conclusion in this regard.

In the cases relied on by learned counsel for defendant there does not appear to have been any statutory classification warranting a conclusion that the word "retail" was used other than in its ordinary and common acceptation.

The judgment is modified by adding to the amount recovered by plaintiff the sum of $49.30, and, as so modified, it is affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.; SLOSS, J.

157 Cal. 703

BROWNELL et al. v. SUPERIOR COURT OF YOLO COUNTY. (S. F. 5,424.)

(Supreme Court of California. May 14, 1910. Rehearing Denied June 13, 1910.)

1. JUDGMENT (§ 278*)—RECORD.

The personal memoranda of the clerk of a court of record made in a book designated as "blotter," or "the rough minutes of the court," as orders of the court are announced, as a guide in entering the orders on the register of actions and in the minutes, are not an official record of the court, and an entry therein of an order is not an official record of the order, but the matter ordered remains a mere oral announcement, though the memoranda may sometimes be useful as evidence on a proper foundation being laid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 547; Dec. Dig. § 278.*]

2. JUDGMENT (§ 215*)—"RENDITION."

Where findings are required, there can be no rendition of the judgment until they are filed, unless they are waived, and where they are waived or are not required, the entry of the decision in the minutes of the court is the rendition of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 392; Dec. Dig. § 215.*

For other definitions, see Words and Phrases, vol. 7, pp. 6082–6084.]

3. JUDGMENT (§ 386*)—ENTRY—"TAKEN."

The word "taken," in Code Civ. Proc. § 473, authorizing the court to relieve a party from a "judgment, order, or other proceeding, taken" against him through his mistake or excusable neglect, provided that application therefor is made within six months after the "judgment, order, or proceeding was taken," is used in the same sense as the words "rendered" or "rendition," when used with reference to a judgment, and while the word "rendered" is appropriate in reference to a judgment or decree, but not to a proceeding or order, the word "taken" is adopted as a term applicable to judgments, orders, and proceedings or either of them, and has relatively the same meaning as rendition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 392; Dec. Dig. § 386.*

For other definitions, see Words and Phrases, vol. 8, pp. 6850, 6851.]

4. TRIAL (§ 400*)—FINDINGS—AMENDMENT OF CONCLUSIONS OF LAW.

Where findings are filed which constitute the rendition of a judgment, and where the conclusions of law signed by the judge show what judgment is to be entered, the court retains power to change the conclusions of law so as to point to a different judgment, and to enter a judgment different from that first announced, and such power continues until the entry of the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 949; Dec. Dig. 400.*]

5. EXECUTORS AND ADMINISTRATORS (§ 315*)—DISTRIBUTION OF ESTATE—ORDER OF PARTIAL DISTRIBUTION—RELIEF—"TAKEN."

Under Code Civ. Proc. § 1661, authorizing the court, after hearing a petition for partial distribution, to order the same by first requiring the distributees to give a bond for a payment of their share of the debts, etc., an order for partial distribution must be prepared, approved, and signed by the judge after the hearing and granting of the petition therefor, and the signing and filing of a formal order is a taking thereof within section 473, authorizing the court to relieve a party from a judgment or order taken against him, provided the application is made within a specified time.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1314; Dec. Dig. § 315.*]

6. Executors and Administrators (§ 315*)—Conformity to Findings—Modification of Conclusions of Law—Power of Court.

The rule that the court may change its conclusions of law after they are filed and render a different judgment from that first announced, applies to proceedings for a partial distribution of an estate of a decedent, and the court, after making an oral statement of its decision on a petition for partial distribution, may, before the decision is recorded and signed or filed, change it and render a different decision.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 315.*]

7. Judgment (§ 386*)—Vacation—Time for Application—Rendition of Judgment.

Where a party had no actual notice of a proceeding, nor any knowledge of judgment therein until it was filed, there should be some fixed manifestation of the judgment or proceeding before it can be considered as taken against him, within Code Civ. Proc. § 473 authorizing the court to relieve a party from a judgment or order if applying therefor within a specified time, so as to set the period of limitation in motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 738, 739; Dec. Dig. § 386.*]

8. Judgment (§ 388*)—Vacation—Notice of Application.

Code Civ. Proc. § 473, authorizing the court to relieve a party from a judgment or order taken against him, provided the application is made within a reasonable time, etc., does not require that notice to the adverse party shall be given prior to the application, but only provides that the relief cannot be given until after notice, and where a party appears and moves the court for the relief within the time specified, and the court makes an order on the adverse party to show cause on a day fixed why the motion should not be granted, and the adverse party is duly notified thereof, the application is sufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 747–749; Dec. Dig. § 388.*]

9. Motions (§ 1*)—Nature of "Motion."

A motion is an application for an order.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4609, 4610.]

In Bank. Application for a writ of prohibition by William W. Brownell and others, against the Superior Court of Yolo County, to prevent the court from hearing an application to set aside an order for partial distribution of the estate of a decedent. Writ denied.

Hurst & Hurst and Alexander R. Baldwin, for petitioners. Harry L. Huston and Arthur C. Huston, for respondent.

SHAW, J. This is an original proceeding in prohibition to prevent the superior court from hearing an application by one Mabry McMahan, who alleges that he is a creditor of the estate, to set aside an order of partial distribution of the estate of Harriet V. Brownell, deceased, on the ground that it was taken against him through his mistake and excusable neglect. It is claimed that the application of McMahan was made after the expiration of the period of six months prescribed as a limitation thereto by section 473 of the Code of Civil Procedure.

1. The petition for partial distribution of the estate was made by Edward Earle Brownell and W. W. Brownell as devisees of the property. It was filed on March 4, 1909, and the hearing thereof was fixed for March 15, 1909. The 10-day notice by posting, required by the law, was duly given, and the matter came on regularly for hearing on the day fixed. No person appeared in opposition thereto, and after the usual ex parte proofs the court orally announced that the petition was granted, and the clerk made a memorandum to that effect. No order was prepared or signed at that time, and nothing further appears to have been done until March 23, 1909, when a paper purporting to be the order for partial distribution was filed in the cause. It was signed by the judge, and it purported to be an order made on March 15, 1909, closing in the usual form, thus: "Done in open court, and dated this fifteenth day of March, A. D. 1909." The order was on the same day (March 23d) entered in the minutes of the court. The memorandum of the clerk, to the effect that the petition was granted, was made in a book which the plaintiffs designate as "the rough minutes of the court," and which in the answer filed herein is styled a "blotter." There is no law providing for "rough minutes." The clerk doubtless finds it necessary, as orders are announced by the court, to make a memorandum thereof for his own guidance in entering the orders on the register of actions and in the minutes. These memoranda are often referred to as "rough minutes," but they do not constitute an official record of the court. They are sometimes useful as evidence, if the proper foundation is laid, but they have no inherent vitality or effect. We cannot regard this personal memorandum as in any sense a record of the court, or as an official record of any character. The application to vacate the order was not made, nor was any proceedings to that end begun, until September 21, 1909. If the six months' limitation began to run on March 15th, the application to vacate it was clearly too late, and the court had no authority to act upon it, except to dismiss it. Section 473 authorizes the court to relieve a party from a judgment, order, or other proceeding taken against him; "provided that application therefor be made within a reasonable time, but in no case ex-

ceeding six months after such judgment, order or proceeding was taken." The question is, when was the decree of partial distribution "taken" within the meaning of this provision?

A somewhat similar question has arisen in this and other states, where a statute provides that an appeal may be taken within a stated time "after the rendition of the judgment." In this state the former practice act prescribed a period of one year. In Gray v. Palmer, 28 Cal. 416, the judgment was pronounced on April 6, 1861. It was drawn up, signed by the judge and filed on April 9, 1861, and was entered in the judgment book on June 17, 1861. An appeal taken on June 14, 1862, was held to be too late, on the ground that "there was a rendition of the judgment as early, at least, as the 9th of April," 1861, when the judgment was formulated, signed, and filed. In Peck v. Courtis, 31 Cal. 209, a final judgment in partition on confirmation of the report of referees was ordered on December 22, 1863, but it was not entered until July 25, 1864. An appeal was taken on July 8, 1865, less than one year after the entry but more than a year after the judgment was ordered. It was held that the order for judgment was equivalent to a rendition thereof and that the appeal was barred. Genella v. Relyea, 32 Cal. 159, was a case similar to Gray v. Palmer, supra, and it was decided the same way, the court saying, however, that the time for taking an appeal began to run at the time judgment was ordered, citing Peck v. Courtis, supra. Peck v. Courtis was followed in Wetherbee v. Dunn, 36 Cal. 252. In New York a writ of error could be taken within two years after the "rendering of the judgment." It was held in that state that the time began to run at the time the judgment was pronounced and not from the time of its entry and that a writ sued out after the judgment was thus rendered was barred. Fleet v. Youngs, 11 Wend. 522; Lee v. Tillotson, 4 Hill. 27. In Nevada, the same conclusion was reached, the court holding that an appeal could be taken after rendition and before entry. Cal. St. Co. v. Patterson, 1 Nev. 155; Kehoe v. Blethen, 10 Nev. 453. In Estate of Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146, and In re Cook, 77 Cal. 225, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267, it was decided that a judgment is binding on the parties and privies as soon as it is rendered and before it is entered. In Crim v. Kessing, 89 Cal. 488, 26 Pac. 1074, 23 Am. St. Rep. 491, the following is laid down as the correct rule under the present Code: "Under the provisions of the Code of Civil Procedure, whenever findings are required there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a question of fact,' and they may in all instances be waived. Wherever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system." See, also, San Joaquin etc., Co. v. West, 99 Cal. 347, 33 Pac. 928; First N. Bank v. Dusy, 110 Cal. 76, 42 Pac. 476, and Painter v. Painter, 113 Cal. 375, 45 Pac. 689, approving this rule.

The word "taken," as used in section 473, is, as we think, used in the same sense as the words "render" or "rendition," when used with reference to a judgment. The word "rendered" is appropriately used in reference to a judgment or decree, but not to a proceeding or order. The phrase in question embraced judgments, orders, and proceedings, and the word "taken" was adopted as a term alike applicable to either or all of them, and having relatively the same meaning as "rendition."

But giving full force to the proposition that the order of partial distribution of the estate of Brownell is to be considered as having been "taken" when entered on the minutes, we cannot perceive how this can aid the plaintiffs here. The entry in the so-called "rough minutes" was, as we have seen, no official record of the order for judgment. The matter ordered still remained a mere oral announcement. Where findings are filed, which constitute the rendition of a judgment, and where, of course, the conclusions of law signed by the judge show what judgment is to be entered, it has been repeatedly held that the court retains power to amend or change the conclusions of law so as to point to a different judgment and to enter a judgment different from that first announced, and that this power continues until the entry of the judgment. Condee v. Barton, 62 Cal. 1; Crim v. Kessing, supra; Broder v. Conklin, 98 Cal. 363, 33 Pac. 211; Brady v. Burke, 90 Cal. 5, 27 Pac. 52; First N. Bank v. Dusy, supra; O'Brien v. O'Brien, 124 Cal. 426, 57 Pac. 225. In the Brownell Estate there was no record of any decision or judgment given by the court, until the filing of the signed order on March 23d. The Code provides that after the hearing of a petition for partial distribution, if the necessary facts are shown, the court must make an order requiring of the distributees a bond for the payment of their share of the debts, and directing that the distribution prayed for be made when such bond has been given and approved by the court. Code Civ. Proc. § 1661. The signed order recites that the bond required had been given and approved, and it directed the distribution positively and without any condition precedent. The order must therefore have been prepared, approved, and signed by the judge at some time after the hearing and granting of the petition. Under the rule stated in Crim v. Kessing, supra, findings not being here required, the order would not be "taken" until it was in some manner entered in the minutes of the court, and here there was no such entry until the formal order or decree was entered at length in the minutes. We think that rule should perhaps be modified in cases like the one at bar so that the signing and filing of the formal order would constitute a "taking" thereof so far as an application for relief under section 473 is concerned. But as it was not signed and filed until March 23d, an application to vacate it would be in time if made within six months from that date. Furthermore, the rule that the court may change its conclusions of law, after they are filed, and render a different judgment from that first announced would seem to be equally applicable here. No findings being required, and the court having merely made an oral statement of its decision, it might, before that decision was recorded, or signed and filed, change it in any respect and render a different decision. Whether or not it could by such change affect things done by the parties under the order as first announced, and before any change was made and announced, is a question not here involved. Nor are we concerned with the effect of an announcement of a decision or order against one who was then present. The party here seeking relief was not present, and he had no actual notice or knowledge of the proceeding, nor any knowledge of the order until it was filed. As to such a party there should be some fixed manifestation of the order or proceeding before it can be considered as "taken" against him, so as to set the period of limitation in motion. We perceive in this no hardship upon the parties in whose favor the order, judgment, or proceeding is taken. They have it in their power to set the time running by procuring the appropriate entry to be made. Our conclusion is that the time began to run on March 23d and not before.

2. The plaintiff further contends that the application of McMahan for relief was not made on September 21st, nor until after the period of six months from March 23, 1909, had expired. This contention cannot be upheld. On September 21, 1909, while the court was in session, McMahan appeared, and formally moved the court to set aside the order of partial distribution, stating at length the ground of the motion and filing affidavits in support thereof. Thereupon the court made an order that the motion be heard on October 4, 1909, and requiring the persons to whom distribution was made, naming them, and all others interested, to appear at that time and show cause why the motion should not be granted. On the same day the distributees and the executor were served with a copy of the order and a notice that the motion would be pressed to a hearing on October 4, 1909. This was a sufficient application within the time limited. Section 473 provides, in effect, that the relief therein specified may not be given until after notice to the adverse party, but it does not provide that no application for the relief can be made to the court until after such notice has been given. If it did require this, since five days' notice must be given, the effect would be to reduce the six months' period by five days. It is the application which is to be made within the six months. A motion is an application for an order.

The letter as well as the spirit of the law is fulfilled where the party appears and moves the court for the relief within that period, and thereupon the court makes an order on the adverse parties to show cause on a day fixed why the motion should not be granted, and they are duly notified thereof. There is no decision of this court contrary to this. Spencer v. Branham, 109 Cal. 336, 41 Pac. 1095, was a proceeding in a justice court, and no application was made to the court within the time limited. A written statement of the motion to be made was handed to the justice while he was engaged in other occupations and was not doing judicial work nor in session as a court. In Thomas v. Superior Court, 6 Cal. App. 629, 92 Pac. 739, the only thing done within the six months was to serve a notice on the adverse party and file it in the clerk's office. This was not in any sense an application to the court. It was merely a notice that at a future time, beyond the six months allowed, such an application would be made. This was not sufficient. "The attention of the court must be called to it and the court moved to grant it." People v. Ah Sam, 41 Cal. 650. This was done by McMahan, in the present case; the grounds were fully stated, and the action of the court invoked; and we hold that to be a sufficient making of the application within the meaning of the Code.

It follows that the court had jurisdiction to entertain and decide the application on its merits, and that prohibition will not lie.

The writ is denied.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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13 Cal. App. 154

BURNS v. CASEY et al. (Civ. 634.)

(Court of Appeal, Third District, California. April 6, 1910.)

1. MUNICIPAL CORPORATIONS (§ 444*)—SPECIAL ASSESSMENTS.

Proceedings leading to the assessment and taxation of property for special purposes, as distinguished from those general burdens necessarily imposed alike upon all property for support of state and municipal governments, are in invitum, and, to validate the tax thereby imposed, the law authorizing such proceeding must be strictly followed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1064–1069; Dec. Dig. § 444.*]

2. MUNICIPAL CORPORATIONS (§ 444*)—SPECIAL ASSESSMENTS—COMPLIANCE WITH LAW.

Laws authorizing assessments for special municipal purposes are not to be so strictly construed as to render them practically nugatory, but a substantial compliance with their provisions is sufficient so long as property owners and bidders for the work are given such notice, in required form, of the proposed improvement as will give them fairly accurate knowledge of its character and extent, and of a reasonable approximation of the detail and total cost thereof, and in such case, if the work has been well performed, the assessment will not be nullified merely because of the omission by the authorities to observe some immaterial technical requirements of the law by the provisions of which alone the work is authorized.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1064–1069; Dec. Dig. § 444.*]

3. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS—SUFFICIENCY OF SPECIFICATIONS.

A provision in specifications for a street improvement, that "a proper foundation shall be prepared by tamping the earth upon which they (curbs, gutters, and round corners) are to rest," specifically provides what shall constitute a "proper foundation" as specified, and does not on its face delegate to the superintendent of streets power to determine that question so as to enable him to increase or diminish the cost of the work at his will.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.*]

4. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS—SUFFICIENCY OF SPECIFICATIONS.

Committing to the street superintendent's judgment or volition the determination whether, according to the condition of the earth, "crushed rock" or "selected earth material" should be used in the preparation of the foundation for a street improvement, was only a reasonable and necessary discretion to vest in him, since the determination thereof necessitated investigation to ascertain whether the soil was naturally soft or yielding so as to require crushed rock or selected earth material according as to the extent of that quality which it possessed, or whether it was naturally sufficiently compact in itself to require neither of such materials, and a provision in the specifications, giving the superintendent such authority, was not on its face a delegation of an unauthorized power to determine the cost of the improvement, fatal to the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.*]

5. MUNICIPAL CORPORATIONS (§ 571*)—ASSESSMENTS—REVIEW—EVIDENCE.

On appeal in a suit to foreclose a lien for an assessment for a street improvement, the contention that the specifications for the improvement amounted to the delegation of an unauthorized power to the street superintendent to decide whether crushed rock or selected earth material should be used as a foundation, and hence to determine the cost of the improvement, cannot be considered where the record does not contain the evidence, so that there is no showing of any material difference in cost between the two materials between which the superintendent was authorized to select, since while, as an abstract proposition, crushed rock would be more expensive than ordinary earth material for the use intended, yet the cost of the use of selected earth material that would as well serve the purposes of a foundation, as would crushed rock, might, on account of the expense of discovering and selecting it, the price to be paid, if it had to be purchased, and the possible transportation expenses, be such that it cannot be said as a matter of law that any difference in price would exist.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 571.*]

6. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS—SUFFICIENCY OF SPECIFICATIONS.

A provision in the specifications requiring that the street be brought to a smooth and even surface by excavating the space above grade and filling the depressions with "suitable earth material," cannot be said to be objectionable as uncertain and as giving the street superintendent such unauthorized power, as to enable him to cause the cost of the improvement to exceed that provided for, in the absence of evidence showing that positive injury has in fact resulted therefrom, it being no more uncertain on its face than if the term "earth material" had been used.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.*]

7. EVIDENCE (§ 18*)—JUDICIAL NOTICE—COST OF BUILDING MATERIALS.

Judicial notice cannot be taken of the fact, if such, that there is a difference in cost of cobbles, trap, and basalt as material for the crushed rock foundation of a street.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 22; Dec. Dig. § 18.*]

8. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS—SUFFICIENCY OF SPECIFICATIONS.

A provision in specifications for a street improvement which minutely describes a catch-basin, both as to size and materials to be used, cannot, in the absence of evidence showing positive injury to have actually resulted therefrom, be held insufficient as delegating power to the street superintendent to fix the cost of the improvement, because it fails definitely to fix the point at which the catch-basin should be located.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.*]

9. MUNICIPAL CORPORATIONS (§ 304*)—PUBLIC IMPROVEMENTS—SUFFICIENCY OF SPECIFICATIONS.

Specifications for such improvement need not specifically locate the line of the curbs and gutters, it being common knowledge that they must be placed at one of the edges of the street fixed by official survey.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 811–816; Dec. Dig. § 304.*]

10. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS—SUFFICIENCY OF SPECIFICATIONS.

Specifications providing that if the mixing of concrete should be done by hand a certain method should be pursued, but if a machine should be used it should be of a standard approved type and the concrete so mixed, be at least equivalent to that mixed by hand as therein specified, cannot be held, in the absence of a showing that positive injury has in fact resulted therefrom, to give to the street superintendent, the discretion to decide which of two methods of mixing the concrete should be adopted, but must be held merely to call for a certain standard of concrete, and to expressly provide that such must be the standard whether mixed by hand or by machine.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.*]

11. MUNICIPAL CORPORATIONS (§ 445*)—PUBLIC IMPROVEMENTS — SPECIFICATIONS — FINALITY OF CITY SURVEYOR'S CONSTRUCTION.

While a provision of the specifications, that in case of a misunderstanding as to the meaning of any provision thereof the interpretation of the city surveyor shall be final, was invalid, the Vrooman street law, under which the work was done (St. 1905, c. 67), not providing or contemplating that such power should be exercised by an officer or agent of the property owners, yet when assuming that the surveyor could by the exercise of such power, have increased or diminished the cost of the work below or above that provided for by the resolution, there is no showing that any attempt was made on his part to exercise such power, nor that occasion arose calling for its exercise, the assessment for the improvement will not be invalidated because of such provision.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent.Dig. § 1065; Dec.Dig. § 445.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by T. M. Burns against Frank J. Casey and others. Decree for plaintiff, and the mentioned defendant appeals. Affirmed.

A. L. Shinn, C. G. Shinn, and Carl L. Shinn, for appellant. White, Miller & McLaughlin, for respondent.

HART, J. This is a suit for the foreclosure of a lien arising upon an assessment of the property of the appellant, situated in the city of Sacramento, for the improvement of the street upon which said property abuts. A decree foreclosing said lien and authorizing the sale of said property for the satisfaction of the said assessment, costs, etc., was entered, and this appeal is brought here by the defendant, Casey, from the judgment, unaccompanied either by a bill of exceptions or the evidence in any form. The legality of the assessment is challenged upon the alleged ground that the board of trustees of the city of Sacramento never acquired jurisdiction to order the work to be done. This contention is founded upon an alleged insufficient description in the resolution of intention of the proposed improvement—that is, that with regard to the description of the work to be done, there were material defects in the specifications, which were made a part of the resolution of intention. Section 3 of the so-called "Vrooman street law" (St. 1905, p. 64) provides: "Before ordering any work done or improvement made which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do and *describing the work.*"

The following are the alleged fatal defects in the specifications upon which we are asked to render a judgment invalidating the assessment:

(1) "Curbs, gutters, and round corners are to be constructed of concrete in accordance with plans attached, and in the following manner: A proper foundation shall be prepared by thoroughly tamping the earth upon which they are to rest, and if necessary, in soft or yielding ground, crushed rock or selected earth material shall be deposited upon the foundation and thoroughly compacted."

(2) "The street shall be brought to a smooth and even surface conforming to the required cross-section of the subgrade by excavating all places above grade and filling the depression with suitable earth material."

(3) "The crushed rock shall be of the harder quality of cobbles, basalt, or trap, free from loam, clay, or shale."

(4) "The rock used in concrete must be of the harder quality of cobbles, basalt, or trap, free from loam, clay, or shale or other inferior material."

(5) "A concrete catch-basin not exceeding five (5) feet in depth will be constructed at a point to be designated by the city surveyor."

(6) "If the mixing is done by hand, the sand and cement must be carefully measured and thoroughly mixed while dry upon a tight platform, after which, sufficient water applied in a spray will be added during subsequent mixing to convert it into a uniform stiff mortar. Then to the required amount of broken rock evenly spread upon a platform and thoroughly drenched with water, the mortar shall be added, and the whole mass turned over at least three (3) times with shovels when every piece of rock shall be completely coated with mortar.

"If a machine is used for mixing it must be of a standard and approved type and the concrete so mixed shall be at least equivalent to that mixed by hand as above described."

The general objection to all those parts of the specifications complained of here is that they are so indefinite and uncertain in certain particulars that they necessarily vest in the superintendent of streets an inordinate and unwarranted amount of discretion as to the character or nature of certain materials with which the street was to be improved. as well as to the manner in which portions of the work were to be done. It is just as well in the beginning to declare it to be our judgment that not a single one of the objections to the assessment urged here possesses substantial merit.

It is, of course, well settled and well understood that proceedings leading to the assessment and taxation of property for special purposes, as contradistinguished from those general burdens necessarily imposed alike upon all property for the support of state and municipal governments, are in invitum, and, in order to validate a tax imposed for special purposes, the law authorizing such proceedings must be strictly followed. But the laws authorizing assessments for special purposes—for the improvement of streets, building of sidewalks and sewers, and other like improvements necessary to the comfort and welfare of inhabitants of local communities—are not supposed to be so "strictly" construed as to render them, practically, nonsensical and nugatory. A substantial compliance with their provisions ought to be all that should be required, by which we are to be understood as meaning that, where property owners and bidders for the work have been given such notice, in form required by law, of the proposed improvement as will put them in possession of fairly accurate knowledge of the character and extent of the work to be done and of a reasonable approximation of the detailed and total cost of the improvement, and the work has been well performed, then in that case no assessment ought to be nullified and the contractor thus forced to suffer a heavy loss, or perhaps made a bankrupt, merely because of the omission by the authorities to observe some immaterial technical requirements of the law by whose provisions alone the work is authorized.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The specific criticism involved in the first objection here is that there is delegated by the board of trustees to the superintendent of streets the power of determining what should constitute a "proper foundation" for the curb, gutters, and round corners, and, further, that that official is also invested with the discretion of deciding whether there should be used in the preparation of said foundation "crushed rock" or "selected earth material." The contention is that the street superintendent was thus given power, by the exercise of which he was able to increase or diminish the cost of the work at his will.

We do not so read that portion of the specifications objected to. It is first therein specifically provided how and in what manner such foundation should be prepared in order to constitute it the "proper foundation" contemplated and provided for by said portion of the specifications. As seen, the language is: "A proper foundation shall be prepared *by tamping the earth upon which they* (curbs, gutters and round corners) *are to rest*," etc., and thus far the description of the work to be performed is about as definite and specific as language could make it. What clearer terms in the English language could be employed to prescribe to the contractor the absolute duty of so tamping and thus hardening the earth as to make the foundation stable and durable? And that is all that that part of the specifications called for, and we do not see that it could have called for either less or more. As to the second point under the first objection, that to the street superintendent unauthorized power, fatal to the assessment, was delegated by committing to his judgment or volition the determination whether, according as he found the condition of the earth, "crushed rock" or "selected earth material" should be used in the preparation of the foundation one answer is, and we think it is conclusive, that, the evidence not having been brought up, there is no showing here that there was any material difference in the cost between the two kinds of materials from which the superintendent was authorized to exercise a selection. Besides, we think that, in any event, it was not only a reasonable, but a necessary, discretion to vest in the street superintendent. To determine whether the ground or earth upon which the foundation was to be laid was "soft or yielding" required investigation, as by digging into the soil a sufficient depth to ascertain whether it was naturally "soft or yielding," thus requiring crushed rock or selected earth material, according as to the degree or extent of that quality it possessed, or whether it was naturally sufficiently compact in itself to require neither crushed rock nor selected earth material.

In McCaleb v. Dreyfus, 103 Pac. 924—the latest expression of the Supreme Court involving an interpretation of the provisions of our street law—it is said: "In awarding a contract for street work it is quite apparent since the surface of the ground is exposed, that there may be an accurate predetermination of the amount and character of material to be used. It is unnecessary, therefore, to delegate any discretion in this matter to the street superintendent. Such was the condition in Perine v. City of Pasadena, 116 Cal. 6, 47 Pac. 777 (a street work case), where the specifications required that 'the contractor shall put in such extra concrete as the superintendent of streets and the city engineer may require, and in such places and in such form as they may designate.' It was easily susceptible of predetermination upon the part of the council whether any extra concrete was required at all, and, if so, the quantity and the place of use. This delegation, therefore, was held to be unreasonable. But where, as here, the work is the construction of a sewer, involving, first, the digging of the trench, and, second, the placing of the sewer upon a durable foundation, it is apparent, that but one of three courses can be pursued in the letting of the contract." The court then proceeds to point out three different methods by which a contract for the building of a sewer may be let, and showing that the better course for the owners of property affected by the assessment is that objected to in that case, where the challenged specifications read: "If, *in the judgment* of the city engineer, it shall be necessary to form any portion of said foundation (of the sewer) of concrete, said concrete shall be paid for as extra work at the price per cubic yard mentioned in the contract." The court further said in that case, and it is equally true as to the objection we are considering here: "Indisputably, the determination as to whether or not a concrete foundation would be necessary must be vested in some one. Indisputably, also, the proper person to determine this was not the contractor, but the street superintendent or city engineer." As stated, and as is plainly obvious, the question whether the earth upon and in which the foundation for the gutters, curbs, and round corners was to be laid was naturally of sufficient compactness and strength to be suitable for that purpose was not one which could, upon a mere inspection of the surface, be determined, and was not, therefore, subject to predetermination by the city council.

There is a wide distinction between the case here and the case of Bolton v. Gilleran, 105 Cal. 250, 38 Pac. 881, 45 Am. St. Rep. 33. In the latter case the contract expressly vested in the street superintendent the power of authorizing, for the construction of a "five-foot brick sewer," payment at the rate of either $9.83 per lineal foot or $12.78 per lineal foot, according as that official might determine what the nature of the foundation should be. Readily it is thus to be noticed that the governing board in that case conferred upon the superintendent of streets discretionary power which enabled him to exercise his own volition with regard to the cost of the improvement. Manifestly, the board exceeded its authority when so delegating to the street superintendent such power, and the assessment was, of course, held to be void by reason thereof. In the case here there is absolutely nothing in the specifications which, in express terms, authorizes the street superintendent to either increase or decrease the price for laying the foundation for the curbs, gutters, etc., nor, as we have before stated, is there anything on the face of the contract itself dealing with gutters, curbs, etc., from which it can be said that the preparation of the foundation would cost more by the use of crushed rock for that purpose than by the use of "selected earth material," or vice versa. Whether there would be any material difference between the cost of one and that of the other would largely depend, it seems to us, upon conditions existing with respect to the accessibility of either the one or other of these materials. It is safe to say that it is known, as an abstract proposition within the scope of common knowledge, that crushed rock would be much more expensive than ordinary earth material for use in the preparation of a foundation for curbs, etc. But by the phrase "selected earth material" we understand is meant that that quality of earth must be used which would as well serve the purposes of a foundation as would crushed rock, and the difficulty in the way of a predetermination of the difference in the cost between the two materials, if any, would be the expense, first, incident to discovering and selecting the earth material which would meet the test under that description, then the price to be paid for it, if it had to be purchased, and furthermore, if the point at which such material was procurable were remotely situated from the point at which it was to be used for the foundation, what would be the expense of transporting it to said last-mentioned point.

In Lambert v. Marcuse, 137 Cal. 47, 69 Pac. 620, where the specifications called for the construction of a stone and grouted gutters from rock of either of two classes, as classified by the ordinance authorizing the work, designated as "class A" and "class B," and where the claim was that thus an unwarranted discretion was vested in the street superintendent to use the rock of either class, it is said: "The option was given to the contractor to use either class A or class B rock. The material to be used was macadamizing rock, and the difference between the two classes was not in the material, but in the density, or hardness, of the rock. But whether there was any difference in the cost does not appear, and we cannot say, as a matter of law, that there was any such difference. The difference in the cost may, by reason of the situation of the rock in place, or the cost of quarrying of the two kinds, be practically equalized, so that it would become a matter of indifference to everybody concerned which class was used."

The foregoing language has peculiar application to the portion of the specifications now under review, for, as we have tried to show, if, abstractly, it may be said that crushed rock is more expensive than selected earth material, the use of the latter might, for reasons which we have suggested, and perhaps others which have not occurred to us, be as expensive and therefore cost as much as crushed rock, and thus the difference in the expense of the two materials at least approximately equalized so that there would be no material difference in the cost between the two. At any rate, we cannot say, as a matter of law or as a matter of fact, in the absence of an affirmative showing that there was any material difference between the cost of crushed rock and that of "selected earth material," that any such difference existed or would exist.

The objection that the provision requiring that the street shall be brought to a smooth and even surface by " * * * excavating the places above grade and filling the depressions with *suitable earth material*" is mortally uncertain, is too hypercritical to merit extended notice. The vice of that portion of the specifications, it is said, is in the use of the language we have italicized, and it is contended that thereby the street superintendent is given such unauthorized and dangerous power as to enable him to cause the cost to exceed that provided for by the resolution. A provision that the depressions should be filled with "earth material" would probably have attracted no comment or excited no criticism by appellant, as it would have been sufficient to describe the material to be used with substantial and satisfactory accuracy. Under such a description it certainly could not be said that anything less than *suitable* earth material was intended to be used. We are, therefore, unable to discern how or in what way the provision is made any less certain by the addition of the word "suitable."

What we have said with regard to the objection first considered applies with equal pertinency and force to the third and fourth points stated in the order in which we have here presented them. We cannot take judicial notice of the fact, if it be a fact, that there is any difference in the cost of the three several kinds of material out of which the crushed rock for the macadam and the rock used in concrete were to be formed. In fact, it would seem that there could in fact be no material difference in the cost between cobbles, trap, and basalt, except possibly in the fact that the one might be the more readily accessible or procurable than the others in a sufficient quantity to do the work.

In the case of Lambert v. Cummings, 2 Cal. App. 643, 84 Pac. 266, cited by appellant, the specifications for macadamizing and guttering certain streets in the town of Berkeley prescribed that the macadam should be formed out of one of three classes of rock, of which two classes only (classes A and B) were described with sufficient clearness and definiteness to convey approximately precise information as to the character of the material to be used in the work. The resolution, however, provided that the rock designated as class C should be such rock as might be approved by the board of trustees upon a sample presented to said board for that purpose. Under such a provision it was within the power of the board to require the macadam to be made out of any kind of rock submitted for its inspection and approval, whether it was rock coming within class A or B, which classes, as seen, were defined and described in the specifications, or an entirely different character of rock from that of either class A or class B. The court in that case well said: "It is at once evident that a contractor bidding for the work must have done so upon the probability of being compelled to use the most expensive rock for macadamizing, unless he had been assured in some way by some private arrangement that he might use other or different rock. The board were thus enabled to favor one contractor and discriminate against another. * * * A resolution of intention, followed by a notice of letting a contract to macadamize a certain street with such rock as may be approved by the board of trustees, does not describe the work to be done. The contractor may be required to use marble or soft sandstone or cobbles."

It will be observed that the power vested in the board in the cited case by the language of that provision of the specifications designating "class C" made the descriptions of classes A and B, otherwise clear and definite, equally as indefinite and uncertain as class C itself. But, as seen, the specifications here specifically describe the rock from which the macadam and the concrete should be made, and do not, as in the case cited, leave to the governing board the right to finally determine whether either of the kinds of rock described should be used, or, disregarding altogether the rock described, that some other and different kind of rock, of which there was no description whatever in the specifications, may be used.

In Lambert v. Marcuse, supra, where, as seen, the street superintendent was clothed with the power to select, in the construction of gutters, from two classes of rock, the Supreme Court, affirming the judgment for plaintiff in an action to foreclose the assessment, says: "The contract gave the superintendent no power to change the material, nor did it give him any discretion to require material not provided for in the contract and in the specifications." So it is true here. Some discretion in street or sewer or like work must be left to the street superintendent or officer to whom is committed the superintendence of such work, or else all improvements contemplated by the street law must be at an end, and where it does not appear as a matter of law or of fact, as it does not appear here, that the exercise of such discretion will result in either materially increasing or decreasing the cost of the proposed improvement beyond or below that contemplated by the contract, a judgment invalidating the assessment because of the delegation of such discretion would not only be inequitable and unjust but unconscionable.

The cases of Perine Cont., etc., Co. v. Pasadena, 116 Cal. 6, 47 Pac. 777; Fay v. Reed, 128 Cal. 360, 60 Pac. 927; Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299; McDonnell v. Gillon, 134 Cal. 332, 66 Pac. 314; and Williamson v. Joyce, 137 Cal. 107, 69 Pac. 854,—are cited by appellant in support of the alleged invalidity of the assessment because of the objections now under discussion; but an examination of these cases will disclose an obvious distinction, as to the facts, between them and the case at bar. It is unnecessary to give them special attention in this opinion. It is enough to say that in those cases there was vested, by reason of an insufficient and indefinite description of the work to be done, in the officer charged with the immediate direction or superintendence of the work a discretion by the exercise of which the cost of the improvement could have been increased or diminished at his will. As stated, such is not the case here.

The fifth objection challenges the validity of the specifications upon the ground that they fail to definitely fix the point at which "a concrete catch-basin" should be located, the exact point of location of said basin being left to the judgment of the city surveyor. In this connection, appellant points out that the specifications do not provide for the location of the curbs, gutters, and gutter drains, and contends that for this reason also the specifications are fatally defective. In support of these objections we are referred to the case of Grant v. Barber, 135 Cal. 188, 67 Pac. 127, supra. There the specifications, which were, as here, made part of the resolution of intention, provided that the contractor "shall put in such culverts as the street superintendent may direct," there being no description of such culverts, either as to size or the material from which they should be constructed. Such discretion or power thus delegated to the street superintendent was out of all reason, and the act of the governing board in delegating it manifestly ultra vires, or beyond their authority.

In the case at bar the catch-basin and curbs, gutters, and gutter drains are minutely described, both with regard to size and the character of the materials of which they were to be made, and, as to the catch-basin, it is to be said that the power given the street superintendent merely to determine the particular point at which it should be located on the street, was perhaps only that power which it was found necessary that he should exercise in order to properly locate it. In any event, it does not appear here (and we do not see how it could be made so to appear) that the location of the basin at any particular point would increase or diminish its cost over or below that which would be involved in its location at some other point. As stated, the size and the material from which it was to be made were specified, and, obviously, its cost readily ascertainable therefrom. As to the claim that the specifications are uncertain in that the line of the curbs, gutters, etc., is not specifically located or pointed out, the reply is that there was no necessity for specifically describing so obvious a proposition. Common knowledge tells us that curbs must be placed at one of the edges of the street, and, thus, as the Century Dictionary tells us, they form the inner side of a gutter. As counsel for respondent well suggest in their brief: "The edges of the street being established by official surveys, it is impossible to understand how any doubt could arise as to the location of the curbs, and the position of the curbs being thus fixed, the plans, as a part of the resolution, fix the position of the gutter and the gutter drains." In other words, the exact location of the curbs, gutters, and gutter drains, as contemplated by the specifications here, is as easily ascertainable from said specifications as if the same were specifically described, or as would be the location of the foundation of a building with reference to the superstructure.

The remaining objection to be considered involves that part of the specifications providing for the character of the concrete to be used, and the contention is that the street superintendent is therein given the discretion to decide which of two methods may be adopted for the purpose of mixing the sand and cement to be used in forming the concrete. This contention cannot be sustained. All that the specifications call for in this respect is a certain standard of concrete, and they expressly provide that such must be the standard, whether the mixing is done by hand or by a machine. While, under the terms of the specifications, the contractor was at liberty to mix the sand and cement either by hand or by means of a machine, there is no language to be found therein which authorized the street superintendent to dictate to the contractor the adoption of either method. The evident purpose of this part of the specifications was to secure concrete of a certain approved standard, regardless of the means to which the contractor might deem it the better plan to resort in order to furnish the kind of concrete required.

There is a further objection raised against the assessment based on that provision of the specifications which reads: "In case of a misunderstanding or dispute as to the meaning or intent of any provision of these specifications, the interpretation of the city surveyor shall be final."

While it is the paramount duty of the street superintendent, or the city surveyor, or any officer who may be legally charged with the responsibility of superintending the work, to require the work to be done in accordance with the terms of the contract or the specifications, the street law does not provide nor does it contemplate that such power as is thus sought to be delegated should be exercised by an officer or agent of the city or the property owners, and if it did so provide, the act to that extent would no doubt be held to be in violation of the Constitution. There is a wide distinction between the power of one selected as an arbitrator to pass upon the proposition whether the work has been done according to the specifications and the power sought to be conferred here by which the decision of the city surveyor as to disputes involving the "meaning or intent" of the specifications is made final and conclusive, thus opening the way for adjudications which do not constitute that "due process of law" by which citizens can alone be deprived of life, liberty or property. But we are unable to perceive how the provision could have misled bidders for the work. And, assuming that the city surveyor could, by the exercise of the power, have increased or diminished the cost of the work above or below that indicated by the resolution, there is nothing here to show that any attempt was made upon his part to exercise such power, or that occasion arose calling for its exercise. Thus we have reviewed all the objections urged against the validity of the assessment involved in this action.

It is our opinion, as already expressly stated, and as must be manifest from the views generally we have expressed herein, that all the objections to the assessment in this case involve technicalities behind which there is little if any substance. It is proper, and indeed, necessary that all the provisions and requirements of laws authorizing the levy of assessments or taxes upon the property of citizens, particularly for special purposes, should be strictly followed, where a strict observance thereof is reasonably practicable; for, unless the rights of property owners are not completely safeguarded in the matter of the levy of such taxes, it may become an easy matter to perpetrate all sorts of fraud against property owners, even to depriving them of their property without lawful right or due process of law. Yet, as the Supreme Court says in Chase v. Trout, 146 Cal. 365, 80 Pac. 81, "however desirable it would be to have the precise details of the work, even to the smallest fraction, fixed in advance of the bids, so that the exact cost to the contractor, as well as the contract price may be known at the time the contract is let, it always has been and always will be impossible to do so." And in Haughawout v. Hubbard, 131 Cal. 678, 63 Pac. 1079, similar language is used. It is there said: "To some extent such details must depend on unanticipated contingencies of the actual construction. The specifications must, therefore, always fail, more or less, in certainty or completeness of detail, and hence the most accurate and detailed specification must leave unprovided for many questions arising in the course of the work as to the kind and amount of work or materials and other details of construction. The giving of discretion to some person as to all these details, the culverts possibly excepted, is inevitable in every such work. If not vested in and exercised by the street superintendent, it will be exercised by the contractor himself. The statute recognizes this condition, and itself provides that the work must be done to the satisfaction of the street superintendent." To the same effect is Haughawout v. Raymond, 148 Cal. 312, 83 Pac. 53.

That there may be no misapprehension of our views regarding certain propositions treated in this opinion, we desire to say that we are not to be understood from anything herein said as holding that cases have not arisen or that cases may not arise in which the invalidity of a street or like assessment has appeared or may appear from the very terms of the resolution of intention itself. In other words, we are not holding here that, if the resolution of intention should disclose the delegation to the street superintendent of power which the Legislature clearly intended should be exercised alone by the board itself, or which, from its very nature, could be said to clothe the superintendent with discretion to enlarge or diminish the cost of the work at his will, the assessment would not have to be declared invalid, regardless of whether or not there was an affirmative showing of actual injury as the result of the exercise of such power. But where, as here, the power or discretion delegated does not appear upon its face to be material or unauthorized, this court cannot declare, as a matter of law, or in the absence of evidence showing that positive injury has in fact resulted from its exercise, that, with regard to the matters as to which such discretion is delegated, the discretion or power so delegated is material or beyond the contemplation of the law.

No substantial reason appears to us why the judgment should not stand, and the same is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

13 Cal. App. 208

In re LINDNER'S ESTATE.

MUTH v. DOMENICI. (Civ. 760.)

(Court of Appeal, First District, California. April 12, 1910.)

1. PARENT AND CHILD (§ 2*)—CUSTODY—RIGHT OF MOTHER.

Upon the death of a father, the mother is prima facie entitled to the custody of her young child, and cannot be deprived of it unless clearly shown to be unfit.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4–32; Dec. Dig. § 2.*]

2. GUARDIAN AND WARD (§ 13*)—RIGHT OF MOTHER TO APPOINTMENT—EVIDENCE—SUFFICIENCY.

On an application by a mother for appointment as guardian of the person and estate of her child, evidence *held* insufficient to sustain a finding that she was not a proper person.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40–52; Dec. Dig. § 13.*]

3. APPEAL AND ERROR (§ 1010*)—FINDINGS OF THE TRIAL COURT—REVIEW.

Where there was any substantial evidence to support the findings of the trial court, the court on appeal will not interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

4. GUARDIAN AND WARD (§ 13*)—RIGHT OF MOTHER TO APPOINTMENT—EVIDENCE—SUFFICIENCY.

On application by a mother for appointment as guardian of the person and estate of her child, general statements by manifestly unfriendly witnesses that the child was always filthy, and that the mother did not keep her house clean, without any showing of the knowledge possessed by the witnesses, did not meet the requirement that a mother cannot be deprived of the custody of her child save by a clear showing that she is unfit.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40–52; Dec. Dig. § 13.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Petition by Madge Muth against Emma Domenici for the appointment of petitioner as the guardian of the estate and person of Juanita A. Lindner, minor child of the petitioner. From a judgment denying the petition, Madge Muth appeals. Reversed.

McGowan, Squires & Westlake, for appellant. Hugo D. Newhouse, for respondent.

HALL, J. This is an appeal from a judgment denying appellant's petition to be appointed guardian of the person and estate of her own child and the order denying her motion for a new trial. The court found that the petitioner was not a fit, proper, or competent person to discharge the duties of guardianship or to be appointed guardian of said minor, who was then less than three years of age. The father of said child died before this proceeding was instituted, so, unless the evidence fairly shows that the mother was not a fit or proper person to have the care and custody of her own child, the judgment and order must be reversed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Upon the death of the father the mother is prima facie entitled to the custody of her young child, and cannot be deprived of such custody unless shown to be unfit by sufficient testimony. In re Campbell, 130 Cal. 383, 62 Pac. 613; Guardianship of Salter, 142 Cal. 412, 76 Pac. 51.

The prior right of parents to the custody of their children under 14 years of age "cannot be disregarded except on the most compelling reasons proven and sustained before the court." 21 Cyc. 34.

The petition of appellant is in the usual form, and showed that the child had an estate of the value of $500, and was then in the custody of Emma Domenici. When the matter came on for hearing Emma Domenici appeared with the child, but filed no answer to the petition. The matter was heard upon three different days. At no time was it suggested by any one that petitioner was in any way immoral or of bad habits. Prior to the death of the father of the child petitioner had brought a suit for divorce from him, and on the 28th day of January, 1907, an interlocutory decree of divorce was granted to her, in which the custody of the child was awarded to its father until further order of the court. The awarding of the custody of the child was in accordance with an agreement between the father and mother which contemplated that the child should be placed with its paternal aunt, Emma Domenici, but which likewise provided that such custody should be temporary only. The father died January 30, 1907, but the child had been given into his custody under the agreement December 24, 1906, and subsequently by him placed with Mrs. Domenici. After the death of the father petitioner remarried, and is now the wife of George Muth, and is able to provide for the child. The evidence taken upon the first and second days of the hearing disclosed that petitioner had visited the child but once since giving it into the care of its father, but nothing else was shown to her prejudice. Indeed, at the close of the second day's session the learned judge presiding expressed the view that this was a most unnatural act, and that she (petitioner) "thinks more of the $500 that is in sight in the estate than she does of the person of the child. That is the only matter that is facing me at the present time."

At the next hearing it was shown without contradiction by letters that passed between her and her counsel, Frank McGowan, Esq., that she was advised by him that she had better not visit the child until the court rendered judgment in the divorce suit. This occurred January 28, 1906. In February petitioner did call to see her child, and in March consulted with Mr. McGowan with a view to regaining its custody. She was then taken ill, but upon leaving her bed wrote to Mr. McGowan urging that steps be taken to get for her the child. Negotiations were at once commenced and carried on by Mr. McGowan, for her, with Mrs. Domenici and the attorney that had represented Mr. Lindner in the divorce case, until finally the petition was filed.

Several letters written by Mrs. Muth to her attorney were read in evidence. None of them refer to the money or estate of the child at all, but do show love and anxiety for the child. They are all expressed in good English, correctly spelled and show the writer to have a fairly good education. These letters and the evidence of Mr. McGowan and other evidence given after the intimation from the court as to its views fully explain in a satisfactory way the reasons why petitioner did not more frequently visit her child.

At the close of the hearing some evidence was given intended to show that petitioner had neglected the child. Emma Domenici testified that "When I got the baby we had to give her a bath. She was filthy. Her hair was not combed. * * * Her hair was matted." But it was shown without contradiction that the baby had for a week or more preceding been in the custody of its paternal uncle and not with its mother at all. She was therefore not responsible for this condition. Evidence was also given by the sister and brother of Mrs. Domenici in general terms that the baby was always filthy and dirty, and that petitioner did not keep her house clean. How frequently they visited the house of petitioner or what opportunities they had of really knowing what care she gave the baby was not shown. Petitioner, after this testimony was given, again took the witness stand and denied its truth. She testified that she bathed the baby every day and always kept it clean. There was not one word of testimony that the child had ever been ill, or that anything existed in the life of petitioner that would militate against the moral well-being of the child. We fully recognize the rule that where there is any substantial evidence to support the finding of the trial court this court cannot interfere. But we likewise recognize that as against everyone except the father the mother is by the law of God and man entitled as of right to the custody of her own child, and of this right she cannot be deprived except upon a clear showing of her unfitness for the exercise of such right.

General statements by manifestly unfriendly witnesses that the child was always filthy and that the mother did not keep her house clean, without any showing as to the opportunities for real knowledge possessed by such witnesses, do not meet the requirements for such a showing.

The general statements made by the brother and sisters of her divorced husband to the effect that she did not keep the child clean are not sufficient to warrant a finding that she is not a fit and proper person to have the care and custody of her own baby, there not being one word tending to show any loose or immoral conduct upon her part, or any neglect that has ever injured the health or physical well-being of the child. A mother who is both capable and anxious to rear her own offspring should not be deprived of the opportunity to thus discharge the duty she owes to the child, without a clear showing of unfitness for the trust.

The ends of justice require that this case be remanded for a new trial, to the end that a careful and full investigation may be had as to whether or not this mother should be deprived of the right to rear and care for her own child. The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

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13 Cal. App. 203

STONE v. SAN FRANCISCO BRICK CO.

(No. 668.)

(Court of Appeal, First District, California. April 11, 1910. Rehearing Denied May 11, 1910; Denied by Supreme Court June 9, 1910.)

1. Trial (§ 404*)—Findings—Construction.

Findings of the trial court must be read as a whole to determine their sufficiency.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957–962; Dec. Dig. § 404.*]

2. Trial (§ 395*)—Findings—Sufficiency—Surplusage.

Where, in an action for work performed and materials furnished, the court a year after the bringing of the action found that prior to the commencement of the action the claim was assigned to plaintiff, and also found, in respect to the plea of limitations, that the cause of action was not barred, and also found the value of the claim and the nonpayment thereof, a finding in the language of the complaint that "within two years last past" plaintiff's assignor performed work for defendant, etc, was immaterial, and would be disregarded as surplusage.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 939; Dec. Dig. § 395.*]

3. Evidence (§ 181*)—Contents of Books Admissible in Evidence — Testimony of Witness.

Where a bookkeeper who kept a book testified to the correctness of the book, the contents of the entries therein admissible if the book had existed could, as authorized by Code Civ. Proc. § 1937, be proved by any witness who had knowledge thereof.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 181.*]

4. Appeal and Error (§ 1054*)—Harmless Error — Erroneous Admission of Evidence.

Where the court rendering a judgment sustained by competent evidence was not affected by evidence erroneously admitted in rebuttal, the error must be disregarded, as required by Code Civ. Proc. § 475.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185–4186; Dec. Dig. § 1054.*]

5. Witnesses (§ 255*)—Examination—Use of Memorandum.

Under Code Civ. Proc. § 2047, permitting a witness to refresh his memory by anything written by himself or under his direction at the time the fact occurred or immediately thereafter, etc., a witness may refresh his memory by use of a memorandum made at his dictation and under his direction when the facts were fresh in his memory, and where he knew that the facts were correctly stated in the memorandum.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874–890; Dec. Dig. § 255.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by W. I. Stone against the San Francisco Brick Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ames & Manning, for appellant. Cushing, Grant & Cushing, for respondent.

HALL, J. Plaintiff sued to recover the sum of $854 as the reasonable value of work and labor performed for and materials furnished to defendant by plaintiff's assignor at the special instance and request of defendant. Plaintiff recovered judgment for the sum of $500, from which and the order denying its motion for a new trial defendant appealed to this court.

The action was commenced by the filing of the complaint on the 18th day of May, 1907, which alleged the performance of the work, etc., within two years last past. The findings were signed and filed on the 21st day of May, 1908. The court, following the language of the complaint, found "that within two years last past, at the city and county of San Francisco, said Union Machine Company performed work, labor, and services for said defendant corporation at its special instance and request, in making and repairing various kinds of machinery and metal appliances, and during said time said Union Machine Company furnished materials to defendant in and for said work on the like request." This finding is attacked by appellant as not supported by the evidence and as evasive and not responsive to the issues presented by the pleadings. The point of the attack is that the words "two years last past" refer to the two years immediately preceding the date of the filing of the findings, and not to the period preceding the filing of the complaint, while the evidence in the case shows without conflict and with certainty that all the work was done and all material furnished before the great earthquake and conflagration which occurred in April, 1906, more than two years before the filing of the findings. Undoubtedly the words "within two years last past" as they occur in the findings were inadvertently used.

Findings must be read as a whole. In this case the court also found that "prior to the commencement of this action" the claim was assigned by said Union Machine Company to plaintiff, and in response to a plea of the statute of limitations (subdivision 1, § 339, Code Civ. Proc.) found that the cause of action was not barred by the provisions of said section or by any other section of said Code. The court also found as to the value and as to nonpayment of the debt. Under these circumstances, we think the finding that the services were performed and the materials furnished "within two years last past" was immaterial, and should be disregarded. The gist and heart of the finding attacked is that the services were performed and the materials furnished by plaintiff's assignor to defendant at its special instance and request. If the court had simply so found without mentioning in that finding the period of time, the finding would have been sufficient, in connection with the other findings as to the assignment before the commencement of the action, as to the action not being barred, as to value, and nonpayment, to support the judgment; for it thus appears that the debt accrued within two years before the commencement of the action.

The vital questions of fact presented by the pleadings are answered by the findings, and the substance of the finding attacked is supported by the evidence. The form of the finding is not to be commended and such errors should be avoided, but we do not think that a judgment should be reversed or a new trial ordered for what so clearly appears to be a mere clerical error.

It is also claimed that the court committed error in permitting the witness Bepler to testify to the balance disclosed, just prior to the great fire, by the collection book kept by the bookkeeper and collector for the Union Machine Company (plaintiff's assignor). It had been shown that this and all other books kept by plaintiff's assignor had been destroyed by the fire of April, 1906. Evidence had also been given by the bookkeeper that he kept the books correctly. Nevertheless the entry in this particular book was not admissible, for it was not the book of original entry, and was not of such a character as to come within the rule allowing the introduction by plaintiff of entries in his own books. But it is not at all clear that the objection made to the admission of the evidence was really pointed at the real vice of the evidence. While a general objection that the evidence was incompetent and hearsay was made, this was coupled with the specific objection "that the book is not shown to be kept in the handwriting of this witness, no entries were made there by him," which seems to have been the real point of the objection relied on. But the bookkeeper who did keep this book testified to the correctness of his books, and subsequently specifically testified to the correctness of this particular book. Under such circumstances, if the entries are admissible at all, and the book has been destroyed, the contents thereof may be further proved by any witness who has knowledge thereof (section 1937, Code Civ. Proc.). So the specific objection made to this evidence was not well taken, and that this was understood by counsel and the court as the real point of the objection we think is manifest from what appears in the record and the original brief of appellant. Appellant in his objection did not suggest that the book was not a book of original entry, which would have been the most appropriate and direct way to call the court's attention to the vice of the offered evidence; and in his brief he heads his discussion of the point with the words, "Error in admitting testimony of person not the bookkeeper as to contents of destroyed books," and concludes his discussion with a summary of his views to the effect that it is doubtful whether contents of destroyed books of account may be proved at all, and that, if such proof may be made, it must come from the bookkeeper.

But, whether or not the vice of the evidence admitted was reached by the objection, we do not think that any error that may have been committed by the court in admitting such evidence is of sufficient importance in this case to require the granting of a new trial. The witness answered that the book showed a balance in favor of plaintiff's assignor of between $700 and $800, and he further testified that no payments were thereafter made by the defendant. The court, however, gave judgment for but $500, thus showing that the evidence in question did not affect the judgment. The judgment rendered is amply sustained by other evidence. The challenged evidence was introduced in rebuttal after the defendant had given evidence as to the balance shown by its books. Under such circumstances, we think this is a proper case for the application of the rule prescribed by section 475, Code Civ. Proc., that error that does not affect the substantial rights of the parties must be disregarded.

Objection was also made to a witness refreshing his memory by the use of a memorandum made under his direction, but the ruling overruling this objection was not erroneous, for it appeared that the memorandum was made at the dictation and under the direction of the witness when the facts were fresh in his memory, and that he knew that the facts were correctly stated in the memorandum. Code Civ. Proc. § 2047.

The judgment and ordered are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

13 Cal. App. 266

In re GOETZ'S ESTATE. (Civ. 770.)

(Court of Appeal, First District, California. April 15, 1910. Rehearing Denied by Supreme Court June 1, 1910.)

1. Wills (§ 458*)—Construction—General Rules—Repetition of Words.

Words occurring more than once in a will are presumed to be used always in the same sense when the context does not show a contrary intention, or the words are not applied to different subjects.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 977; Dec. Dig. § 458.*]

2. Wills (§ 534*)—Construction—Property Bequeathed.

Clauses 3 and 4 of a will were specific bequests of money. Clause 6 gave to appellants certain personalty. Clause 7 stated that testator made no money bequests to appellants because the real estate devised to them by clause 5 was sufficient. Clause 13 provided that, if there should be some surplus of money, it should be equally divided among the legatees. *Held*, under Civ. Code, § 1322, providing that a clear and distinct bequest cannot be affected by other words not equally clear and distinct, that the bequest in clause 13 is not limited, so as to exclude appellants by clause 7.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1154; Dec. Dig. § 534.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Joseph Goetz. From an order denying an application for a decree of partial distribution, Louis Albert Goetz and others appeal. Reversed, with directions.

See, also, 109 Pac. 145, 492.

P. A. Bergerot, A. P. Dessouslavy, and Jellett & Meyerstein, for appellants. Louis Bartlett and Loewy & Gutsch, for respondent.

KERRIGAN, J. This is an appeal from an order denying an application for a decree of partial distribution.

The controversy calls for a construction of clauses 7 and 13 of the will of Joseph Goetz, deceased. The first clause of the will contains the names of the executors and vests them with certain powers. The second clause reads: "I make the following bequest: all of which money bequest and to be paid in gold coin of the United States of America." In the third and fourth clauses the testator bequeathed to six nephews and a niece—other than the appellants—and to a grandniece, sums of money aggregating $180,000. By the fifth clause he devised to the appellants, three nephews and a niece, all his real estate. In the sixth clause among other gifts he bequeathed to the appellants certain pictures, some jewelry, and his household furniture, all of substantial value. The seventh clause reads as follows: "I make no money bequests to my nephews and niece which are mentioned in paragraph Fifth of my will as the real estate owned by me at the time of my death so bequeathed to them in equal shares is ample and sufficient." The only other clause in the will that need be quoted is clause 13, which reads as follows: "If there should be some surplus of money from the sales of my personal properties consisting of mortgages notes; and shares of stocks and banks account so mentioned shall be divided equally among the legatees herein mentioned in this will share and share alike."

From the findings of the court it appears that the debts of the estate have all been paid, and that after liquidating certain unpaid legacies, and making an adequate allowance for the remaining expenses of administration, the surplus of the personal estate referred to in the thirteenth clause will not be less than $60,000, and there is no reason why a partial distribution of the estate should not be made to the appellants unless it was the intention of the testator by clause seventh to exclude them from participating in what he termed the "surplus" of his state. The appellants are not only devisees, but admittedly by virtue of the terms of the sixth clause of the will they are also legatees, and as such, under clause 13 standing alone, they are beneficiaries.

This brings us to a consideration of the real question in the case, namely: Does the seventh clause of the will limit or affect the thirteenth clause thereof? The testator drew his own will. He was a foreigner by birth, whose command of the English language, and especially of technical legal terms, was limited; and for this reason, among others, it is somewhat difficult to determine the testator's intentions. We think, however, that it was not his desire that clause seventh should affect or restrict the thirteenth clause. From a reading of the will it would seem that, while the testator out of excess of caution provided for the disposition of a possible surplus of his estate, he hardly expected that there would be any surplus, but that the legacies of $180,000 in clauses 3 and 4 would exhaust his entire personal estate. In clause 10 he directed that a portion of the rents of the real property devised should constitute a part of his estate. In clause 11 he directed that, if there should not be sufficient money to pay the legacies mentioned in clause 3, said legacies should be proportionately reduced. Clause 13 itself reads: "If there should be some surplus of money," etc., it "shall be divided equally among my legatees," which uncertain form of expression, when compared with the certain and positive language in which other provisions of the will are stated, would also indicate that he considered the surplus of his personalty to be at least a doubtful quantity. Accordingly, and as the tie was closer and stronger between appellants and the testator then between him and respondents, and, as he nowhere in his will stated the value of his whole estate or of his real property, it is more reasonable to assume that, remembering the superior claims of appellants on his bounty, he wrote clause 7 to explain why he had made no definite money bequests to appellants, rather than that he intended thereby to exclude them from receiving any part of the possible residue of his estate.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Further light is thrown on the purpose of clause 7 by a consideration of the structural arrangement of the will. In clauses 3, 4, 5, and 6 the testator disposed of $180,000 in cash, all his real estate and his pictures, jewelry, and household furniture, which clauses cover what we may term the primary disposition of his property. Immediately following these is clause 7, in which he says, "I make no money bequests" to my nephews and niece mentioned in paragraph 5 of my will, as the real estate "bequeathed to them is ample and sufficient." Six clauses farther along he says, however, "If there should be some surplus of money," etc., it "shall be divided equally among the legatees * * * mentioned in this will share and share alike." The seventh clause following immediately, as it does, the disposition, as he apparently supposed, of all of his property, was intended, we believe, not as a limitation or restriction of clause 13, but as a reason why he made no specific money bequests to the appellants. Again, in clause 2 the testator, in referring to the legacies in clauses 3 and 4 of named sums of money, spoke of them as "money bequests"; and there is some force in the suggestion that in employing the same expression in clause 7 he meant thereby to say that he made no bequests to appellants of specific sums of money because the real estate given them was ample and sufficient. In 30 Am. & Eng. Encyclopedia of Law (2d Ed.) p. 671, it is said: "Repetition of words. Words occurring more than once in a will are presumed to be used always in the same sense when the context does not show a contrary intention, or when the words are not applied to different subjects."

In Pringle v. Wilson (decided September 23, 1909) 104 Pac. 316, it is said: "It is a familiar rule of construction that other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another." See, also, Beal on Legal Interpretation (2d Ed.) p. 558. It will be unnecessary, however, to consider this point further, for whatever the testator meant by clause 7 it cannot be successfully denied that it is at least doubtful whether that clause was intended to limit or affect clause 13; and section 1322 of the Civil Code specifically provides that a clear and distinct bequest in a will, such as is clause 13, cannot be restricted or qualified by another provision therein which is indefinite or doubtful; and it must be held, therefore, that appellants are residuary legatees under clause 13, and entitled to partial distribution of the personal estate of the testator. The last-mentioned section reads as follows: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will or by an inaccurate recital of or reference to its contents in another part of the will." See, also, Estate of Upham, 127 Cal. 90, 59 Pac. 315; Estate of Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; Estate of Granniss, 142 Cal. 1, 75 Pac. 324; Williams v. Williams, 73 Cal. 99, 14 Pac. 394.

The order is reversed, and the court is directed to enter an order granting the application for partial distribution.

We concur: COOPER, P. J.; HALL, J.

13 Cal. App. 198

In re GOETZ'S ESTATE. (Civ. 763.)

(Court of Appeal, First District, California. April 11, 1910.)

1. DEEDS (§ 6*)—DEED OR EXECUTORY CONTRACT—"SOLD."

In a recital in an agreement that real property is sold, the word "sold" does not conclusively show a present conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 6; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 7, pp. 6540-6542; vol. 8, p. 7801.]

2. DEEDS (§ 6*)—DEED OR EXECUTORY CONTRACT.

An agreement reciting that real property was sold, and reciting the deposit of a sum of money on account of the purchase price to be returned if the sale was not consummated according to the conditions of the agreement, the purchaser's signature being preceded by the words "I agree to purchase," pursuant to which the purchaser went into possession and the seller executed a deed and placed it in a bank to be delivered on the performance of conditions by the purchaser, was an agreement of sale, and not a conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 6; Dec. Dig. § 6.*]

3. CONVERSION (§ 11*)—EFFECT OF CONTRACT OF SALE.

An agreement of sale of real property of decedent revoked before his death, the part payment made to him being returned, did not work an equitable conversion of the realty into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 20; Dec. Dig. § 11.*]

4. CONVERSION (§ 11*)—CONTRACT OF SALE—STATUTORY PROVISIONS.

Under Civ. Code, § 1301, providing that an agreement for the sale of property disposed of by a will previously made does not revoke such disposal, but the property passes subject to the same remedies on the testator's agreement for a specific performance or otherwise as against the devisee as might be had against the testator's successors if the property had passed by succession, an agreement of sale of land by a testator does not work an equitable conversion of property into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 20; Dec. Dig. § 11.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Joseph Goetz, deceased. From an order of partial distribution, an appeal is taken. Affirmed.

See, also, 109 Pac. 105, 492.

Louis Bartlett, for appellants. P. A. Bergerot, Jellett & Meyerstein, and A. P. Dessouslay, for respondents.

KERRIGAN, J. This is an appeal from an order of partial distribution, whereby a certain parcel of real estate in the city and county of San Francisco was distributed to the respondents.

The testator, Joseph Goetz, devised all his real estate owned by him at the time of his death to the respondents, who were his nieces and nephews. The surplus of his estate which remained after the payment of money legacies aggregating $180,000 was bequeathed by him to the appellants and others. Joseph Goetz executed his will May 11, 1904. He died July 1, 1907. On January 7, 1907, he and E. C. Chapman had executed an instrument in writing as follows: "Chatfield & Vinzent, Real Estate, Mortgages, Loans and Insurance, 51 Post Street. San Francisco, Jan. 7, 1907. Received from E. C. Chapman the sum of $5,000.00, being deposit on account of $75,000.00, United States gold coin, the purchase price of the property this day sold to him, as per the owner's authority, situated in the city and county of San Francisco, State of California, and described as follows. [Here follows a particular description of the real property.] Terms of sale: 90 days allowed to examine title and consummate sale; at the expiration of said time the balance of said purchase money is due and payable upon tender of the deed of the property sold. If title is defective, thirty days are allowed the seller to perfect the same, and if, after the expiration of said time (unless extended by mutual consent) the title is incurably defective, then the deposit is to be returned at once. If the sale is not consummated in accordance with the foregoing conditions the deposit is to be forfeited. Time is of the essence of the contract. Taxes for the fiscal year 1906–07 to be pro rated. Title is to be approved by the Pacific Title Insurance Company, whose policy of insurance shall be evidence of good title. Chatfield & Vinzent. I, the said E. C. Chapman, hereby agree to purchase the above-described property and to comply with all the conditions therein contained. (Sale to be consummated at the office of Chatfield & Vinzent.) E. C. Chapman. San Francisco, Jan. 7, 1907. I hereby approve the above sale. Joseph Goetz."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Two days after the execution of this contract, to wit, January 9th, Joseph Goetz signed a grant, bargain, and sale deed of said land to Chapman. On January 11th he duly acknowledged the same, and deposited it with the French-American Bank of San Francisco, with written instructions that it be delivered to Chapman on or before 90 days from date upon payment by Chapman of $70,000, which amount was stated to be the balance of the purchase price of said property "as per contract of sale dated January 7, 1907." Subsequent to this date, Chapman went into possession of said property and wrecked some of the buildings, and caused some of the bricks thereon to be cleaned. When the instrument of January 7th was executed, Chapman paid the $5,000 deposit therein mentioned. On April 25, 1907, Chapman and Goetz signed an agreement wherein it was provided that, in consideration of the sum of $2,000 additional deposit, Chapman's time for the carrying out of the contract of January 7th was extended up to and including May 10, 1907. On May 9, 1907, Goetz signed and delivered a receipt to Chapman for $93.10, being interest for 10 days from the 10th to the 20th of May on $68,000, the balance due Goetz from Chapman on the "contract of sale" of said property. On May 24, 1907, in the presence of Goetz and Chapman, the contract of January 7th was marked "canceled" the deed which had been on deposit with the French-American Bank was returned to Goetz, and, in the language of Chapman, "the deal was off."

The respondents claim under a devise by the testator of all the real estate owned by him at the time of his death, which includes the parcel now in dispute. Appellants, on the other hand, contend that the instrument of January 7th operated as a grant, bargain, and sale deed from Goetz to Chapman, and that consequently Goetz at the time of his death no longer owned the land, or that, if the instrument was not such conveyance, it operated in equity to convert the realty into personalty, so that in either event the property would not be carried by the devise to the respondents. We cannot agree with the contentions of appellants. It is true that in the contract in question the word "sold" was used, and that Chapman went into possession of the property and wrecked some of the buildings. But it is conceded, as, of course, it must be, that the word "sold" does not conclusively show a present conveyance. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Eaton v. Richeri, 83 Cal. 185, 23 Pac. 286; Shainwald, Buckbee & Co. v. Cady, 92 Cal. 83, 28 Pac. 101; Gallup v. Sterling, 22 Misc. Rep. 672, 49 N. Y. Supp. 942; Brooks v. Libby, 89 Me. 151, 36 Atl. 66; Cooley v. Miler & Lux (Sup.) 105 Pac. 981; Payne v. Neuval (Sup.) 99 Pac. 476. And the possession by Chapman only shows that the parties intended to carry out the contract. Later, however, they changed their minds and canceled the arrangement. The instrument was not called by the parties a deed, nor was it executed with the formalities of such a document, and it was not regarded as a conveyance by either Goetz or Chapman. The fact that a deed to the property was deposited with the bank by Goetz shows that Goetz at least did not regard the agreement of January 7th as a deed. Moreover, Chapman's signature to the contract is preceded by the words "I agree to purchase." The $2,000 paid by him was referred to in the receipt not as a part payment, but as an additional deposit. Finally, the conduct of the parties to the transaction with reference thereto, and particularly on May 24th, when in the presence of Chapman the deed was returned to Goetz by the bank and the contract marked "canceled," indicates that they never intended that the agreement of January 7th should divest Goetz of his title. Upon a consideration of the whole instrument, together with the conduct of the parties, it is very plain to us that the instrument was an agreement of sale and not a conveyance.

Equally without merit is appellants' contention that, if the agreement in question be construed as a contract of sale instead of a conveyance, it effected an equitable conversion of the property from real estate into personal estate, and that the property must therefore fall into the residue of personal estate and be distributed to the testator's legatees. This contention is based upon the theory that the contract was subsisting, valid, and enforceable at the time of the death of Goetz; but the court found on ample evidence that on May 24th "the said agreement for the purchase of said property was entirely canceled and rescinded by agreement then entered into between the said decedent and the said Edgar C. Chapman," and that thereafter Goetz "returned and paid to said Edgar C. Chapman the said sum of $5,000 paid on account of said purchase price as aforesaid." Another conclusive answer to this contention is that section 1301 of the Civil Code operated to prevent the application of the doctrine of equitable conversion (even if it had been otherwise applicable). That section reads as follows: "An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement for a specific performance or otherwise against the devisees or legatees as might be had against the testator's successors if the same had passed by succession."

The order is affirmed.

We concur: COOPER, P. J.; HALL, J.

13 Cal. App. 193

W. P. JEFFRIES CO. v. SUPERIOR COURT et al. (Civ. 781.)

(Court of Appeal, Second District, California. April 9, 1910.)

JUSTICES OF THE PEACE (§ 159*)—APPEAL—UNDERTAKING—NOTICE OF FILING.

Under Code Civ. Proc. § 978a, providing that the undertaking on appeal from a justice to the superior court must be filed within five days after the filing of notice of appeal, and notice of the filing of the undertaking must be given to respondent, and that the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they or other sureties justify within five days thereafter, the appeal must be regarded as though no such undertaking had been given, service of notice of the filing of an undertaking is not necessary to give the superior court jurisdiction of the appeal; the evil sought to be remedied by such section being the necessity of the owner of the judgment keeping watch during the 30 days within which previously appellant might file his undertaking, respondent then, as now, being required to except to the sureties within five days after the filing of the undertaking; the notice not being a step in perfecting the appeal, but only in the collateral proceeding to justify, an appeal by the provision of section 974 being taken by filing and serving a notice of appeal, and being perfected or made effectual by filing an undertaking "for the payment of costs on appeal"; and the qualification by the sureties on this undertaking, in the absence of exception, which may be waived, being a full and complete justification.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

Application by the W. P. Jeffries Company for writ of review to the superior court in and for the county of Los Angeles and W. P. James, judge thereof. Demurrer to petition sustained. Writ denied.

Andrew J. Copp, Jr., for petitioner. James P. Clark and Sidney J. Parsons, for respondents.

PER CURIAM. Certiorari. Petitioner is plaintiff in an action brought in a justice's court of Los Angeles county in which he obtained a judgment against the defendants in the action on October 11, 1909. The latter appealed to the superior court upon questions of both law and fact. Separate notices of appeal were served and filed on October 21, 1909, by two of the several defendants in the action, and on the same day the statutory undertakings on appeal and to stay execution were filed by one of the defendants; and on October 25, 1909, a separate undertaking for the same purpose by the other appealing defendants was filed. On October 27, 1909, all the papers in the cause were certified to and filed in the office of the clerk of the superior court.

No notice of the filing of these undertakings, or either of them, was given as provided by section 978a of the Code of Civil Procedure at the time they were filed, or within 30 days thereafter; and on November 11, 1909, respondent served notice upon appellants of its intention to move to dismiss the purported appeals, which motion was noticed for November 22, 1909, and based upon the failure of appellants to serve the notices of the filing of said undertakings as aforesaid. An affidavit of counsel setting out the facts was served with the notice. Thereafter, on November 12, 1909, one of the appellants served notice upon petitioner of the filing of his undertaking. The motion to dismiss said appeals was heard at the time for which noticed and the motion denied. It is this order denying this motion which we are asked to review.

Section 978a, Code Civ. Proc., is a new section added to the Code in 1909, and reads as follows: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." The requirement of the first sentence, to wit, the filing of the undertaking within five days after the service of the notice of appeal, and the giving of notice of the filing of the undertaking, are new provisions in the statute. Prior to the enactment of this section, the undertaking could be filed at any time within the 30 days during which the appeal might be taken. Section 978. The portion of 978a, relating to the justification of sureties, is but a re-enactment of the same matter theretofore a part of section 978. It is apparent, then, that the only question presented on this application is: "Was service of notice of the filing of an undertaking by appellants necessary to give the superior court jurisdiction of the appeal?" We think this question must be answered in the negative. Statutory provisions are to be construed with reference to the intention and purpose of their enactment. The apparent evil to be remedied by the amendment of 1909 was the necessity under the old conditions that the owner of a judgment rendered in a justice's court should keep constant supervision of the justice's docket for the period of 30 days to prevent an appeal being taken therefrom without adequate security being given on the appeal. The remedy was the requirement that the undertaking be filed within five days, and that notice of the filing of the undertaking should be given to him. No change was made by the amendment in regard to the time within which the respondent must except to the sufficiency of the sureties. This is still required to be done within five days after the filing of the undertaking; no reference being made to any notice of such filing. Notice of intention to file an undertaking would serve no useful purpose, as the service and filing of the notice of appeal would accomplish all that a notice of an intention to file an undertaking could do, as it implied that within five days the undertaking necessary to perfect the appeal would be filed. This is regarded as sufficient notice of intention on appeals from the superior court. No reason exists for giving a notice in advance of the act, as no hearing was to be had or act done which required the presence of the adverse party when the instrument was presented to the justice. If considered as a notice to be given after the undertaking has been filed, there is no provision as to the time it should be served or the effect of a failure to serve it. The language used in the latter part of the section with respect to the notice to be given of the time of justification of sureties cannot be read into the first sentence, as petitioner suggests. Neither is it applicable by analogy.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

If the failure to give notice of the filing of the undertaking should subject appellant to a penalty, such as that prescribed where the sureties fail to justify, there would have been no question as to the legislative intention. It is true, as argued by petitioner, that the absence of such a provision makes somewhat for the view that this notice is a step in perfecting the appeal, rather than a part of the collateral proceeding to justify, but its very nature and purpose make it part of the latter. Its sole use is to bring home to respondent the knowledge that the appeal is already perfected, at least, prima facie. Only after the appeal has been taken and rendered effectual to this extent can it serve any purpose. It merely invites the respondent to inspect the undertaking already filed in order to determine the sufficiency of the sureties executing it. The justification of the sureties after notice is not a necessary step in taking an appeal. An appeal is taken by filing and serving a notice of appeal. Section 974. It is perfected or made effectual by filing an undertaking "for the payment of the costs on appeal." The qualification by the sureties, upon this undertaking, in the absence of exception, is a full and complete justification. A further justification may be required by the respondent by excepting to the sufficiency of the sureties. This further justification is a collateral proceeding in which the respondent may exercise a right granted him to determine the adequacy of the security given for his protection on the appeal. This he may waive, and if he fails to exercise his right to except, or fails to attend before the court when the sureties are in attendance for the purpose of justifying, the appeal remains perfected and effectual under the undertaking as originally filed, just as it does when he does not except. Bank of Escondido v. Superior Court, 106 Cal. 43, 47, 39 Pac. 211. If, however, after exception properly made, the sureties fail to justify within five days, "the appeal must be regarded as if no such undertaking had been given." Section 978a; Wood v. Superior Court, 67 Cal. 115, 7 Pac. 200; McCracken v. Superior Court, 86 Cal. 76, 24 Pac. 845; Bennett v. Superior Court, 113 Cal. 440, 45 Pac. 808; Lane v. Superior Court, 5 Cal. App. 762, 91 Pac. 405.

The question here under consideration was not before the Court of Appeal for the Third District in Stimpson, etc., Co. v. Superior Court, 107 Pac. 1013. In that case there was an entire failure to file any undertaking after giving the notice of appeal; the undertaking relied on having been executed and filed "months before the trial." In the absence of some clearly expressed intention upon the part of the Legislature to make jurisdictional the serving of a notice the sole purpose of which is what we have declared this one to be, we feel constrained to hold that the failure to do so does not deprive the superior court of jurisdiction to hear an appeal in which the other steps provided by the statute are regularly and properly taken.

The demurrer to petition is sustained and the writ denied.

13 Cal. App. 170

MOORPARK SCHOOL DIST. OF VENTURA COUNTY et al. v. REYNOLDS et al. (Civ. 763.)

(Court of Appeal, Second District, California. April 7, 1910.)

SCHOOLS AND SCHOOL DISTRICTS (§ 42*) — FORMATION OF HIGH SCHOOL DISTRICT — PROCEEDINGS — SUBMISSION TO POPULAR VOTE.

An application for a mandatory writ recognizing the formation of a certain high school district showed that nine school districts had filed with the county superintendent of schools separate petitions, each stating that it was signed by a majority of the heads of families in the ——— school district, and asking for an election to determine the question of establishing a union high school district to be composed of the named school districts within said county, "or any seven of them which shall include the ——— school district," and then named the nine districts petitioning. It appeared that at the election no votes were cast in two of the districts, but a large majority in five other districts voted for the formation of a district and a majority of all the voters in the nine districts were in favor. A majority of the heads of families in A. district did not sign the petition, while B. district had for five years been a part of another union high school district. Pol. Code, § 1670, subd. 4, as amended by St. 1907, c. 519, provides that, when the heads of families equal in number to a majority in each district as shown in two or more contiguous school districts in the same county unite in the petition for the establishing of a union school district, the superintendent shall call the election. *Held*, that only the heads of families had a right to designate the boundaries of a district, the superintendent being given no authority, and that as the language of the petition might be construed as requesting the formation of a district which might or might not comprise contiguous or compact territory, and the petitions did not unite in the request for an election within the seven districts of the nine which could have united, the vote of yes or no required was not on an alternative proposition, and the election was invalid.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 85; Dec. Dig. § 42.*]

Original application by the Moorpark School District of Ventura County and others against James E. Reynolds, as superintendent of schools, and others, for writ commanding filing of certificate. Writ denied.

T. O. Toland and Toland & Rogers, for petitioners. Don G. Bowker, for respondents. Edward M. Selby, amicus curiæ.

PER CURIAM. The petitioners pray the court for a writ commanding the superintendent of schools for Ventura county to make and file a certificate of the result of an election alleged to have been held on August 3, 1909, on the question of forming a certain high school district, and further requiring said superintendent to call an election in said union high school district for the purpose of electing a board of trustees therefor.

Many questions involving a proper construction of the statutes with reference to the creation of high school districts have been presented and ably argued upon this application. We think, however, that the primary question for determination and the one which should control the action of the court in the premises, depends upon the legal organization and creation of the high school district alleged to have been created by a vote of the people thereof; for if, as a fact, such high school district was not legally created and established, it follows that the superintendent of schools has no duty to perform in connection with the matters sought in the application.

It is made to appear from the petition filed herein: That on the 30th day of June, 1909, eight certain school districts, to-wit, Long Canyon school district, Fairview school district, Timber school district, Simi school district, Santa Susana school district, Las Posas school district, Conejo school district, and Moorpark school district, filed with the superintendent of schools of Ventura county eight certain petitions, each of which was in the following form, omitting the introductory part: "We, the undersigned, being a majority in number of the heads of families as shown by the last school census of the ——— school district, and also a majority of the heads of families now residing within said ——— school district, respectfully petition that you call an election in the time and in the manner as by law provided for the purpose of determining the question of establishing and maintaining a union high school district to be composed of the following-named school districts within said county of Ventura, state of California, or of any seven of them, which shall include the ——— school district." Then follows a statement of the names of all the school districts sought to be included, among which was another district called Somis school district. That afterwards, on the 19th day of July, 1909, Somis school district presented a petition of similar character. All of the nine petitions so presented were similar in form, except that, where the blank appears in the petition, there was inserted the name of the particular school district joining in the petition. It further appears that the nine school districts comprised contiguous territory, and that, excluding Santa Susana school district upon the easterly border and Somis school district upon the westerly boarder, the remaining seven districts formed contiguous and compact territory. Upon the filing of the petition by the Somis school district, the superintendent of schools called an election in each of the school districts, notifying the qualified electors of an election to be held upon the question of the formation of a union high school district to consist of the following school districts (naming the nine districts), or any seven or more of said districts, including ———, which blank contained the name of the particular district in which the notice was posted. That said election was held in each of the school districts named, except that no votes were cast in Las Posas and Conejo districts, and as a result of said election a large majority of the voters of Somis district, Timber district, Moorpark district, Fairview district, and Long Canyon district voted for the creation of such high school district, and a majority of all of the voters in the nine districts cast their votes in favor of the formation of such high school district. That the superintendent of schools filed with the county clerk a certificate of the result of said election, which stated that the boundaries of said proposed union high school district are the exterior boundaries of the nine districts in which the election was held. It is further made to appear that, excluding Santa Susana and Somis districts, the census children exceeded 200, and the aggregate of votes cast in favor of the formation of the high school district was greater than that of the votes cast against it.

Subdivision 4 of section 1670 of the Political Code (St. 1907, p. 958), in force prior to July 1, 1909, provided: "When the heads of families equal in number to a majority in each district, as shown by the last preceding school census, residing in two or more contiguous school districts in the same county (provided, that said districts are accredited by said school census with a school population of two hundred or more), shall unite in a petition to the county superintendent of schools for the establishing and maintaining of a union high school district, he shall, within twenty days after receiving said petition, call an election for the determination of the question," etc. It is conceded that a majority of the heads of families in Santa Susana district did not sign the petition. It is also averred in the petition for the writ that Somis school district, included therein, is, and has been at all times for five years, a part and one of the districts comprising and comprised within a union high school district called the Oxnard high school district.

Considering, then, the demurrer filed to the petition for the writ, it is admitted that, by reason of the insufficiency of the petition in behalf of Santa Susana district and the fact that Somis was already within another high school district, neither of said districts could be included within the high school district sought to be created by the petition. The statute authorizing the heads of families to petition is the equivalent of an authority for them to unite in a request for a particular thing. An examination of the petitions filed with the superintendent of schools clearly shows that the petitioners therefor did not unite in a request for the formation of a specific territory into a high school district. Each district requested that its own territory be included, either with six other districts, or eight other districts. The only persons who under the law have a right to designate the boundaries of a district are the heads of families. There is nothing in the act indicating that the superintendent of schools, or any other person, shall have any right to determine what districts shall be united, and when the heads of families by their petition fail to unite in a specific request for the creation of a definite territory into a high school district they fail to comply with the statute, through which petition jurisdiction is given to the superintendent of schools to call the election. Under the peculiar language of these petitions, they were open to the construction of requesting the formation of a district which might or might not comprise contiguous and compact territory. These petitions did not unite in a request for an election within the seven districts which could have been united, but, on the contrary, requested an election to unite other territory, notably Santa Susana district, which declined to enter into the district, and Somis district, which could not enter into a new district. The necessity for the definite character of the request is evident when we consider the statute with reference to the election, which provides that the electors shall vote "yes" or "no" upon the question involved. The call for the election must be based upon the petition, and, with an alternative proposition in the petition and call for election, it would not be possible for an elector by simply answering "yes" or "no" to express his assent or dissent to or against the organization of a district having particular and specified boundaries. We are of opinion, therefore, that the demurrer to the petition for this writ should be sustained.

It may not be improper to say further that were a consideration to be had of the issues presented by the answer and return nothing is therein disclosed which, in our opinion, could have the effect of validating the proceedings sought to be instituted, or to confer upon the superintendent of schools jurisdiction or authority to call the election.

Writ denied.

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13 Cal. App. 175

PEOPLE v. BOND. (Cr. 108.)

(Court of Appeal, Third District, California. April 7, 1910.)

1. Criminal Law (§ 1159*) — Appeal — Review—Weight of Evidence.

Unless the testimony in support of the verdict is so inherently improbable as to demand its rejection the appellate court is bound by it, though the evidence, considered by itself, does not convince.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. Criminal Law (§ 59*)—Aider—Abettor—"Aid"—"Abet."

To "aid" does not imply guilty knowledge or felonious intent, but means to assist and supplement the efforts of another, while to "abet" includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71–74; Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 1, pp. 289–291; vol. 1, p. 15.]

3. Homicide (§ 30*)—Principal and Accessory.

If, without the knowledge of accused, another feloniously makes an assault, and accused voluntarily assists in taking the life of the person assaulted, although he does not fire the fatal shot, both participants are equally guilty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48–51; Dec. Dig. § 30.*]

4. Homicide (§ 250*) — Manslaughter—Sufficiency of Evidence.

Evidence *held* sufficient to sustain a verdict of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 516; Dec. Dig. § 250.*]

5. Criminal Law (§ 829*)—Instructions—Repetition.

In a prosecution for homicide where all the material elements of every degree of the crime included in the charge were clearly defined, and the jury instructed that unless they believed from the evidence to a moral certainty and beyond a reasonable doubt that deceased was killed by accused and by no other, or that he was killed by accused and another person who had conspired together to commit the crime, or that he was killed by some other person, while accused aided and abetted such other person in killing him, it will be their duty to acquit accused, a refusal to instruct that if no aiding and abetting by defendant in the homicide and no conspiracy between him and another had been shown, but if there existed a reasonable doubt as to which of them inflicted the wound from which deceased died, the accused was entitled to be acquitted, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. Criminal Law (§ 1137*) — Homicide (§ 340*)—Appeal and Error—Harmless Error—Instructions.

In a prosecution for murder, in which there was no evidence that prior to the killing defendant and another had conspired together to commit the offense, a portion of an instruction relating to the conspiracy might well have been omitted, but accused cannot complain of the error in giving it, as he requested the instruction, and because it could not have prejudiced the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137;* Homicide, Cent. Dig. §§ 715–720; Dec. Dig. § 340.*]

7. Homicide (§ 305*) — Instructions — Conspiracy.

In a prosecution for murder, in which accused, with another person, was implicated in the crime, it was not error to refuse an instruction that if there is not a conspiracy proven, then accused did not aid and abet, as the conspiracy implied an agreement to commit the crime as to which there was no evidence, while aiding and abetting requires only the actual participation in the act constituting the offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 637; Dec. Dig. § 305.*]

8. Homicide (§ 305*) — Necessity for Defining Conspiracy.

It was not necessary for the court in a prosecution for homicide, where accused and another were implicated, to define the term "conspiracy," where the court had instructed that unless the jury believe from the evidence that deceased was killed by defendant and another person, "who had conspired together to commit the crime," they were to acquit accused, as it must be assumed that the jury would understand that expression, and the expression used is not open to the construction that, if accused and another had formed a joint purpose of arresting lawbreakers such agreement would constitute them conspirators, as the instruction necessarily excludes any agreement except one to commit the crime for which accused was prosecuted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 637; Dec. Dig. § 305.*]

9. Homicide (§ 298*)—Conflicting Instructions.

Accused and another were deputy fish and game commissioners, and had arrested deceased for violating the fish law, and deceased was killed in a struggle which took place between them immediately after the arrest. The court instructed that a peace officer may arrest any one committing a misdemeanor without a warrant, that in making the arrest or in preventing escape after the arrest the officer when resisted is not bound to retreat, but may use such physical force as is apparently necessary to effect the arrest or to subdue the efforts of the prisoner to escape, but he cannot in either case take the life of the prisoner unless it appears to him as a reasonable man from all the circumstances that the taking of the prisoner's life is necessary to prevent great bodily injury to himself or those acting with him, or to prevent the killing of himself or those acting with him. The court further instructed that accused as an officer of the law had a right in endeavoring to arrest and retain deceased if he had committed a public offense in his presence to use all the force necessary or that appeared to him as a reasonable man to be necessary to overcome all resistance even to the taking of life. *Held*, that the instructions were not conflicting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.*]

10. Criminal Law (§ 823*)—Appeal and Error—Harmless Error—Instructions.

If the instructions were inaccurate or incomplete, they were rendered harmless by the remainder of the charge in which all the conditions concerning which the evidence relates and under which the right to take the life of deceased exists were fully expressed and the theory of the defense was fully presented to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995; Dec. Dig. § 823;* Homicide, Cent. Dig. §§ 718, 719.]

11. Criminal Law (§§ 404, 1036*)—Admissibility of Evidence — Clothes of Deceased.

In a prosecution for homicide, it is not error to admit in evidence the remnants of the shirt worn by deceased at the time of the homicide, and if accused objected to its admission on the ground that it is not shown to be in the same condition as at the time it was removed from the body of deceased he should have called it to the attention of the court or interrogated the witnesses concerning it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 891, 2639–2641; Dec. Dig. §§ 404, 1036.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12. Criminal Law (§ 455*) — Opinion Evidence—Course of Bullet.

In a prosecution for homicide the sheriff who had inspected the body was competent to describe what he had seen, and was properly allowed to testify that the bullet entered the left side of deceased passing through his body and coming out on the right side, there being other evidence in the case showing that the bullet entered the left side.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1044; Dec. Dig. § 455.*]

13. Criminal Law (§ 454*) — Opinion Evidence—Age of Deceased.

In a prosecution for homicide, evidence by a witness who had known deceased for 25 years that deceased was 70 years of age is admissible, as age is provable by the inference of any competent observing witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1043½; Dec. Dig. § 454.*]

14. Homicide (§ 338*)—Harmless Error—Admission of Evidence.

Deceased, while fishing, immediately before the killing, was arrested by accused and another for violating the fish law. *Held* that, overruling an objection to a question to a witness as to whether a fishing ladder was in working order at the time the witness was there was not erroneous on the ground that the cross-examination and the introduction of evidence as to the condition of the fish ladder was prejudicial to accused because it would lead the jury to believe that fishing within the prohibited distance of a fishing ladder which was not in working order would not be a misdemeanor, that inference being obviated by an instruction that accused and the person acting with him were deputy fish commissioners, and while acting in such capacity placed deceased under arrest for the violation of the fish law committed in their presence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 712; Dec. Dig. § 338.*]

15. Homicide (§ 163*)—Admissibility of Evidence—Character of Accused.

Deceased was killed by accused and another shortly after their arrest of deceased for violating the fish law. *Held*, that evidence of another person who had been arrested by accused and the person acting with him for violating the fish law that he had been properly treated by the officers was properly rejected in a prosecution for the homicide, as the conduct of accused on a different occasion is not pertinent evidence to disprove the commission of the crime for which he is being tried.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310, 311; Dec. Dig. § 163.*]

16. Witnesses (§ 388*)—Impeachment—Laying Foundation.

It is not error in a prosecution for homicide in cross-examining a witness who testified at the coroner's inquest to ask questions preliminary to impeachment as to his testimony at the coroner's inquest without producing the record, and asking the witness if at the coroner's examination he did not place the hand of another person upon a gun, and say that that was the manner in which deceased took hold of the gun, is not improper without showing the witness the record, where the record contained no photograph of the incident and could have afforded the witness no assistance.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1238; Dec. Dig. § 388.*]

17. Homicide (§ 338*) — Harmless Error — Cross-Examination—Instructions.

Deceased was killed shortly after his arrest by accused and another, acting as deputy fish and game commissioners, for violation of the fish law. In a prosecution for the homicide the man who was acting with accused was cross-examined as to whether he had his hand upon the shoulder of deceased when arrested, and also whether the fish ladder was in working order. *Held*, that such cross-examination was not prejudicial as creating the impression that the arrest of deceased was unlawful, where the court instructed that defendants were deputy commissioners, and while acting in such capacity placed deceased under arrest for violation of the fish law committed in their presence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 712; Dec. Dig. § 338.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

D. M. Bond was convicted of manslaughter, and he appeals. Affirmed.

Jas. T. Matlock, Jr. (Braynard & Kimball and W. H. Orrick, of counsel), for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, for respondent.

BURNETT, J. The defendant and one M. A. Carpenter were jointly charged with murder. They were tried separately, and the defendant Bond was convicted of manslaughter. He has appealed from the judgment and the order denying his motion for a new trial.

On August 20, 1908, appellant and the said Carpenter, who were deputy fish and game commissioners, were at a certain point on Battle creek, in Tehama county, looking for an individual who, they had been informed, was violating the fish and game law. They walked up the creek and observed the deceased, an Indian named Robert Junior, engaged in unlawful fishing. The officers went away in search of the other party, but returned in a short while and placed the Indian under arrest. With Junior at the time were his wife, his daughter, and his granddaughter. There is a sharp conflict in the testimony as to what occurred at the scene of the arrest, but it is agreed that all the parties proceeded up the hill to the camp of the deceased. An entirely different account from the statement of the defendants as to what occurred at the camp is given by the Indians. According to the former, the history of the affair is about as follows: Upon their arrival the deceased looked around and about the wagon as though searching for something, the Indian woman taking her position at the rear wheel thereof, the evidence without conflict showing that while Junior was down at the creek fishing the Indian girls had placed his rifle under the wagon and covered it with a quilt. Deceased then went out to a tree and an outhouse, which were near, and immediately turned back, looked under a board and then started towards the wagon. Bond and Carpenter were watching him and the latter stated to the former: "I guess he hasn't got any gun." They then started towards their buggy, Bond being in advance about 15 feet. When they had gone about 20 feet they heard a commotion at the rear end of the wagon and looking back they saw the Indian woman shoving deceased away, and saying to him, "Oh, no; oh, no; go away." The deceased was crouching down to get under his wagon. Carpenter, who was carrying a fish basket containing fish which he had taken from deceased, threw it down and hastily returned to the wagon where Junior was endeavoring to get the gun which had been partially exposed. When Carpenter was within four or five feet of him the Indian ran around the right hind wheel of the wagon and got hold of the gun barrel, and Carpenter leveled his revolver at deceased and said to him: "Get away from there; let that gun alone; you are crazy." Deceased then straightened up, and suddenly grabbed Carpenter's pistol with his left hand, catching hold of Carpenter's arm and coat sleeve with his right hand. They then struggled for the possession of the revolver out towards a certain tree. During the time Carpenter fired a shot, and when they reached the tree he fired again and deceased fell away from him to the ground. When Carpenter drew his pistol the defendant Bond was about 20 feet away, and he hastily returned to the wagon, but did not arrive until after Carpenter had fired the first shot. Two other shots were fired about the same time, one by Carpenter and the other by Bond. At this time Carpenter was trying to lunge away from the Indian and they were still struggling together. Bond testified that he fired the shot "to make him (Junior) let loose of Carpenter. He was struggling with Carpenter for the possession of the gun at that time." One bullet shattered the left shoulder of the deceased and another passed through his body, entering from the side just above the nipple, the point of exit being three or four inches lower, causing his death a few seconds thereafter.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

It is stoutly insisted by appellant that the evidence is insufficient to support the verdict of manslaughter. It is virtually conceded that there is testimony tending to show that the crime was committed, but the contention is that it must be disregarded on account of the want of credibility of the witnesses so testifying. In this connection we deem it necessary to refer only to the widow who was the principal witness for the people. It is contended that it appears she contradicted herself in important particulars, when we compare her testimony at the coroner's inquest, the preliminary examination, and the trial of the defendant. On two essential propositions, it is contended by appellant, she is entirely inconsistent, to wit: "As to whether deceased straightened up and turned around before stepping away from the wagon, or straightened up and stepped backwards from the wagon; also, as to whether the point of entrance of Bond's bullet was on the left or right side of deceased, she having at the time of the trial changed her testimony in both of these particulars from that given by her at both the coroner's inquest and the preliminary examination. In addition to this she has made the very startling and unnatural statement that defendant Bond, a deputy fish and game commissioner, deliberately and in cold blood fired the shot without saying a word or a moment's warning, and without any hostile demonstration on the part of deceased." But how can we say that the witness was not honestly mistaken in reciting some of the less important details of the occurrence and that her story was not substantially correct as to the vital facts surrounding the homicide? Is it not a matter of common knowledge that honest and intelligent witnesses differ radically in their statements of even less exciting events which they have witnessed and that they are often strangely uncertain as to details which seemingly would make a lasting impression upon the memory? We should not demand of this untutored Indian woman a more tenacious memory, a clearer impression of the surrounding circumstances attending an event of such excitement and trepidation or a more consistent statement of its various features than experience and observation demonstrate may be expected from more intelligent and favored observers of such an occurrence. And while it does seem somewhat incredible that a public officer should be guilty of such brutality as is described by this witness, it must be admittted that the annals of crime contain the record of many deeds equally cruel and inexplicable. But the complete answer to the whole contention of appellant readily suggesting itself is that the jurors are the exclusive judges of the credibility of the witnesses and of the weight of the evidence, and unless the testimony in favor of the verdict is so inherently improbable as to demand its rejection appellate courts are bound by it. It is needless to add that it is not a question of whether the higher court is convinced by it of defendant's guilt or may be satisfied of defendant's innocence. The Indian woman did testify clearly and positively to facts from which only the inference can be drawn that the defendant committed at least the crime of manslaughter, unless it can be said that there is no sufficient evidence that defendant's shot caused the death of deceased. Indeed, giving full credit to her statements, and assuming that there was a sufficient showing that appellant's shot contributed to the fatal result, the conclusion would follow that there should have been a conviction of murder. But it is probable that, recognizing the not uncommon disposition of mankind to yield somewhat to the influence of interest or prejudice in giving testimony of important events of deep concern to the witness, the jury believed that all the witnesses to the homicide were not entirely candid, and while rejecting the theory that defendant maliciously killed the deceased, they were satisfied that he was not altogether blameless and should be convicted of the lesser offense.

At any rate, here is some of the testimony which we are asked to brush aside as unworthy of credence: "My husband, he pass around the wagon, and went over here where this table was and looked in the box and then come back along here, and I caught him by the arm and called his attention to this loose wagon nut. He was standing near this loose wagon nut when I had this conversation with him about the monkey wrench, and Carpenter was over there with his fish basket, and Bond was standing over here near the right hind wheel of the wagon. The time that I saw Bond shoot my husband was when my husband turned around and was facing over towards the oak tree, then my husband staggered back to the live oak tree, and was holding on to one of those cross bars, and he was there when Carpenter shot him. My husband didn't reach around to pick up the gun, and didn't offer to fight Bond, and didn't tell Bond that he would fight him, and didn't tell him that he would cut him or shoot him. He didn't have a club in his hand. He didn't have any rock to go and strike Mr. Bond. He didn't have any knife at all. He didn't offer to fight Mr. Bond at any time. I was right there all the time." The testimony of the girls as to what occurred at the camp in the main corroborates the statements of the widow.

Another circumstance to which attention is directed by appellant to show the improbability of the testimony of the Indian witnesses relates to the entry and exit of the bullet. It is argued that since the ground was comparatively level and Junior was admittedly much taller than the defendant, if the shot had been fired as related by said witness the bullet would have left the body above the point of its entry. But this is a matter of speculation, and it overlooks the familiar fact that the course of such wounds through the tissues of the body is often eccentric and apparently opposed to the recognized laws of physics. Besides, there was evidence from which the jury had a right to infer that the position of defendant, as testified to by the Indian witness, was considerably higher than the place upon which Junior was standing. But it is further insisted by appellant: (1) That "the evidence is insufficient to show that defendant fired the shot which caused the decedent's death"; and (2) it "totally fails to show that any conspiracy was entered into between Carpenter and defendant, or that the latter aided and abetted the former in the commission of the homicide."

As to the first proposition it is said: "Of the three shots fired, Carpenter fired two and defendant one. One of the three missed the decedent, another inflicted a flesh wound merely, while the third passed through the most vital parts of the body, causing instantaneous death." It is claimed that there is no evidence to show that the defendant fired this shot which passed through the body. In arguing the importance of this feature of the case appellant says: "Even had the authorship of the fatal shot been merely one of a series of incidental or secondary facts necessary to establish the defendant's connection with the affair, instead of being, as it was, the paramount issue in the case, it is certain that it would have had to be proved to a moral certainty, and in such a manner as to exclude every other reasonable hypothesis." People v. Phipps, 39 Cal. 333. But answering the last suggestion first, it should be sufficient to say that the rule announced is for the jury, and not for a reviewing court. If we can find any evidence in the record from which a rational inference might be drawn that defendant fired the fatal shot, our inquiry as to this feature can go no further. It is, of course, well settled that "If the evidence which bears against the defendant, considered by itself and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." People v. Emerson, 130 Cal. 562, 62 Pac. 1069. There is this to be said, also, that it is a mere inference drawn by appellant from the evidence that one shot "inflicted a flesh wound merely," while another caused "instantaneous death." One of the witnesses testified that the shot which inflicted what appellant calls "a flesh wound merely" "broke the arm completely, but we couldn't find out if it had left the body at all, and I don't know whether that bullet that entered the arm went down into the heart or not." Another witness who declared on direct examination that one of the shots "pierced his arm about the center of the arm up near the shoulder, breaking his arm and lodged in the bone," said on cross-examination: "I didn't see whether that bullet went out or not. There was no indication of it. It might have gone down and lodged in the deceased's arm. I couldn't tell whether it stopped in a bone or went on into the body." No autopsy was held, and there is probably nothing in the respective positions of the participants at the time of the homicide or in the course of the bullets to afford any assistance in determining who fired the fatal shot. There is—it may be admitted—no certainty as to its source, and it cannot be positively affirmed which shot missed the deceased, which of the two, if only one, or whether both striking the body caused the fatal termination, or how long the deceased survived the fatal blow; but the question with which we are concerned is, Do we find in any of the circumstances detailed by any of the witnesses substantial support for the inference that appellant fired the fatal shot?

According to the transcript, the widow testified: "D. M. Bond shot my husband. Shot him right here. (Showing.) My husband, he hold him right here this way (showing), and he go back that way; and he hold this pole here, and he come across and he hold him here, and he do this way (illustrating by holding hands on body), 'Oh!' And he do that way. (Showing.)" It thus appears that the witness illustrated the actions of Junior after the first shot was fired by appellant. While, manifestly, we have an incomplete reproduction of those movements, there is sufficient in the transcript to support the inference that the Indian was seriously wounded. The convulsive movements of the body and the position in which the hands were placed apparently described by the witness, may have carried to the jury the conviction that the shot fired by Bond was the one that passed through the body and caused the death of the deceased. We cannot say, in view of the record, that such conclusion is unwarranted. According to the witness, the question of the infliction of the fatal wound narrows itself to two shots—one fired by appellant and the other by Carpenter—since she declares that the last shot was fired into the air when she struck Carpenter's pistol while her husband was lying on the ground. It is quite probable that both of these shots which took effect contributed to the death of Junior, but, at any rate, the solution of the question as to who caused his death must be found in the circumstances detailed by the witnesses, and it cannot be said that the inference which connects appellant with the fatal result is unsupported.

But again, it will not be disputed that the jury had a legal right to reject a portion of the testimony of the defendants and also of the witnesses for the prosecution. The jury, basing their conclusions upon the evidence, may have adopted substantially the following theory: That the Indian assaulted Carpenter at the creek, as testified to by the latter; that defendants harbored resentment in consequence of Junior's violent conduct; that, after arriving at the camp, Carpenter, without even the appearance of justification, drew his pistol and made an effort to shoot the deceased; that the latter seized the pistol and while the two were struggling for its possession Bond, understanding the situation, deliberately fired a shot which contributed to the fatal result and caused the Indian to relax his hold upon the weapon and thereupon Carpenter fired the last shot, which was followed immediately by the death of Junior. Upon this theory it could not be doubted for a moment that appellant could be convicted properly as an aider and abettor of the crime. "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime." People v. Dole, 122 Cal. 492, 55 Pac. 581, 68 Am. St. Rep. 50. Or, as defined in State v. Tally, 102 Ala. 25, 15 South. 722, 737, cited by appellant: "The legal definition of 'aid' is not different from its meaning in common parlance. It means to assist, 'to supplement the efforts of another.' Rap. & L. Law Dic. p. 43. 'Abet' is a French word compounded of the two words 'a' and 'beter'—to bait or excite an animal; and Rapalje and Lawrence thus define it: 'To abet is to incite or encourage a person to commit a crime. An abettor is a person who, being present or in the neighborhood, incites another to commit a crime and thus becomes a principal in the offense.'" It would not be necessary for Carpenter to have communicated his purpose to appellant to make the latter chargeable as a principal. If, with the knowledge of Bond, Carpenter feloniously made the assault and the former voluntarily assisted in taking the life of the Indian, although he did not fire the fatal shot, both would be equally guilty. It would be absurd to say that if Bond knowingly contributed to the death of Junior he would not be an aider and abettor of whatever crime was committed. There is nothing opposed to this view in the decisions cited by appellant. For instance, in Walker v. State, 29 Tex. App. 621, 16 S. W. 548, the Court of Appeals of Texas said: "But again, in order to hold the defendant a principal where he did not participate in the actual infliction of the fatal wound, it is absolutely necessary for the state to show that he knew of Shearer's intent to commit the murder or fire the fatal shot, and that knowing this intent on the part of Shearer he aided it or encouraged him by acts or words to do so." Or, as it is stated in Lyons v. State, 30 Tex. App. 642, 18 S. W. 416: "If there be no conspiracy or agreement, each would be held responsible for his own acts. But, though there was no conspiracy to commit an offense, still if one commits an offense, and the accused was present and knew the intention of the other and aids by acts or encourages by words or gestures the person engaged in the commission of the offense, he would be guilty of the offense committed. But he would be guilty only to the extent of his knowledge or for the natural and reasonable consequences of the acts aided or encouraged by him."

There can be no controversy about the doctrine announced in Wilson v. State (Tex. Cr. App.) 24 S. W. 409, and other similar cases cited by appellant, that "If two or more persons conceive the intention at the same time to strike B. without previous concert, and do strike him without knowing the intention of the other, each would be responsible for his own acts, but would not be an aider or abettor of the other. To apply this rule to this case, if appellant, without concert with Sam, and without knowledge of his intentions, conceived the intention to and did strike Bagley with a rock about the time that Sam stabbed him, he would not be responsible for said act; nor would he, in striking Bagley, be aiding or abetting Sam in his acts. But, notwithstanding this, if appellant assaulted deceased with the rock he would be responsible for the homicide; or, if the blow with the rock contributed materially to the death of Bagley, he would also be responsible."

Appellant's contention as to the insufficiency of the evidence cannot be upheld, therefore, for the reason that a rational conclusion may be drawn therefrom—either that he unjustifiedly fired the fatal shot, or wrongfully contributed to the death of the deceased, or that Carpenter made a felonious attempt to take the Indian's life, and appellant, with knowledge of such assault, aided in the consummation of the unlawful purpose and therefore became an aider and abettor of the crime.

Appellant complains because the court refused to charge the jury "That if no aiding and abetting by the defendant in the homicide, and no conspiracy between him and Carpenter had been shown, and if there existed a reasonable doubt as to which of them inflicted the wound from which the deceased died, the defendant was entitled to be acquitted." Nothing, however, seems to have been omitted that was necessary for the complete information of the jury. All the material elements of every degree of crime included in the charge were clearly defined, and the jury were instructed that, "Unless you believe from the evidence to a moral certainty and beyond a reasonable doubt that Robert Junior was killed by the defendant D. M. Bond and by no other person, or that he was killed by said defendant and another person who had conspired together to commit the crime, or that he was killed by some other person while said defendant aided and abetted such other person in killing him, it will be your duty to acquit the defendant." The foregoing was given at the request of the defendant and embodied a recognition of the three aspects of guilty participation as a principal in the commission of a crime which are described in section 31 of the Penal Code, as where one "directly commits the act constituting the offense, aids and abets its commission, or not being present has advised and encouraged its commission." There is no evidence in the record that prior to the killing the defendants "had conspired together to commit the offense," and therefore that portion of the instruction might well have been omitted, but appellant cannot complain, because he requested it, and, besides, it is clear that it could not have prejudiced the jury. It may be said, also, that it was not error for the court to refuse the instruction that "If there is not a conspiracy proven then the defendant did not aid and abet, and if you do not believe beyond a reasonable doubt that Bond's shot killed Robert Junior, then I instruct you that the defendant Bond is entitled to a verdict of acquittal." "Conspiracy" implies an agreement to commit the crime, while to "aid and abet" requires actual participation in the act constituting the offense. It is therefore manifest that one may "aid and abet" without having previously entered into a conspiracy to commit the crime.

The court declined to give to the jury the definition of conspiracy. There seems to have been no necessity for such definition. The only instruction in which the term appears is the one to which we have already referred, and we must assume that the average juror would know what the court meant by the expression "had conspired together to commit the crime." It is not open to the imputation, as claimed by appellant, "that the fact that the defendant and Carpenter had formed a joint or common purpose of arresting lawbreakers and of enforcing in a lawful manner the law passed for the protection of fish would have made them conspirators and liable for the acts of each other while in the execution of that purpose." The instruction, by necessary implication, excludes from consideration any agreement except one to commit "the crime." The "crime" referred to is clearly the felonious killing of the deceased. It is claimed that appellant was entitled to an affirmative charge upon the subject covered by said instruction, and Phipps v. State, 34 Tex. Cr. R. 608, 31 S. W. 657, is cited, wherein it is stated: "The charge of the court instructs the jury who are principals, and throughout, on behalf of the state, in instructing the jury as to each grade of the offense, the jury are told, if you believe that M. V. Phipps either alone or acting with Tom Phipps as charged in the indictment did certain acts, then he would be guilty of the offense, etc. But nowhere in the charge are the jury instructed affirmatively if Tom Phipps killed the deceased and the defendant did not act or utter any word in aid or encouragement of said Tom Phipps, then he would not be guilty of any offense. Inasmuch as the evidence in this case, as before stated, fails to show that M. V. Phipps did any act in aid of said homicide, at the time, such a charge was pertinent and was called for, and should have been given by the court in an affirmative and substantive manner." But here the jury were told unequivocally that they must believe beyond a reasonable doubt that one of these several conditions existed or else they must acquit. It is difficult to understand how the instruction could have more positively "affirmed" the duty of the people to establish one of these conditions to justify conviction.

It is further claimed that the instructions upon the question what would constitute justifiable homicide when committed by an officer in making an arrest were confusing and conflicting. The instructions complained of were: "A peace officer may arrest any one committing a misdemeanor in his presence, without a warrant. In the making of the arrest, or in preventing an escape after the arrest, the officer, when resisted by the offender, is not bound to retreat, but may use such physical force as is apparently necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or on the other to subdue the efforts of the prisoner to escape, but he cannot in either case take the life of the prisoner, unless it appears to him as a reasonable man, from all the circumstances, that the taking of the life of the prisoner is necessary to prevent the infliction of great bodily injury upon himself or upon those acting with or under him, or to prevent the killing of himself or those acting with or under him," and again: "The defendant as an officer of the law, had a right, in endeavoring to arrest and retain the said Robert Junior, if said Robert Junior had committed a public offense in his presence, to use all the force that was necessary, or that appeared to him as a reasonable man to be necessary, to overcome all resistance, *even to the taking of life*, and if he use no more force than was reasonably necessary, or that appeared to him as a reasonable man to be necessary, to then and there overcome any resistance that was being made to him, he should be acquitted," etc.

The contention is that these instructions are irreconcilably conflicting inasmuch as in the former the jury were told that "the defendant was not justified in killing the decedent merely because this was necessary in order to arrest him," and in the latter that "if the decedent had committed a public offense in the defendant's presence the latter had a right 'to use all the force that was necessary or appeared to him as a reasonable man to be necessary to overcome all resistance, *even to the taking of life*.'"

The distinction made by appellant is, we think, more fanciful than real. We must, of course, read the whole of the instructions together, and so considered there is no conflict whatever. The proposition of law expressed in both of these instructions is that where the officer is authorized to make an arrest he may use whatever force is necessary to accomplish his purpose and overcome whatever resistance may be offered. Unless the resistance, however, should be of such a nature that it appeared to the officer as a reasonable man that he, or any one acting with or under him, was in danger of receiving great bodily injury, he would not be justified in killing the prisoner. The reason is plain; in such case he could overcome the resistance without killing the prisoner. A resistance that does not threaten great bodily injury can and should be overcome without a homicide. Therefore he may use all the force "that appears to him as a reasonable man to be necessary to overcome all resistance, *even to the taking of life*," as stated in the second quoted instruction, but this claim of resistance is not to be a mere subterfuge; the resistance must be such as appears to the officer likely to inflict great bodily injury upon himself or those acting with him. Otherwise there is no necessity to take life and it cannot be permitted.

But if there were any inconsistency or confusion in the quotations already made, it is entirely removed by the concluding portion of the second instruction, which we deem it unnecessary to set out in full. Even if we were to concede that the court used an inaccurate or incomplete expression in the foregoing we would still be required to hold that it was without prejudice, as when all the charge is considered we find that all the conditions concerning which the evidence relates and under which the right to take the life of deceased existed were fully and completely expressed. People v. Turpin, 10 Cal. App. 526, 102 Pac. 680. The theory of the defense, as formulated by counsel for appellant, was fully presented to the jury in the instructions, and we see nothing to criticise therein.

The court did not err in admitting in evidence the remnants of the shirt worn by deceased at the time of the homicide. It had been in possession of the sheriff from the time it was removed from the body, and the only objection made was that the proper foundation had not been laid. If appellant was relying upon the claim that it was not shown to be in the same condition as at the time it was removed, he should have called that to the attention of the court or interrogated the witness concerning it. It was probably an unnecessary piece of evidence. There is nothing in the record to show that there was anything in the appearance of the cloth to throw any particular light upon the tragedy, but it is clear as anything can be that we cannot say that the introduction of the fragment of the shirt influenced the jury against appellant. As far as we are advised, the effect could have been no different if a portion of any other garment worn by the deceased had been received in evidence. The case is not at all similar to the one cited from Mississippi, where the skull of the deceased was produced without sufficient preliminary proof.

Appellant assigns error in the ruling of the court "allowing Sheriff Boyd to testify that the bullet entered the left side of deceased, passed through his body and came out on the right side." The objection was that the "proper foundation had not been laid and the witness was not properly qualified." The witness had inspected the body, and was competent to describe what he had seen. If it should be said that the position of the place of entry and of exit involved expert knowledge, or that it was not a proper subject of expert testimony, the complete answer is that the other evidence shows without conflict that the bullet entered the left side, and this is the theory upon which appellant assails vigorously the testimony of the Indian woman. That the deceased was shot to death appears without controversy, and the answer to the said question, in view of the conceded facts, is favorable to appellant.

One Bramlett, a witness for the prosecution, was permitted to give his opinion that deceased was 70 years of age. The rule seems to be that "age is provable by the inference of any competent observing witness. This is true both in the case of human beings, whether they be adults, minors, or children, and in the case of animals or inanimate objects." 17 Cyc. 98. The witness showed he was qualified by testifying that he had known the deceased for something like 25 years. The jury, though, probably attached no importance to his testimony, as it was very much weakened on cross-examination, and the widow testified that her husband was strong enough to whip either of the defendants.

The court overruled the objection to the question asked in the cross-examination of the witness Pedlar: "Do you know whether that fish ladder was in working order at the time you were there?" The contention of appellant is that "this cross-examination and the introduction of evidence as to the condition of the fish ladder must have prejudiced the defendant's case to the extent of leading the jury to believe that fishing within the prohibited distance of a fish ladder which was not in working order would not be a misdemeanor." But, as pointed out by the Attorney General, this inference was obviated by the instruction of the court that the defendants were deputy fish commissioners, and while acting in such capacity "they placed deceased under arrest for the violation of the game and fish laws of California committed in their presence."

One Anderson had been arrested by defendants on August 19th for violating the fish law, and by him appellant sought to show that he had been properly treated by the officers. The court rightly sustained an objection to the proffered testimony. So far as we are informed, the conduct of defendant upon a different occasion has never been held pertinent evidence to disprove the commission of a crime of which he is being tried. If appellant desired to have the jury apprised as to his character or reputation in the community for the trait involved in the charge, the statute provides how that should be done. It is needless to say that the said attempt did not meet the requirement of the law.

Appellant complains because the court, without requiring the record to be shown the witness, permitted the cross-examination of the codefendant Carpenter as to his failure to testify at the coroner's inquest and the preliminary examination concerning certain matters related at the trial. The questions were: "I will ask you, Mr. Carpenter, if at the coroner's inquest, when you were detailing this affair before the inquest, if you testified to anything before the jury about hearing voices upon the bank?" and "Now, I will ask you if at the coroner's inquest you testified to anything about the peddler fishing there?" and "Now, I will ask you if both at the preliminary examination of this case and at the former trial of this case, if you didn't place my hand upon this gun and testify that that was the manner in which the Indian grabbed it?" As to the first two, they were merely preliminary for the purpose of impeachment and were properly allowed, although the transcript of the testimony of the witness was not first shown him. People v. Hart, 153 Cal. 261, 94 Pac. 1042. It is also clear that the matter is of so little importance and the answers were so satisfactory that no prejudice could possibly have resulted. It is not contended that the incident referred to in the last question was photographed, and we must assume that the record would have afforded no assistance. As to this, it may be said also that no unfavorable inference could have been drawn from the explanation of the witness.

Witness Carpenter was cross-examined as to whether he put his hand upon the shoulder of deceased when arresting him, and also whether the fish ladder was in working order. Appellant contends that this may have created in the minds of the jury an erroneous impression that the arrest of deceased was unlawful. But, as we have seen, this was obviated by the instruction given in reference to the arrest. The objection that they were not proper cross-examination to the questions asked of the defendant as to an agreement to see the deceased and his family home, and in reference to the distance from the right hind wheel of the wagon to the tree, was properly overruled. Besides, they related to trivial matters and the answers could not possibly have influenced the result.

The record has received our careful attention to the end that no injustice might be done, but, in our opinion, it cannot be said that the appellant did not have a fair trial or that there is not substantial support for the verdict.

To interfere with the conclusion of the jury and of the trial court would be, as it appears to us, a violation of the well-established principles governing the action of appellate tribunals.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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13 Cal. App. 218

KOWALSKY v. SUPERIOR COURT IN AND FOR SANTA CRUZ COUNTY et al. (Civ. 803.)

(Court of Appeal, First District, California. April 14, 1910. Rehearing Denied May 13, 1910; Denied by Supreme Court June 13, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 256*)—APPEAL FROM ORDERS—CLAIM AGAINST ESTATE—VACATION.

Code Civ. Proc. § 963, subd. 3, authorizing an appeal from an order granting or refusing letters testamentary or of administration, or refusing to revoke the same, and from other orders not pertinent does not authorize an appeal from an order granting a motion to vacate the allowance of a claim against the estate.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 851; Dec. Dig. § 256.*]

2. PROHIBITION (§ 3*)—SCOPE OF REMEDY—JURISDICTION—CLAIMS AGAINST ESTATE.

Where it is claimed that the court has no jurisdiction to vacate an order allowing a claim against a decedent's estate, claimant may obtain a writ of prohibition to restrain the granting of the order, plaintiff having no other remedy by appeal under Code Civ. Proc. § 963, subd. 3.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 4; Dec. Dig. § 3.*]

3. EXECUTORS AND ADMINISTRATORS (§ 514*)—CLAIMS—ALLOWANCE—VACATION.

Code Civ. Proc. § 1636, provides that all matters including allowed claims not passed on on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown on the settlement of a representative's final account. *Held*, that where an administrator's former account which had been allowed and settled set forth petitioner's claim on a note indorsed by decedent within section 1628, providing that every account of an administrator must exhibit all debts which had been presented and allowed during the period embraced in the account, such intermediate account on its settlement constituted a conclusive establishment of the claim against all persons interested in the estate, in the absence of an appeal from such order or direct attack thereon, as authorized by sections 473 and 1737.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2292; Dec. Dig. § 514.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Application by Henry I. Kowalsky for a writ of prohibition against the Superior Court of Santa Cruz County and Hon. Lucas F. Smith, presiding judge thereof. Writ granted.

Rothchild, Golden & Rothchild, for petitioner. Lent & Humphrey, for respondent.

HALL, J. This is an original proceeding brought in this court to obtain a writ prohibiting the superior court of Santa Cruz county and the judge thereof from proceeding to hear or grant a motion made by the administrator of the estate of Margaret McLaughlin, deceased, for an order setting aside the allowance and approval of a claim of plaintiff against said estate theretofore made by the judge of said court. An alternative writ was issued, and the defendant made return thereto both by demurrer and answer.

From the record before us it appears that the plaintiff on the 25th day of June, 1907, presented to Frank McLaughlin, the then administrator of the estate of said Margaret McLaughlin, deceased, his claim for the sum of $1,955.49 upon a promissory note, executed by said Frank McLaughlin and indorsed by said Margaret McLaughlin; that said claim was approved by said Frank McLaughlin as such administrator on said day, and thereafter, on the same day, the claim was approved and allowed by the judge of said court and duly filed. Thereafter said Frank McLaughlin having died without completing the administration of said estate, Samuel N. Rucker was appointed administrator of said estate, and thereafter, to wit, on the 9th day of December, 1909, said Rucker, as such administrator filed and presented to the court a "full report and account of the administration of the estate of Margaret McLaughlin, deceased, from the commencement thereof to the 1st day of October, 1909"; that thereafter, on the 20th day of December, 1909, after due notice given, the said account was duly "settled, approved, and allowed." This order has not been attacked by appeal or otherwise; at least the record before us discloses no such attack. Neither has it been suggested in the oral argument or otherwise that an attack has as yet been made upon the order settling and approving said account. On the 2d day of March, 1910, said Rucker, as such administrator, gave notice of a motion for an order of the court setting aside the allowance made by the judge of said court June 25, 1907, of plaintiff's claim. It is the jurisdiction of the court to entertain and grant such motion that it attacked by this proceeding.

Defendant suggests that, if the court should grant the motion, plaintiff would have a plain, speedy, and adequate remedy by appeal under section 963, subd. 3, Code Civ. Proc., but a reading of said section discloses that no appeal is given thereby from an order vacating the allowance of a claim against an estate. We have been cited to no other provision of the law giving plaintiff any remedy against an order setting aside the allowance of a claim against an estate, and we know of none. Therefore, if defendant is proceeding without jurisdiction in the matter in controversy, plaintiff is entitled to the writ as prayed for.

Plaintiff claims that in no event may the administrator by motion made more than six months after the allowance of a claim procure the setting aside of such allowance; and that in the case at bar the allowance of plaintiff's claim has been placed beyond attack by any one by the order settling and approving the administrator's account, in which it is claimed this claim was exhibited as an allowed claim. In reply to the first proposition defendants cite Barker's Estate, 26 Mont. 279, 67 Pac. 942, and Cone v. Crum, 52 Tex. 348. Neither case is in point. In Barker's Estate the attack was by the widow of the decedent against a claim that had been allowed in favor of the administrator, and the attack was made upon the hearing of his account. Cone v. Crum decides that the administrator may maintain an action in equity, brought within a short time after the allowance of the claim, where the allowance was made by mistake and through inadvertence.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

However, it is not necessary for us to pass upon the question as to whether or not the administrator may under any circumstances take action to set aside the allowance of a claim against the estate, for we think that by the allowance of the account presented by the administrator December 9, 1909, the claim of plaintiff passed into the category of claims "passed upon on the settlement of a former account" (section 1636, Code Civ. Proc.), and was thereby conclusively established against all persons interested in the estate, in the absence of any appeal from such order or attack thereon under section 473, Code Civ. Proc.

In all material respects the facts of this case are like those in Estate of McDougald, 146 Cal. 191, 79 Pac. 878, where it was said: "When an account is presented for settlement after due notice, as in this case, any creditor or person interested may contest the same, and may object to any item of charge or credit, or to any claim allowed and not passed upon on the settlement of any previous account, and may thereupon have his objection settled and determined. Code Civ. Proc. §§ 1635, 1636. The settlement of an account and the allowance thereof by the court is conclusive against all persons in any way interested in the estate. Code Civ. Proc. § 1637. One whose claim has been rejected and who is prosecuting a suit upon it against the estate is a person interested who may make such a contest, and who is concluded by the settlement of a previous account. The first account of the administratrix set forth her claim as one of the allowed claims against the estate. This was sufficient to notify all persons interested that the validity of this claim would be determined and established by the settlement of the account as rendered. No objection or contest was made. The account was settled, allowed, and approved as rendered, and thereupon this claim, with the others mentioned in the list, passed into the class of claims passed upon in the settlement of a former account (section 1636) was conclusively established against all persons in any way interested, and its validity was not thereafter subject to attack upon the hearing of any subsequent account. A judgment or order of a court having jurisdiction is conclusive of all matters involved which might have been disputed at the hearing, although no objection was in fact made. This rule applies to the settling of accounts the same as to any other proceeding."

In the report containing the account presented by the administrator to the court December 9, 1909, three allowed claims are set forth. One of the three is the claim of plaintiff. As to this claim, it is there said: "That, after the said time for presentation of claims against said estate had fully expired, the claim of H. I. Kowalsky was presented for $1,955.47, claimed to be due on the promissory note of said Frank McLaughlin, such note purporting to have been indorsed by said Margaret McLaughlin by her writing her name across the back thereof at the time of its execution, to wit, November 30, 1904; that said last-mentioned note was made payable one year after date, to wit on November 30, 1905, and said claim therefor states that when said note became due, viz., November 30, 1905, the same was presented by claimant to and payment demanded of the maker, said Frank McLaughlin, who failed to pay the same; that said claimant thereupon, after presentation as aforesaid, and upon said 30th day of November, 1905, gave notice in writing to said Margaret McLaughlin of the said demand and the failure of said Frank McLaughlin to pay said note; that said Margaret McLaughlin's death had occurred prior to the said maturity of said note, to wit, on said 16th day of November, 1905; that it is further stated by claimant in his verification of said claim that he had been a resident of New York, and had not been in the state of California for more than two years continuously preceding the 23d day of April, 1907, the date of such verification; that said claim was allowed against said estate and filed therein on the 25th day of June, 1907, for the amount stated in such claim."

The statute requires that "every account must exhibit all debts which have been presented and allowed during the period embraced in the account." Section 1628, Code Civ. Proc. The setting forth of the particulars of this claim, and the manner of its presentation and allowance, was certainly an exhibit of the debt thus presented and allowed. It was not at all necessary that a separate list be made of the claims allowed, as is sometimes done. The statute only requires that the debts allowed be exhibited in the account. In this case the debts were listed and fully set forth in the report, which likewise set forth the amount of money received and expenses incurred and money expended. Everything done, including moneys received and expended, and expenses incurred but not paid, and debts allowed was submitted in the form of a report to the court. The report and account which is annexed to defendant's answer herein, purports to be "the full report and account of the administration of the estate of Margaret McLaughlin, deceased, from the commencement thereof to the 1st day of October, 1909." This particular claim and the action of the administrator and of the judge in allowing and approving it were thus presented for the final action of the court upon settlement of the account. Although the court found all the matters stated in the report to be true, which includes the statement that Margaret McLaughlin had died before the maturity of the Kowalsky note, the court approved the account as rendered. This was an approval of all allowed debts exhibited with the account, and included the claim of plaintiff, which thus passed beyond attack except by an appeal from such order, or other direct attack thereon. Code Civ. Proc. §§ 1737, 473; Estate of McDougald, 146 Cal. 191, 79 Pac. 878.

The court therefore has no jurisdiction to grant the motion of the administrator to set aside the allowance of the claim and the writ must issue as prayed for.

It is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

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13 Cal. App. 279

HOUSE v. PONCE. (Civ. 753.)

(Court of Appeal, First District, California. April 19, 1910.)

1. QUIETING TITLE (§ 43*)—OWNERSHIP—ALLEGATION OF—BURDEN OF PROOF.

Plaintiff in a suit to quiet title, having alleged ownership and right to possession, can recover only on showing title in himself, and cannot otherwise disturb even the possession of defendant, irrespective of whether defendant's paper title is perfect or not.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84–87; Dec. Dig. § 43.*]

2. VENDOR AND PURCHASER (§ 224*)—BONA FIDE PURCHASER—NOTICE.

The grantee of one who refused to give any deed but a quitclaim, who received no consideration even for that, and who, in fact, had conveyed away the property and claimed no interest therein, was not within Civ. Code, § 1214, providing that every conveyance, except a lease for not more than one year, shall be void against any subsequent purchaser in good faith and for value, whose conveyance is first duly recorded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 469–473; Dec. Dig. § 224.*]

3. QUIETING TITLE (§ 44*)—EVIDENCE—ADMISSIBILITY.

In a suit to quiet title, evidence by the person under whom plaintiff claimed that he only signed a quitclaim deed to plaintiff's grantor, that he received no consideration, and that at the time he did not own the property, having disposed of the lots and given deeds for them, was properly admitted, it not being in the nature of declarations tending to impeach the title which he conveyed by the quitclaim deed, but was for the purpose of showing that he in effect had nothing to convey, and therefore conveyed nothing.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 44.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by A. E. House against J. P. Ponce. Judgment for defendant, and plaintiff appeals. Affirmed.

A. H. Jarman, for appellant. Rogers, Bloomingdale & Free, for respondent.

COOPER, P. J. This action was brought for the purpose of quieting plaintiff's alleged title to certain lots described in the complaint as being in College Terrace in Santa Clara county. Defendant had judgment, and plaintiff prosecutes this appeal from the judgment on the judgment roll accompanied by a bill of exceptions.

The complaint alleged that the plaintiff was the owner and entitled to the possession of the lots, and that defendant was in possession thereof, claiming some interest or estate therein. The answer denied the ownership of the plaintiff, and alleged the possession and right to the possession of the said lots in defendant. It further alleged that said lots were sold to the state of California on the 26th day of June, 1896, for delinquent taxes assessed and levied thereon for the year 1895; that thereafter, on the 27th day of August, 1901, in pursuance of such sale, a deed to said lots was duly executed by the tax collector to the state of California; that thereafter, on the 20th day of January, 1905, the state sold said lots according to law to defendant, who was the highest bidder, for the sum of $181, and, in pursuance of such sale, the tax collector executed and delivered to defendant a deed to said premises, which deed defendant has placed of record. The court found that the plaintiff was not at any time the owner nor entitled to the possession of said lots; that the defendant was the owner, in the possession, and entitled to the possession thereof. The court also found that all the proceedings as set forth in the answer from the said assessment up to and including the execution of the deed to defendant were regular, and that the tax deed was valid and conveyed a valid title to defendant.

Plaintiff contends that there were several irregularities in regard to the assessment, the notice of sale, the manner of sale, and the amount thereof sufficient to justify us in holding the tax deed void. In view of the conclusion, we have reached it is not necessary to examine nor to discuss the several alleged informalities in the proceedings by which the tax deed was finally executed and delivered to defendant. It is well settled that the plaintiff, having alleged that he was the owner of the lots and entitled to the possession thereof, was required to prove that he was such owner, and the burden was upon him to make such proof. He was entitled to relief only upon showing title in himself, for, if he had no title, he could not disturb even the possession of defendant, and it was not his business as to whether or not defendant's paper title was perfect. Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819; McGrath v. Wallace, 116 Cal. 549, 48 Pac. 719.

It may be conceded that at the time of the assessment and also at the time of the sale to the state the lots were owned by one Alexander Gordon. The record shows that plaintiff in proof of his title introduced in evidence a deed of said Gordon to one Farley, followed by a deed from said Farley to plaintiff. It does not appear that the deeds were read in evidence; nor is there anything as to the date or contents other than the statement that the deeds conveyed the property described in the amended complaint. This statement, of course, can mean nothing more than that the deeds were correct in form and purported to convey the premises as described in the amended complaint. Defendant called Gordon as a witness, and he testified that about February, 1906, said Farley came to the witness' house claiming to represent some one else, and wanted to get a deed to the lots; that Farley presented a bargain and sale deed, which witness declined to sign, but he finally, after some conversation, signed a quitclaim deed to Farley; that witness received no consideration for the deed; that witness at the time he made said quitclaim deed to Farley did not own the lots, but had conveyed two of them to W. J. Walsh in May, 1888, two of them to John Robinson in April, 1889, and the other two to Levi Van Fossen in 1893; that witness had disposed of all of said lots and given deeds to them prior to 1895. These deeds, although it does not appear that they were recorded, were good as to all persons save a subsequent purchaser or mortgagee in good faith and for a valuable consideration (section 1214, Civ. Code). The evidence of Gordon is not contradicted, and plainly shows that no title was in him when he conveyed to Farley. There is not a word of evidence even tending to show that plaintiff paid any consideration for the lots, or that he was a bona fide purchaser. The fact that Gordon refused to make any other than a quitclaim deed was notice to Farley, and sufficient to put him upon inquiry. The grantee in said quitclaim deed assumed all risks as to title. He took, and knew he was taking, only such title as was left in Gordon. There being no title in Gordon, nothing was conveyed. There is no explanation as to why the plaintiff procured the quitclaim deed. If he did it for the purpose of acquiring a standing upon which to come into court and attack the defendant's tax title, such purpose does not commend itself to a court of equity. The defendant, being in possession under a deed from the state, regular in form, for which he paid a valuable consideration, and thus enabled the state and county to collect the taxes which had been assessed upon the lots, cannot be disturbed for light or trivial reasons, or by a stranger who has nothing but a quitclaim deed from one who had no title. The law aims to do justice and prevent wrongs. One claiming its affirmative aid to quiet his title must prove such title, and not rely upon a mere piece of paper made without consideration by one who had no title.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The testimony of Gordon was properly admitted. It was not in the nature of declarations tending to impeach the title which he had conveyed by the quitclaim deed, but was for the purpose of showing that he in effect had nothing to convey, and conveyed nothing at the time he made the quitclaim deed.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

157 Cal. 730

MANNIX v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 5,582.)

(Supreme Court of California. May 26, 1910.)

1. Appeal and Error (§ 480*)—Stay—Authority to Grant—Authority of Superior Court—Amount of Security.

The superior court does not have general power to stay execution after an appeal is perfected from its judgment, and it would not have authority to stay execution on a judgment for $4,000 upon the filing of an undertaking on appeal in the sum of $2,666.66.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2257; Dec. Dig. § 480.*]

2. Prohibition (§ 20*)—Grounds—Want of Jurisdiction—Sufficiency of Application.

A writ of prohibition will not be issued by the Supreme Court to prevent a stay of execution which it is claimed that the superior court is about to order after the perfecting of an appeal from its judgment, where the application does not show the filing of an undertaking on appeal and an application to stay proceedings.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 69; Dec. Dig. § 20.*]

In Bank. Application for prohibition by Thomas Mannix against the Superior Court of the City and County of San Fransisco. Application denied.

Naylor & Riggins, for petitioner.

PER CURIAM. The application to amend the petition for a writ of prohibition is denied.

After an appeal is perfected from a judgment of the superior court, that court does not have general power to stay the execution. It may be admitted, for the purposes of this case, that if, upon such appeal, an undertaking on appeal in double the amount is given as provided in section 942, Code Civ. Proc., the superior court would have power to compel the sheriff to respect and observe the stay of execution thereupon given by the statute. We cannot suppose, however, even if it has such power, that the superior court would order the sheriff to stay proceedings on an execution to enforce a judgment for $4,000 upon the filing of an undertaking on appeal in the sum of $2,666.66. Such an order would doubtless be without authority. But the proposed amendment shows that no such undertaking has been filed, and hence that the lower court cannot be about to order a stay of the proceedings as apprehended, at least until such inadequate undertaking has been filed and an application for such stay of proceedings has been made to it. Upon the facts stated, the case does not call for the interposition of the authority of this court by way of prohibition.

157 Cal. 727

MERCED RIVER ELECTRIC CO. v. CURRY, Secretary of State. (S. F. 5,402.)

(Supreme Court of California. May 25, 1910.)

1. Corporations (§ 471*)—Indebtedness—Creation—Constitutional Provisions.

Const. art. 12, § 11, making void all fictitious indebtedness of a corporation, and providing that the bonded debt thereof shall not be increased except in pursuance of the general law, nor without the consent of the holders of the majority of the stock at a meeting duly called on notice, does not apply to a corporation free from bonded debt, which proposes to create a bonded debt, and does not require that a stockholders' meeting shall be held for the purpose of creating such debt or that notice shall be given, but the bonded debt may be created as authorized by Civ. Code, § 359, by the unanimous vote of the directors and the written consent of the holders of two-thirds of the subscribed capital stock without the formality of a stockholders' meeting called for that purpose on notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1833; Dec. Dig. § 471.*]

2. Corporations (§ 450*)—Bonded Indebtedness—Filing of Certificate with Secretary of State—Statutes.

Civ. Code, § 309, prohibiting the directors of a corporation from creating any debt beyond the subscribed capital stock, does not justify the Secretary of State in refusing to file a certificate required by section 359, subd. 8, showing the adoption by a corporation of a resolution to create a bonded debt, on the ground that the proposed debt exceeds the subscribed stock, since the proposed debt is not created until the bonds are issued and delivered to third persons for a valuable consideration, and whether the stock is subscribed at or before the adoption of the resolution to create the bonded debt or filing of the copy of the certificate is immaterial, provided a sufficient amount of stock is subscribed as the bonds are sold.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1793; Dec. Dig. § 450.*]

In Bank. Application for a writ of mandate by the Merced River Electric Company against Charles F. Curry, Secretary of State, to compel defendant to receive and file in his office a certified copy of a certificate made by plaintiff. Peremptory writ issued.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

William B. Bosley, for petitioner. U. S. Webb, Atty. Gen., for Secretary of State.

SHAW, J. The plaintiff, by original proceeding in this court, asked for a writ of mandate to compel the defendant, as Secretary of State, to receive and file in his office a duly certified copy of a certificate duly made by the plaintiff for the purpose of creating a bonded debt.

The plaintiff is a private corporation, duly organized under the laws of this state. Its authorized capital stock is $2,000,000, divided into 20,000 shares of the par value of $100 each. Only 25 shares have been subscribed for or issued. By proceedings duly taken, in accordance with the provisions of the fifth subdivision of section 359 of the Civil Code, the corporation resolved to create a bonded debt of $1,500,000. A certificate showing the due adoption of this resolution, and all the facts required to be stated therein by subdivision 7 of said section, was duly executed by the proper officers of the corporation, and, as required in subdivision 8 of said section, it was filed in the office of the county clerk of the county in which the original articles of the corporation were filed. A copy of this certificate, duly certified by said clerk, was presented to the defendant, in his official capacity as Secretary of State, and he was requested to file the same, as required by said eighth subdivision. He refused to do so, assigning as his reason that, by section 309 of the Civil Code, corporations are forbidden to create any debts beyond their subscribed capital stock, and that it would violate section 11 of article 12 of the Constitution.

The aforesaid section of the Constitution merely declares that all fictitious indebtedness of a corporation shall be void, and that the bonded debt thereof shall not be *increased*, except in pursuance of a general law, nor without the consent of the holders of a majority of its stock, at a meeting duly called upon 60 days' notice. No fictitious debt is here proposed, nor any "increase" of the bonded debt. There is no existing bonded debt and the corporation proposes to "create" one, not to increase a bonded indebtedness already in existence. The statute (Civ. Code § 359) authorizes such *creation* of a bonded debt by the unanimous vote of all the directors and the written consent of the holders of two-thirds of the subscribed or issued capital stock, but without the formality or delay of a meeting of the stockholders called for that purpose upon 60 days' notice. The Constitution does not require that such meeting be held or that such notice be given, in order to *create* an original bonded debt, such as is here contemplated, and we do not think it applies to this case.

Section 309 of the Civil Code declares that: "The directors of corporations" must not "create any debts beyond their subscribed capital stock." If the bonded debt proposed could be considered as "created" when this certificate is filed by the Secretary of State, this section might justify the defendant's refusal to receive and file it. But no such bonded debt is yet created, nor would its creation be accomplished by such filing of the certificate. All that has been accomplished so far, and all that could be accomplished by the filing of the certificate, would be the mere authorization to the officers of the company to prepare, sign, and seal bonds of the company to the stated number and amount, ready for sale and delivery whenever such delivery may become lawful by reason of subscriptions for the required amount of stock. The debt represented by any bond would not exist nor be *created* until the bond is issued by the company; that is, delivered to a third person for a valuable consideration. Whether such stock is subscribed at or before the adoption of the resolution to create the bonded debt, or the filing of the copy of the certificate with the Secretary, is immaterial, provided a sufficient amount of stock is subscribed as the bonds are sold and delivered. The fact that such stock has not yet been subscribed is no ground for the refusal of the Secretary to file the certified copy of the certificate. For these reasons, the peremptory writ of mandate was issued.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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13 Cal. App. 283

SIMMONS v. SWEENEY. (Civ. 676.)

(Court of Appeal, Third District, California. April 19, 1910. Rehearing Denied by Supreme Court June 17, 1910.)

1. Novation (§ 4*)—Substitution of New Agreement.

Where by a written contract plaintiff sold land to defendant, with the agreement that plaintiff should receive one-third of profits above that amount when the property could be sold for as much as $19,000, and subsequently defendant asserted that she would not take less than $21,000 for her share, and that plaintiff might take any amount received above that sum, and plaintiff attempted to make a sale on such terms but failed to get $21,000, there was a rescission of the written agreement, and a substitution of the parol contract, constituting a novation, defined by Civ. Code, § 1530, as the substitution of a new obligation for an existing one.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 5, pp. 4848–4851; vol. 8, p. 7733.]

2. Novation (§ 4*)—New Obligation.

Where by a written agreement plaintiff sold land to defendant, the plaintiff to receive one-third of the profits when the land could be sold for $19,000 or over, where defendant repudiated the agreement, asserting that she would not accept less than $21,000 as her share, the surplus to go to plaintiff, the plaintiff had the right to elect to stand upon the written agreement, but, having failed to do so and accepted the terms proposed by defendant, the latter were substituted for the written agreement, and, when there was a failure to sell the property according to the terms of the oral agreement, it was too late to seek a revival of the obligations of the written contract.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. CONTRACTS (§ 10*)—MUTUALITY OF AGREEMENT.

Where by a written contract plaintiff sold land to defendant, the plaintiff to receive one-third of the profits when the land could be sold for $19,000 or over, the mere assertion of defendant that she would accept not less than $21,000 as her share was not such an interference with the freedom of appellant's choice as to deprive the contract entered into on his acceptance of the terms proposed by her of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*]

4. CONTRACTS (§ 95*)—VALIDITY—DURESS.

The mere threat to withhold from a party a legal right which he has an adequate remedy to enforce is not duress, which will evade the execution of a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431–440; Dec. Dig. § 95.*]

5. NOVATION (§ 4*)—CONSIDERATION.

Where a written contract provided that plaintiff should receive one-third of the profits on the sale of land for $19,000 or over, a new oral agreement whereby defendant was to receive $21,000, and plaintiff all that could be procured above that amount, was based on a sufficient consideration.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. § 4.*]

6. FRAUDS, STATUTE OF (§ 139*)—EFFECT—"EXECUTED CONTRACT."

Where an oral modification of a written contract provided that defendant was to receive $21,000 on the sale of land, and plaintiff all that could be procured above that amount, and plaintiff attempted to sell the land in accordance with the agreement, but failed to get an offer as large as $21,000, so that the deal was declared off, the contract was executed under Civ. Code, § 1661, providing that an executed contract is one the object of which has been fully performed, so as to be taken out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 334–341; Dec. Dig. § 139.*

For other definitions, see Words and Phrases, vol. 3, p. 2562.]

7. BROKERS (§ 49*)—PERFORMANCE OF CONTRACT.

A written agreement whereby plaintiff was to receive one-third of the profits on the sale of land for $19,000 or over does not entitle plaintiff to commissions where under a subsequent oral agreement he attempted to sell the property, and received offers aggregating $20,400, which he refused in accordance with the terms of the oral agreement.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 49.*]

8. BROKERS (§ 54*) — COMPENSATION — PERFORMANCE OF SERVICES.

Before a broker can be said to have earned his commission, it must be shown that he provided a purchaser who was ready and willing to make the purchase in accordance with the terms imposed by the seller.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75–81; Dec. Dig. § 54.*]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by D. J. Simmons against Mary Sweeney. From an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

J. R. Hughes and B. F. Howard, for appellant. J. W. S. Butler, for respondent.

PER CURIAM. The action is for damages for the violation of a contract. In December, 1906, appellant procured from one Henderson an option on lots 5, 6, and east half of lot 7, bounded by M and N and Sixteenth and Seventeenth streets, in the city of Sacramento, for the sum of $16,000. Shortly afterward appellant entered into an agreement with respondent, whereby she was to purchase the property for $16,250, and give him one-third of the profits above $16,250 when the property could be sold for as much as $19,000. Accordingly appellant procured Henderson to deed the property to respondent for said consideration, $250 of the amount being paid to Simmons. In the spring of 1907 the parties herein reduced their agreement to writing, as follows: "Lots 5, 6, and east half of lot 7, M and N, 16th and 17th streets. Price paid $16,250, selling price $19,600. Mrs. Sweeney to receive ⅔ of the profit; D. J Simmons to receive ⅓ of the profit. [Signed] D. J. Simmons; Mary Sweeney." Appellant claims that "it is for the violation of said contract by respondent in preventing a sale of said property for $20,400 at an auction sale had April 23, 1908, and refusing to stand by the terms thereof and divide the profits, as provided in said contract, that damages are sought in this action." The court found that said written agreement was executed by appellant and respondent, and, further, that in "April, 1908, it was mutually agreed between the plaintiff and defendant that the plaintiff, who is an auctioneer, should advertise and sell said property at public sale, and that said property should not be sold at said sale for less than $21,000, and that if the bids for said property offered at said sale should not aggregate said sum of $21,000 said property should not be sold and should be withdrawn from sale, and that the plaintiff (defendant?) should have and receive as her portion of the purchase price of said property at said sale the sum of $21,000, and not less, and that defendant (plaintiff?) should receive all sums for which said property should be sold at said sale in excess of said sum of $21,000." It is further found that, in pursuance of said agreement, plaintiff advertised the sale to take place on Thursday, April 23, 1908, at 10 o'clock a. m.; that on said date, "in the presence of the defendant and in the presence of various persons who were assembled at said sale, stated to the persons present at said sale that he would offer the said property in subdivisions and would receive bids upon said subdivisions so offered, and that, after having offered all of said property in subdivisions for sale, he would then offer the property as a whole for sale and receive bids thereon, and that in the event the bids offered for said property, either in subdivisions or as a whole, did not aggregate the sum of $21,000, that the sale of the property as a whole or in subdivisions would be declared off and that said property would be withdrawn from sale"; that the property was thereupon offered for sale, and that certain bids were received for the subdivisions, aggregating less than $21,000; "that the said plaintiff, after he had received said bids as aforesaid, for said property in subdivisions, thereupon announced that he would offer the property for sale as a whole, and he thereupon did offer said property as a whole for sale, but received no bids therefor. Thereupon the said plaintiff, in the presence of defendant, and in the presence of said bidders aforesaid and the bystanders at said sale, declared that, inasmuch as the bids offered for said property did not aggregate the sum of $21,000, the said sale and the said sales of said subdivisions was and were off, and that the said property was withdrawn from sale, and the said bids or offers were, and each of them was, rejected." There is a finding, also, that none of said bidders made any tender to defendant or demanded a deed or renewed his bid or offer to buy said property or any of the subdivisions thereof.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The evidence is abundantly sufficient to support the finding that this parol agreement was made, and that plaintiff conducted said auction in accordance with its terms. The testimony of the plaintiff himself is to that effect. He testified that "at that meeting Mrs. Sweeney said she wanted $21,000 for her interest in the property. I said this, that I would go on and advertise it, pay all the expenses out of my pocket, and would endeavor to get—she said the property ought to bring $25,000, and she says, 'if it brings enough to cover my interest and my expense.' I told her I did not think it would bring that much, but that it would bring $22,500, and she told me that at that time she wanted $21,000, and she said at that time that all I got over $21,000 I could have. I advertised the property and said I would try and see. If the property brought $22,500 I was to get $1,500. If it brought $25,000 I was to get $4,000. If the property did not bring $21,000 the sale was not to go, and the sale was to be declared off; that was the distinct understanding. The day of the sale I cried the property in the usual way, offering the land in parcels. Before the sale, I told the bidders I was going to subdivide it and offer it in parcels or pieces, as I described them how I was going to offer them, and told them that the highest and best bidder would get them, provided that it brought a certain amount. I said this very clearly. I do not think I told them how much it was to bring. I might have said that it must bring $21,000, but I don't recollect. I then told the various bidders on the subdivisions or several parcels I would offer the piece of property as a whole, and that if it did not bring the sum required by Mrs. Sweeney that the sale would be off. I thereupon cried the parcels and obtained certain bids on them. At the conclusion of the sale, so far as the sale of the subdivisions was concerned, I offered it as a whole, stating that the property did not bring the price Mrs. Sweeney wanted. I received no bids upon the property as a whole, and I thereupon declared the sale off."

The terms of the agreement are recited in substantially the same way by respondent. She adds the statement that appellant declared he would take the responsibility on his own shoulders and pay the expenses of the auction sale, and Mrs. Sweeney was to get $21,000.

There is thus shown a rescission of the written agreement and the substitution of the parol contract. In other words, we have the clear case of a novation, "the substitution of a new obligation for an existing one." Section 1530, Civ. Code. Under the construction, we are bound to place upon the evidence there can be no controversy that after the execution of said written agreement, and, before any services were performed under its terms, the parties thereto entered into another and entirely different agreement concerning the same subject-matter. The only possible question that could arise would be whether this was intended to be substituted for the written agreement, and whether the subsequent conduct of appellant in attempting to sell the property is referable to said parol agreement. This was for the court to determine from all the facts and circumstances. While there was no express declaration that the parol contract was to supersede the written one, no other conclusion seems reasonable. The terms of these two contracts were entirely inconsistent, and could not be operative at the same time. But the evidence for respondent shows conclusively that everything done by appellant towards effecting a sale of the property was in pursuance of the said parol agreement. He followed its terms in advertising the property and announced to the bidders that their bids were rejected and the property withdrawn because it did not bring the said amount of $21,000. In fact, no one can read the evidence dispassionately without reaching the conclusion that the earlier agreement was entirely annulled by consent and, since appellant failed to sell the property for the sum agreed upon, he was entitled to no compensation. If appellant intended to rely upon the first contract, he should have declined to accept and act upon the proposition subsequently submitted by respondent. He was called upon to exercise his election, and he chose to take his chances of getting a larger compensation under this second arrangement.

The rule approved by our Supreme Court in Alderson v. Houston, 154 Cal. 11, 96 Pac. 884, is stated as follows in Lake Shore, etc., Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33: "Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party, and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination had been reached and is being acted upon. It would seem clear on principle that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not of themselves amount to a breach, so as to create an effectual renunciation of the contract, for one party cannot by any act or declaration destroy the binding force and efficacy of the contract. As said by Bowen, L. J., in Johnson v. Milling Co., 16 Q. B. Div. 460: 'Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. * * * If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages. These views are amply sustained by numerous decided cases." It is difficult to conceive how any other position could be taken with any show of reason. In the case at bar, appellant not only failed to elect to stand upon the original contract and to regard the acts and declarations of respondent as a repudiation of its terms and entitling him to the commission provided therein, but he accepted respondent's new proposal, subsequently acted upon it, and thereby the rescission of the former contract was entirely consummated. It was then too late to seek a revival of the privileges and obligations of the written contract. They had disappeared as completely as though never existing.

The specific grounds upon which appellant attacks the second agreement and the conclusion of the trial court drawn therefrom are, as stated by him: "Said so-called agreement was invalid and of no binding force on the rights, duties, and obligations of the parties, or either of them, as laid down in the said written agreement, in this: (1) It was not a mutual agreement within the meaning of the law. (2) There was no sufficient consideration to support it. (3) It was an oral agreement conveying an interest in real property. (4) It was an unexecuted oral agreement changing the terms of a written agreement." None of these contentions can be successfully maintained. The want of mutuality is affirmed on the pretext that appellant was coerced by the assumption of authority on the part of respondent. He was confronted, so it is claimed, by the menacing declaration that respondent "must have $21,000 for her share or there would be no sale." But it is too plain for argument that there was no interference nor attempted interference with the freedom of appellant's choice. We are not aware of any authority holding that such a declaration amounts to menace or duress. The record does not disclose anything in the appearance or manner of respondent calculated to inspire fear in the mind of appellant or to influence unduly his judgment. "The mere threat to withhold from a party a legal right which he has an adequate remedy to enforce, is not, in the eyes of the law, duress. Certainly not such as will evade the execution of a contract." Cable v. Foley, 45 Minn. 421, 47 N. W. 1135; Taylor v. Ford, 131 Cal. 440, 63 Pac. 770; Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 103 Pac. 938. We find nothing to indicate either legal or moral duress.

It is equally clear that there was a sufficient consideration to support the agreement. Appellant acquired the right to retain whatever was received for the property in excess of $21,000. It was believed that the property could be sold for such an amount as would amply compensate appellant for his services. That subsequent events proved the parties to be mistaken in their judgment does not affect the question of consideration. If the property had been sold for a large amount in excess of the sum to be paid respondent, it would be equally as reasonable to contend that there was no consideration for the contract. The truth is, of course, that the opportunity for benefit to both parties and the expectation of realizing it growing out of the terms of the agreement are sufficient to make it binding. If we were willing to concede the soundness of appellant's position that the agreement in question purported to convey an interest in real property, it would signify nothing, as it is manifest that it was entirely executed, and therefore taken without the statute of frauds. "An executed contract is one the object of which is fully performed." Section 1661, Civ. Code. When it was found that the property would not bring $21,000, there was nothing left for appellant but to declare the bids rejected and the property withdrawn from sale. This was done voluntarily by appellant and the contractual relation terminated. It may be that he would have been authorized to advertise the property again and repeat the effort to sell, but that question is not involved, since appellant pursued the matter no further but treated the contract as at an end and brought suit for his commission.

But, in addition to the foregoing, it must be said that, if the parol agreement was invalid, appellant has not shown himself entitled to recover under the written agreement. Since he acquiesced in the new proposal, the most that could be claimed would be that the written contract is still operative. But, as a basis for any commissions under this, appellant must prove that he obtained a purchaser for the property. "Before a broker can be said to have earned his commission, it must be shown that he provided a purchaser who was ready and willing to make the purchase in accordance with the terms imposed by the seller." Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642. It cannot be said that this duty has been performed when the agent by his own act has dismissed the prospective buyer and acquitted him of any connection with the transaction and of any obligation to purchase.

There can be no doubt, we think, that the findings are supported by the evidence, and that no error was committed by the lower court.

The order denying the motion for a new trial is affirmed.

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13 Cal. App. 224

LOEFFLER v. WRIGHT et al. (Civ. 662.)

(Court of Appeal, Third District, California. April 14, 1910. Rehearing Denied by Supreme Court June 13, 1910.)

1. Landlord and Tenant (§ 83*)—Option to Renew—Breach—Damages.

In an action to recover damages for a landlord's failure to perform an agreement to lease for a period of years, plaintiff was bound both to allege and prove that he placed himself in such a position as to exact performance by exercising his option to continue the term or notify the lessor that he desired to exercise the privilege of extending the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 263, 264, 269; Dec. Dig. § 83.*]

2. Specific Performance (§ 114*)—Sale of Land—Enforcement—Appeal.

A bill for specific performance of an option to purchase land was fatally defective where it contained no allegation of an offer to pay the consideration or willingness to do so, and that the contract was just and equitable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 367, 368; Dec. Dig. § 114.*]

3. Bankruptcy (§ 152*)—Filing Petition—Caveat.

The filing of a bankruptcy petition is a caveat to all the world and in effect an attachment and injunction, and, on adjudication and qualification of the trustee, title to the bankrupt's property becomes vested in the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. § 152.*]

4. Bankruptcy (§ 387*)—Composition—Collateral Attack.

A composition in bankruptcy cannot be collaterally attacked in a state court; and hence a creditor of a bankrupt desiring vacation of an order of composition must proceed in the federal district court under the bankruptcy act, providing for the annulment of a composition once confirmed for fraud, where the fraud has come to the knowledge of the objector since the confirmation, and where he makes his application within six months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 607; Dec. Dig. § 387.*]

5. Limitation of Actions (§ 100*)—Running of Statute—Fraud.

Where plaintiff signed a corporate trust deed as secretary for the corporation, grantor, he would be deemed to have had actual notice of alleged fraud consisting of misrepresentations as to the contents of the deed at the time it was signed, and therefore could not avoid the bar of limitations in a suit to set it aside for fraud on the ground that he did not discover the fraud until within three years prior to suit brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 492; Dec. Dig. § 100.*]

6. Limitation of Actions (§ 100*)—Fraud—Right of Action—Accrual—Statutes.

While a cause of action to cancel a trust deed for fraud is deemed not to have accrued until the discovery of the facts constituting the fraud, it must also appear that the discovery could not sooner have been made by the exercise of reasonable diligence; plaintiff being presumed to have known all that reasonable diligence would have disclosed as provided by Code Civ. Proc. § 338, subd. 4.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 492; Dec. Dig. § 100.*]

7. Pleading (§ 225*)—Demurrer—Leave to Amend.

Where plaintiff had made three attempts to present properly his cause of action and at each time failed, the court was justified in concluding that the failure arose from want of facts rather than from lack of skill in stating them, and did not therefore err in sustaining a demurrer without leave to amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 575; Dec. Dig. § 225.*]

8. Pleading (§ 225*)—Leave to Amend—Discretion—Necessity of Request.

It is not an abuse of discretion to sustain a demurrer to the complaint without leave to amend, where no application to amend has been made.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 575; Dec. Dig. § 225.*]

Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by John Loeffler against W. H. Wright and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. H. U. Brandenstein and J. C. Meyerstein, for respondents.

BURNETT, J. Several diverse and somewhat uncorrelated acts alleged to be fraudulent are made apparently the basis of appellant's claim for relief and much evidentiary matter is pleaded in the second amended complaint, but it is contended by him that "there is only one cause of action set forth therein, and that is to have plaintiff's lease and option to purchase declared valid and superior to the claims of all the other defendants, and for damages for depriving plaintiff of the possession of said land so leased and covered by his option to purchase and the valuable improvements thereon including his hotel, pickle factory, machinery, stock, and supplies."

Adopting this theory of the complaint, the essential facts may be somewhat briefly presented. The initial transaction was with a corporation known as the Jersey Island Packing Company. It is alleged: That three of the directors of said corporation who were the principal stockholders and are defendants herein on and prior to the 11th day of June, 1903, made certain false and fraudulent representations to plaintiff as to the financial condition of said corporation, and thereby induced plaintiff to purchase 3,060 shares of the capital stock thereof for the sum of $91,800, and to make valuable improvements upon the real estate belonging to said corporation known as the Jersey Island Tract, "and which was the same land that was thereafter leased to plaintiff for the term of 7½ years on the 16th day of December, 1903, and which on the same day the said corporation agreed to sell to plaintiff at any time during the aforesaid period of 7½ years, as fully appears in said lease and agreement to sell, a copy of which is hereto attached and marked 'Exhibit A.' That thereafter, on or about the ——— day of December, 1903, the said corporation * * * agreed to cancel the agreement whereby plaintiff purchased said stock and made said improvements upon said realty, and to return to plaintiff the purchase price thereof, save and except the sum of $3,000 and the cost price of said improvements, amounting to $26,000 more, which the directors claimed said corporation was unable to pay, and, in consideration thereof, the said corporation then and there agreed to and with plaintiff that it would lease to him said 100 acres of the aforesaid realty upon which said improvements were located for a period of 7½ years, and give him an option and agreement whereby he might purchase said land and improvements at any time within said period for the sum of $20,000; and that the plaintiff agreed to said proposition on the part of said corporation, and further agreed that upon the execution and delivery to him of said lease and agreement of sale he would return his stock which had been theretofore sold to him as aforesaid, to the officers of said corporation, and resign his position as director of said company; and that, after such agreement had been duly made as aforesaid, the said manipulators, W. H. Wright, Frank V. Wright, and H. Bendel, acting for and on behalf of said corporation, refused to make, execute, or deliver said lease to plaintiff, according to said agreement, for the reason that it would interfere with and take precedence of the fraudulent trust deed which said manipulators and wreckers had fraudulently designed to have executed, as hereinbefore set forth. That after the manipulators refused, as aforesaid, to carry out and execute said option to buy and agreement to lease, said fraudulent deed of trust was gotten up, as hereinafter set forth, and the same was placed on record on said 19th day of September, 1903, in order that the same might take precedence of said option and lease, without plaintiff's knowledge of its existence or recordation, and that thereafter, on the 16th day of December, 1903, the said corporation in pursuance of said agreement so previously made by and through its proper officers and in pursuance of the resolution of its said board of directors made, executed, and delivered to plaintiff in consideration of the facts and premises hereinbefore stated the lease and agreement to sell said real property as the same is fully set forth and described in said Exhibit A hereunto attached. That said agreement of sale and lease is still in full force and effect, and binding upon said corporation and all the parties hereto, and superior to said fraudulent deed of trust, all claims of the creditors of said bankrupt corporation, and the rights of said trustees to sell said Jersey Island Tract for any purpose whatsoever."

Certain difficulties arise from a consideration of these averments and of the said exhibit A attached to the complaint. It is averred, for instance, that the corporation agreed in December, 1903, to execute this lease and option to buy for a period of 7⅓ years, and that thereafter the directors refused to make, execute, or deliver said lease to plaintiff. In the very next paragraph it is positively alleged that the corporation, "in pursuance of said agreement so previously made by and through its proper officers and in pursuance of the resolution of its said board of directors, made, executed and delivered to plaintiff" the lease and agreement to sell said real property. It further appears by express allegation that on the 16th day of December, 1903, this land was leased to plaintiff for the term of 7½ years, and, when we turn to the said exhibit, we find it recited therein that "the owner of the land shall and will upon the premises and conditions herein stated suffer and permit the occupier (John Loeffler) to enter on and occupy from the date hereof until the 31st day of December, A. D. 1904," the said land. The lessee was granted the privilege, however, of renewing the lease "for a further period of ten years at the expiration of this lease."

For the refusal of the directors to execute said lease, the reason is assigned that it would take precedence of the said fraudulent trust deed. It appears that said refusal occurred in December, 1903, and it is alleged that afterwards said fraudulent deed of trust was gotten up without plaintiff's knowledge of its existence, whereas the fact is, and it is shown by the complaint, that said deed was signed and acknowledged by plaintiff as the secretary of said corporation on the 11th day of September, 1903, and recorded on the 19th day of the same month. Again, plaintiff claims the said lease was in full force and effect when the second amended complaint was filed in 1908, but by its terms it expired on December 31, 1904. There is no allegation that the lease was renewed or that plaintiff exercised his option to continue the term or notified the lessor or defendants that he desired to exercise the privilege of extending the lease. There is no allegation that he paid or tendered the rent that was due under the terms of said lease. The complaint is silent as to any offer to purchase said property on the part of plaintiff as he was authorized to do by said lease. Notwithstanding these omissions, plaintiff seeks to recover damages for the conduct of defendants in withholding the said property from plaintiff for the period of three years from the "21st day of March, 1904, up to and about ——— day of May, 1905, when the said corporation was adjudged a bankrupt," and from the latter date till the beginning of this action. It is clear that, since the right to the possession of said property is grounded in said lease, plaintiff by appropriate allegations must bring himself within its terms. The action is essentially to recover damages for a failure specifically to perform an agreement to lease for a period of years, and it is elementary that one seeking such relief must show that he placed himself in such a position as to exact performance from the other party. In Shamp v. White, 106 Cal. 220, 39 Pac. 537, it is said that, "where the contract between the parties is for a renewal as distinguished from an extension of the lease, it is incumbent upon the lessee desiring to exercise his option for renewal to give notice of his election before the expiration of the original term." So, if we regard that feature of the complaint relating to the option to purchase the land, the same condition is presented. There is no allegation of an offer to pay the consideration or the willingness to do so or that the contract was just and equitable. Again, it appears that the corporation in May, 1905, was adjudged an insolvent, and that the claims of plaintiff "against said corporation have been duly adjudicated and filed with the clerk of the United States District Court in and for the Northern District of California." It has been held that "the acts of Congress relating to bankruptcy, so far as are concerned matters within their purview, are paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of an insolvent person or corporation, is essentially exclusive." In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. The filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction, and, upon adjudication and qualification of the trustee, the bankrupt's property is placed in the custody of the bankruptcy court, and title becomes vested in the trustee. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. It would seem from the foregoing postulates, as urged by respondents, that, when said corporation was adjudged a bankrupt, the said United States District Court immediately acquired full, complete, and exclusive jurisdiction of the corporation's property and to determine all controversies between that company and third parties affecting the assets in its custody. It is true, though, that it further appears that, after the adjudication of insolvency, a composition was confirmed by said District Court, and the proceedings there closed. The effect of this was to revest in the bankrupt title to all the property, and it would seem to follow that plaintiff was at liberty to pursue his remedy against the company and its assets, unless its assets had been formally transferred, which is not alleged. Plaintiff pleads, indeed, the irregularity of said composition, but it is not contended that this irregularity appeared on the face of the proceedings. Respondents' position, therefore, appears sound that this order of composition cannot be successfully assailed in this collateral way in a state court.

Desiring to have the order of composition set aside, appellant should have proceeded in said District Court under the bankrupt act providing for the annulment of a composition once confirmed upon the ground of fraud where the fraud has come to the knowledge of a party since the confirmation and where he moves within six months. In re Jersey Island Packing Co. (D. C.) 152 Fed. 839, 18 Am. Bankr. Rep. 417. As appears in the last cited case, this was in fact the course pursued by appellant, but his application to have the composition in question set aside was denied by the said District Court. In either aspect of the situation, therefore, whether the composition be valid or a nullity, it would seem that plaintiff cannot prevail in this proceeding.

But regarding only the transaction preceding the adjudication of insolvency and directing our attention to the allegations as to the disturbance by defendants of plaintiff's possession before the expiration of the year, for which the land was leased, we are involved in difficulty in determining what damage was suffered by plaintiff for the balance of the year, for the reason that this is not segregated from the whole loss alleged to have been incurred up to the time of said adjudication of insolvency, to wit, May, 1905. But if we could make the division there is an insuperable obstacle to recovery in the fact that prior to the execution of the lease, as we have already seen, a deed of trust was executed by said corporation of said property to certain of the defendants. If the property was conveyed to these grantees, according to the terms of said deed, in September, 1903, it would take precedence, of course, over the said lease executed by the grantor in December, 1903. It is true that plaintiff seeks to avoid said deed on the ground of fraud, but the action should have been brought within three years. Section 338, Code Civ. Proc. Plaintiff seeks to avoid the bar of the statute by alleging that he did not discover the fraud of which he complains till some time in January, 1905, but the fraud consisted in the misrepresentation as to the contents of said deed. He must be deemed to have had actual notice of this, as the deed was signed by him, and, in addition, by the recordation of the deed he would have constructive notice thereof. The date of the filing of the original complaint does not, indeed, appear, but the intendments being in favor of the ruling of the court below we must assume that the action was brought after the expiration of three years from the execution of said deed. Again, it is not sufficient for the plaintiff to allege that he did not discover the fraud till a certain date. The rule is that, while the cause of action to set aside an instrument on that ground is deemed not to have accrued until the discovery of the facts constituting the fraud, it must also appear as well that the discovery could not have been made by the exercise of reasonable diligence. And plaintiff is presumed to have known all that reasonable diligence would have disclosed. Code Civ. Proc. § 338, subd. 4; Simpson v. Robert Dalziel, 135 Cal. 599, 67 Pac. 1080. The foregoing defects in the complaint and others which we deem it unnecessary to consider are covered by the demurrer of respondents which we think was properly sustained.

Appellant also complains because the court sustained the demurrer without leave to amend. This is a matter, however, within the discretion of the lower court, and cannot be reviewed except for an abuse of that discretion. Plaintiff had made three attempts to present properly his cause of action. He had failed in each, and the court was justified in concluding that any further effort would be equally futile. Indeed, the inference would be natural and reasonable that his failure arose from the want of facts rather than from lack of skill in stating them. Besides, it does not appear that plaintiff invoked the favor of the court to the end that another amended complaint might be filed. The following quotations from the decisions of the Supreme Court are in harmony with this view: In Martin v. Thompson, 62 Cal. 622, it is said: "We cannot say the court abused its discretion in disallowing plaintiff's motion to file a second amended complaint. It does not appear from the transcript that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file." In Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44, it is said: "The power of the court in allowing parties to an action to file amended pleadings is largely a matter of discretion. Here plaintiff had three opportunities to make a good complaint and failed. Three failures to make a good complaint fairly indicate that a fourth attempt would also be unavailing. The proposed amendment or proposed amended pleading was not tendered to the court for inspection, and we see nothing erroneous in the action of the court in refusing to allow further amendments. The failure to make a good pleading probably arises in a lack of facts rather than in the fault of the pleader." And the later expression, found in Stewart v. Douglass, 148 Cal. 512, 83 Pac. 699, is: "When a demurrer is sustained to a complaint, it is within the discretion of the court either to allow an amended complaint to be filed or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. The plaintiff merely asked leave to file an amended complaint, and, so far as the record discloses, did not show that there were any allegations of fact omitted from the complaint to which the demurrer had been sustained which, if inserted therein, would in any respect change its legal effect, nor make any statement whatever of the grounds or reasons for making the application for leave to amend. There was clearly no abuse of discretion shown. Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516."

In the case at bar there is nothing to show that appellant indicated in the court below any desire to file another amended complaint. We must assume that he made no such application, and hence it is out of the question to say that there was any abuse of discretion in sustaining the demurrer without leave to amend.

The judgment is affirmed.

We concur: **CHIPMAN, P. J.; HART, J.**

(157 Cal. 732)

PEOPLE v. MOHR. (Cr. 1,561.)

(Supreme Court of California. May 27, 1910.)

1. CRIMINAL LAW (§ 1023*)—APPEAL—ORDERS APPEALABLE.

Under Pen. Code, § 1237, authorizing an appeal from a final judgment of conviction, from an order denying a new trial, and from an order made after judgment affecting the substantial rights of the parties, an order denying a motion in arrest of judgment is not appealable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2591; Dec. Dig. § 1023.*]

2. CRIMINAL LAW (§ 1134*)—APPEAL—SCOPE OF REVIEW.

Under Pen. Code, § 1237, errors in an order denying a motion in arrest of judgment, may be reviewed on appeal from the judgment of convictions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2997; Dec. Dig. § 1134.*]

3. BANKS AND BANKING (§ 21*)—INFORMATION—REQUISITES.

An information alleging that accused with intent to defraud prosecutor drew and delivered to a third person a check on a bank, knowing at the time he had no funds in or credit with the bank to meet the check, states the offense denounced by Pen. Code, § 476a, prohibiting the drawing of checks with intent to defraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

4. CRIMINAL LAW (§ 1165*)—APPEAL—PREJUDICIAL ERROR.

Where the evidence, though legally sufficient to support a conviction, was not so clear and convincing as to justify the conclusion that accused was not prejudiced by erroneous rulings, the errors were ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085; Dec. Dig. § 1165.*]

5. WITNESSES (§ 277*)—EXAMINATION—CROSS-EXAMINATION—EXTENT.

Where accused, charged with drawing a check on a bank in which he had no funds, merely identified a letter written after the transaction as one written and signed by him, and stated that his name was the name signed to the check, questions on cross-examination as to whether or not he had at different times assumed different names asked in such a manner as to indicate that the district attorney had in his hands at the time written data to support the questions were improper, because not in response to the direct examination, and because they were asked for the purpose of reflecting on the character of accused, and creating the impression that he was in the habit of using assumed names.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979–984; Dec. Dig. § 277.*]

6. CRIMINAL LAW (§ 376*)—EVIDENCE—ADMISSIBILITY.

One on trial for a specific offense may not be discredited in the minds of the jury by evidence of specific acts in his past life not connected with the specified offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 836; Dec. Dig. § 376.*]

7. CRIMINAL LAW (§ 1170½*)—EVIDENCE—ADMISSIBILITY.

The error in permitting the state to show on the cross-examination of accused, not in response to his direct examination, that, after accused had been informed of the issuance of the warrant for his arrest, he took an assumed name, was prejudicial, necessitating a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. § 1170½.*]

8. CRIMINAL LAW (§ 1165*)—APPEAL—HARMLESS ERROR.

An answer to an improper question that is favorable to accused renders generally the error in allowing the question nonprejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3089; Dec. Dig. § 1165.*]

In Bank. Appeal from Superior Court, Kings County; John G. Covert, Judge.

H. J. Mohr was convicted of crime, and he appeals. Reversed.

J. C. C. Russell, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of the offense defined by section 476a of the Penal Code; it being alleged in the information that he did willfully, with the intent to defraud one C. B. Rourk, draw, utter, and deliver to one Frank Harrington a certain check for the payment of money, to wit, $12, on the Hanford National Bank of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hanford, a banking association, knowing at the time that he had no funds in or credit with said bank to meet or pay said check upon its presentation. Upon this conviction he was adjudged to suffer imprisonment in the state prison for two years. This is an appeal from the judgment, the order denying a new trial, and the motion in arrest of judgment. The last-named order is not appealable (section 1237, Pen. Code; People v. Matuszewski, 138 Cal. 533, 71 Pac. 701), but errors in connection with the motion in arrest of judgment may be considered on the appeal from the judgment. We are satisfied that the information stated facts constituting the public offense defined by section 476a of the Penal Code, and that it was not subject to any of the objections specified in the demurrer. The demurrer was therefore properly disallowed, and the motion in arrest of judgment properly denied. The evidence introduced was legally sufficient to support a conclusion on the part of the jury that the defendant was guilty of the offense charged. A careful review thereof, however, satisfies us that the case against the defendant was not of such a nature that we can say that he was not prejudiced by certain rulings of the trial court which we are satisfied were erroneous; in other words, that the evidence as to his guilt of the offense charged was not so clear and convincing as to justify us in concluding that he was not prejudiced by such rulings.

The defendant was put upon the witness stand merely to identify a letter written by him to Harrington after the transaction as one written and signed by him. On his direct examination he merely stated that his name was H. J. Mohr, that he was the defendant, and that he wrote and signed the letter. On cross-examination, the district attorney was permitted by the court, apparently upon the theory that it was proper cross-examination in view of his statement that his name was H. J. Mohr, to ask such questions as: "Did you ever go under the name of Harold Miller?" "Did you ever go by the name of W. J. Wilbur?" "Did you ever register during the month of October as H. O. Miller?" "Did you ever go by the name of Harold Miller?" "Now, during the month of October, 1908, didn't you register at the Victor Lodging House under the name of H. O. Miller?" "Did you ever go by the name of E. H. Moore?" "Did you ever go by the name of H. E. Moore?" "Did you ever go by the name of W. J. Wilbur?" "Did you ever go by the name of E. J. King at Turlock, Stanislaus county, in this state?" These and other questions equally subject to objection as not proper cross-examination constituted the whole of the cross-examination, and all of them the defendant was required by the court to answer, although proper objections were made thereto. It appears, too, that these questions were asked in such a manner as to indicate that the district attorney had in his hands at the time he asked the questions written data to support the same. The conduct of the district attorney in asking these questions was objected to and excepted to by defendant's counsel, but the court apparently approved such conduct, refusing to direct that officer to desist, and directing him to proceed.

The questions above noted were all improper cross-examination. They were not in response to any portion of the direct examination and were obviously asked not for the purpose of discrediting defendant as a witness, but simply and solely for the purpose of reflecting upon his character as a man, and creating the impression in the minds of the jurors that he was in the habit of going under assumed names, a matter "not conducive to a good character for defendant" (People v. Arlington, 123 Cal. 356, 55 Pac. 1003. See, also, People v. Denby, 108 Cal. 54, 40 Pac. 1051), and certainly, upon such a charge as was here under investigation, affirmative answers to such questions would have been exceedingly prejudicial. There was no issue or dispute as to defendant's true name. The check was signed "H. J. Mohr," and the defendant had been informed against and was being prosecuted as "H. J. Mohr," which name, it must be assumed from the record, he had acknowledged on arraignment to be his true name. The questions were clearly directed solely, not to the proposition that his name was something other than H. J. Mohr, but to the proposition that, his true name being H. J. Mohr, he had on various occasions assumed a false name. The claim that they constituted cross-examination simply because he had testified that his name was H. J. Mohr was, under the circumstances, the merest pretense, and clearly without sound basis. If the defendant had testified on direct examination to the effect that he had never gone under an assumed name, such testimony, although inadmissible under the circumstances of this case, would have afforded sufficient ground for the questions asked by the district attorney, but there was no testimony of this nature on direct examination. It is elementary that a defendant on trial for a specific offense may not be discredited in the minds of the jury by evidence of specific acts in his past life not connected in any way with the matter under investigation, either offered in chief by the district attorney, or elicited on cross-examination of the defendant, unless the evidence given by him on direct examination was of such a nature as to warrant it as proper cross-examination. As said by Justice Temple in People v. Denby, supra, the proposed evidence "had no place in this case, and, if it were relevant testimony, it would have been improper to educe it from the defendant under the circumstances. It had no connection with the matters concerning which he had testified in chief." The Attorney General apparently does not contend otherwise, but seeks to avoid the effect thereof by the claim that the erroneous rulings were not prejudicial.

This claim is based on the fact that all of the questions as to assumed names, except those as to the name H. O. Miller, were answered in the negative. As to the name H. O. Miller, defendant answered in the affirmative, saying that on the night before his arrest, learning that there was a warrant out for his arrest, he registered at the Victor lodging house in Hanford as H. O. Miller. As to this, it is claimed that the answer was not prejudicial in view of the accompanying statement that it was after he was informed of the warrant of arrest, it being said that the taking of an assumed name would be regarded as natural and usual under the circumstances, and would not operate to his prejudice with the jury. We cannot say that this would be so. Such action on the part of the defendant might reasonably be regarded by the jury as inconsistent with innocence of the charge against him, and as indicative of a desire to conceal himself so as to avoid arrest, constituting practically evidence of flight. Such evidence could not properly be elicited from the defendant himself, except where proper cross-examination, which, we have shown, it was not. It amounted to the eliciting of positive evidence of facts tending to show guilt, thus virtually compelling the defendant to testify against himself, which our law does not permit.

In view of what we have just said, it is unnecessary to consider whether as to the other questions any prejudicial effect was obviated by the negative answers. It is doubtless true that generally an answer to an improper question that is favorable to the defendant is a complete reply to a claim of prejudicial error in the allowing of the question.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; LORIGAN, J.; SLOSS, J.

157 Cal. 770

OLDER v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

(S. F. 5,384.)

(Supreme Court of California. May 31, 1910.)

1. CONSTITUTIONAL LAW (§ 16*)—CONSTRUCTION OF CONSTITUTION.

The provisions of the Constitution must receive a practical common sense construction considered with reference to the prior state of the law, and with reference to the mischief intended to be remedied by the change.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 16; Dec. Dig. § 16.*]

2. CONSTITUTIONAL LAW (§ 16*)—CONSTRUCTION OF CONSTITUTION.

The court in aid of the rule that the provisions of the Constitution must be construed with reference to the prior state of the law, and to the mischief to be remedied by a change therein, may examine the debates in the constitutional convention at the time of the adoption of the part of the Constitution in question, and learn from the statements of the Constitution makers, if possible, their purposes and intentions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 16; Dec. Dig. § 16.*]

3. CRIMINAL LAW (§ 116*)—CHANGE OF VENUE—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 1, § 9, providing that criminal prosecutions for newspaper libel shall be tried in the county where the newspapers have their publication office, or in the county where the person libeled resided at the time of the publication, unless the place of trial shall be changed for good cause, adopted, as shown by the history of the section and the debates in the constitutional convention, to relieve newspaper publishers from the danger of prosecution in any county in which a libel may be circulated, does not regulate change of venue in such cases, but Pen. Code, § 1033, authorizing a change of venue on the application of accused on the ground that a fair and impartial trial cannot be had in the county, controls the right of a newspaper publisher to a change of venue in a prosecution for libel, and the good cause referred to in the Constitution is the cause provided for in the Penal Code in force at the time of the adoption of the Constitution, and continued in force under article 22, § 1, because not inconsistent with the Constitution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 116.*]

4. CONSTITUTIONAL LAW (§ 29*)—CONSTRUCTION OF CONSTITUTION — SELF-EXECUTING PROVISIONS.

A constitutional provision is not self-executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law, but to be self-executing the provision must supply a sufficient rule by means of which the right given may be enjoyed or protected or the duty imposed enforced.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. § 29.*]

5. CONSTITUTIONAL LAW (§ 29*)—CONSTRUCTION OF CONSTITUTION — SELF-EXECUTING PROVISIONS.

Const. art. 1, § 9, providing that criminal prosecutions for newspaper libels shall be tried in the county where the newspapers have their publication office or in the county where the person libeled resided at the time of the publication, unless the place of trial shall be changed for good cause, is not self-executing, because it does not provide the machinery for transferring a case, but the subject of change of venue in such cases is left to be regulated by Pen. Code, §§ 1033–1038, inclusive.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 29.*]

In Bank. On rehearing. Reversed, and judgment of trial court affirmed.

For former opinion, see 10 Cal. App. 564, 102 Pac. 829.

Hiram Johnson, Sullivan & Sullivan, and Theo. J. Roche, for petitioner. J. W. P. Laird, Rowen Irwin, and John E. Bennett, for respondents.

MELVIN, J. The petitioner, Older, asked the District Court of Appeal of the Third appellate district to issue a writ of mandate compelling respondents to entertain and determine the right of said petitioner to a change of venue of an action for criminal libel pending in Kern county. The motion for change of venue was based upon grounds other than that mentioned in section 1033 of the Penal Code. After deciding preliminarily that, in spite of the fact that Kern county is in the Second appellate district, the District Court of Appeal of the Third district had jurisdiction to issue the writ, that court gave an alternative writ, and after full hearing granted a peremptory writ directing respondents to proceed with the hearing and decision of the motion for change of venue upon its merits. Upon consideration of a petition for rehearing filed by respondents and answered by petitioner, this court granted a rehearing of the matter.

In the opinion rendered by the District Court of Appeal at the time of issuing the alternative writ, that court explained that the reason for taking up a matter pertaining to a county within another district was one of convenience to the attorneys for petitioner. This language occurs in the opinion: "Counsel for petitioner declare, and we must assume, that all members of the bar at all times act in good faith with the court; that it would be inconvenient and in fact impracticable to present this application to the Second appellate district court; that they were limited in the time within which to prepare the elaborate petition which has been filed here; and that the actual trial of the petitioner is set for the 11th day of May, 1909—one day from that on which this application was presented. The Constitution (section 4, art. 6) confers upon the District Courts of Appeal the jurisdiction of hearing writs of mandate, and does not confine the issuance of such writs by such courts within their territorial jurisdictions. But, as a matter of comity, as we have declared, such writs should invariably be applied for to the court of the district in which the cause for the writ arises, unless there are shown, as there are here, special circumstances which justify the issuance of the writ by a court of another district."

Counsel for respondents are of the opinion that the District Court of Appeal for the Third district is in error in the conclusion that it has jurisdiction to issue writs of mandate to any part of the state. Section 4 of article 6 of the Constitution provides that: "The said courts shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction." The jurisdiction of the District Court of Appeal, according to respondents, is either territorial or conferred-territorial in matters appealable to it from within the district in which it exists, and conferred in causes assigned to it by the Supreme Court. In the proceeding before us the District Court of Appeal of the Third district has issued mandate with reference to a motion in a case directly appealable to the district court of another district. Hence, according to the contention of respondents, the issuance of said writ was not necessary to the complete exercise of the appellate jurisdiction of that court. But the language of section 4 of article 6 of the Constitution is very general, and it may be urged with much force that the words "necessary or proper to the complete exercise of their appellate jurisdiction" modify not the words "mandamus, certiorari, prohibition, or habeas corpus," but refer exclusively to "other writs." This interpretation would give a District Court of Appeal jurisdiction to issue to any part of the state either of the four writs mentioned by name, but would limit its power as to those designated as "other writs." It is not necessary, however, to determine the exact meaning of this language, in view of the conclusion reached by us with reference to the constitutional question discussed by the District Court of Appeal concerning change of venue in cases of criminal libel. For the purposes of this case we may assume that the District Court of Appeal of the Third appellate district had jurisdiction to issue the writ, and that under the facts mentioned mandamus was the proper remedy. But we do not find it necessary to decide these matters, because we are unable to agree with the learned District Court of Appeal in the conclusion that section 9 of article 1 of the Constitution makes available, upon a motion for change of venue in a certain class of actions for criminal libel, grounds other than those mentioned in section 1033 of the Penal Code.

Certain informations are pending in the superior court of Kern county. In these informations one Fremont Older, editor, and R. A. Crothers, proprietor and publisher of a newspaper printed in San Francisco, are jointly charged with criminal libel. There is no question raised with reference to the county in which these actions were commenced, but the said Older moved for a change of the place of trial upon the grounds that "the convenience of witnesses and the ends of justice will be promoted by the change, and that the place of trial should be changed for good cause." There was no motion on the ground mentioned in section 1033 of the Penal Code "that a fair and impartial trial cannot be had in the county." The petition of said Older alleges, and the answer of the judge presiding in the superior court of Kern county at the hearing of the motion for change of venue admits, that the judge announced, after argument and consideration of the matter, that he intended to deny the motion for the sole reason that he had no jurisdiction to grant it upon the grounds urged in said petition, nor for any reason other than that specified in section 1033 of the Penal Code. The question for our determination, therefore, is this: Has the defendant in an action for criminal libel alleged to have been committed by a publication in a newspaper, the right to a transfer of his case from a county in which it is properly pending by reason of any "good cause" for such removal other than that provided in section 1033 of the Penal Code? In other words, is section 9 of article 1 of the Constitution self-executing without any legislative definition of the words "good cause"? The section in question is as follows: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Indictments found, or information laid, for publication in newspapers shall be tried in the county where such newspapers have their publication office or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause." Admittedly, in all other prosecutions, defendants desiring change of venue are limited to the rule of section 1033 of the Penal Code, which is as follows: "A criminal action may be removed from the court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county."

Petitioner's counsel, however, contend that publishers and editors of and contributors to newspapers are singled out by the Constitution for special favor and privilege by being given the right to change of venue for any "good cause" which may appeal to the discretion of the judge. Not only is this a startling contention, but in our opinion there is nothing to support it, either in the language of the Constitution or the reported debates of the constitutional convention. The rule of the Constitution that there might be a change of venue for "good cause" in these cases was adopted after a spirited debate in which the conclusion was reached that the liberty of the press, so important in all free governments, would be better protected by limiting these prosecutions to the county in which the newspaper was printed or the county of the residence of the person charging the libel. It would seem monstrous and grotesque that a man indicted for murdering his neighbor or for stealing money would be limited to local prejudice as a reason for the removal of his case to another county for trial, and that one charged with the assassination of reputation or the filching of a fellow citizen's good name should have a wider privilege in that regard, and it would be still more wonderful that a constitutional convention should adopt such a rule and give it place in the organic law to be proposed for adoption by the people without one syllable being spoken indicative of such an intention.

In considering the intention of the framers of the Constitution with reference to change of places of trial in cases where prosecutions are pending for criminal libels published in newspapers, we must investigate the evils which were to be remedied, the reforms to be accomplished, and all other matters which assist in discovering the purpose of the members of the constitutional convention. As was well said in the opinion in the case of the People v. Stephens, 62 Cal. 233, all the provisions of the Constitution "must receive a practical common-sense construction. They must be considered with reference to the prior state of the law, and with reference to the mischief intended to be remedied by the change." In aid of this canon of interpretation, we may also examine the debates which occurred at the time of the adoption of the part of the Constitution under analysis, and learn from the statements of the Constitution makers themselves, if possible, their purposes and intentions. Springfield v. Edwards, 84 Ill. 626. Let us, then, see what abuse the framers of the Constitution of 1879 wished to eradicate. There can be no doubt that they desired to relieve the publishers of newspapers from the danger of prosecution in any county in which any alleged libel might be promulgated, no matter how far from the principal place of business of the newspaper such county might be. Under the old Constitution the publisher of a newspaper might be prosecuted in any county in which the libel was circulated. Desiring to correct this evil Mr. Ayres proposed an amendment to section 9 of article 1. That section in the Constitution of 1849 was as follows:

"Sec. 9. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments, for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." At page 318, volume 1, of the Debates and Proceedings of the Constitutional Convention, we find the opening of the very interesting discussion which culminated in the adoption of the section which we are now examining. Mr. Ayres' proposed amendment was as follows: "Add to the section the following: Trial for libel against publishers of newspapers shall be held in the county where the newspapers and periodicals are published, subject only to the change of venue as in other prosecutions." Obviously there was no intention here to put these cases of criminal libel in a class by themselves with reference to change of venue. It was the intention of Mr. Ayres to place defendants charged with criminal libel published in newspapers under the provisions of section 1033 of the Penal Code which was then and for years had been in existence in substantially the form in which it now appears. His sole purpose was the removal of the privilege of prosecuting a publisher or editor at a selected location far distant from his place of business. This amendment was lost, and then the convention entered upon the discussion of an amendment which resulted in the substitution of the words "shall have a right to return a general verdict as in other cases" for the words "shall have the right to determine the law and fact."

Subsequently, Mr. Campbell proposed this amendment: "Indictments or informations for publications in newspapers shall be tried in the county where such newspapers have their publication office, unless place of trial shall be changed for good cause." It will be seen that this amendment was almost identical with the one theretofore proposed by Mr. Ayres, except that the former applied only to *publishers* of newspapers while the latter included within its purview indictments for *publications* in newspapers, and in the latter the phrase "unless the place of trial shall be changed for good cause" was used in lieu of the words "subject only to the change of venue as in other prosecutions." So nearly alike were these two amendments that several members made objections to considering Mr. Campbell's measure because, according to their recollection, it had been voted down. In the discussion which followed Mr. Campbell said nothing about the change in the phraseology whereby we could draw the inference that he wished change of venue in this sort of criminal libel cases to depend upon the discretion of the court as to what was "good cause." Indeed, all of the debaters, including Mr. Campbell, seemed to regard the amendment of Mr. Ayres and of Mr. Campbell as practically the same, differing only in the phraseology employed by the respective draughtsmen and small details, such as the exclusion of the word "periodicals" from Mr. Campbell's proposed amendment. Mr. Campbell, speaking to his proposed amendment, said in part: "The publisher may be brought to answer in Siskiyou, or in any part of the state in which that paper circulates, and you then have this state of things: That a man may be dragged eight hundred miles from his home to answer to a charge of misdemeanor before a selected judge, and before one whose political convictions and associations are such, or whose present associations are such, that the judge is the intimate friend of the prosecutor. The prosecutor may select any county in the state in which to bring the action, or all of the counties in the state, as has heretofore been attempted. They have their choice of all the judges in the state, and all the advantage which locality can give them. They can take the victim from one end of the state to the other, and there is no one to prevent them, no law to interfere, and you will then have what you are pleased to call the freedom of the press." After an extended debate upon the matter Mr. Shafter said: "When a man is charged with being a thief he has as much right to be vindicated at his own home as the newspaper has. I therefore move this amendment, which I think is eminently right and proper. It is to be added to amendment already presented by Judge Campbell, and I hope that gentleman will accept it, as a part of his amendment."

Thereafter the following proceedings were had: "The Chairman: Send up the amendment. The secretary read: 'Or in the county where the party alleged to be libeled resided at the time of the alleged publication.' Mr. Shafter: That will confine the trial to two places, either to the place where the paper is published, or to the place where the libeled party resided at the time of the publication. Mr. Campbell: I accept the amendment. Mr. Edgerton: Mr. Chairman, is an amendment in order? The Chairman: No, sir; there is already an amendment to an amendment. Mr. Campbell: I have accepted the amendment offered by the gentleman from Marin, Mr. Shafter. The Chairman: If the amendment is accepted, then an amendment to the amendment will be in order. The gentleman from Sacramento will send up his amendment. Mr. Edgerton: I move to amend so as to read as follows: 'Indictments or informations for publications in newspapers shall be found and tried in the county where such papers have their publication office, or in the counties where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause.' Mr. Van Dyke: The amendment is unnecessary. Mr. Edgerton: I am opposed to the whole thing, but I suggest this merely. The Chairman: The question is on the adoption of the amendment. Mr. Shafter: I move to insert the words 'Indictment found or information laid.' Mr. McFarland: I would suggest that something be left to the Legislature when it comes to arrange the details." The entire section was then adopted as amended by the committee of the whole and afterward by the convention, except the jury was given the right to determine the law and the facts and was not limited to the power of returning a general verdict. Not one word of the debate conveys to us the idea that the members of the convention desired to put editors and publishers and writers for newspapers in a class by themselves subject to having prosecutions for criminal libel changed upon the discretion of a judge for what he might regard as "good cause," while other persons accused of libel not published in a newspaper or of any other crime, and being under indictment or information therefor, would be limited to the legislative enactment contained in the Penal Code, if they would seek change of venue in any given case. Indeed, the remark of Judge McFarland indicates that he at least considered some legislative action necessary to the complete operation of the constitutional enactment.

It is provided by section 1 of article 22 of the Constitution: "That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature." By this section the rule announced in the Penal Code must be and remain in force if not inconsistent with section 9 of article 1. We can see no such inconsistency, and as that rule provides but one reason for changing the place of trial, we must regard it as the legislative measure of "good cause."

In the brief of petitioner's counsel, and in the opinion of the District Court of Appeal, the belief is expressed that it was intended by the makers of the Constitution to take entirely from the Legislature the power of providing the grounds upon which an indictment or information for criminal libel arising out of the publication in a newspaper might be transferred for trial from the county in which the prosecution was instituted. As we have indicated, we can see no reason for such a rule. Why should such a special class be made of those who are charged with the most dangerous and public form of libel? Why should editors and publishers of and contributors to newspapers be freed from laws made by the Legislature and be given by the Constitution to the tender mercies of judicial discretion as exercised in the vague, dimly defined region of "good cause"? The constitutional provision which we are considering either bestows a right which is to be regulated and given definite operation by statute, or it takes the place of statutory enactment, and becomes itself a statute which may not be repealed by the Legislature. Only upon the latter theory can it be upheld as self-executing. This doctrine is well expressed by Judge Cooley as follows: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Cooley's Const. Lim. p. 121. The Supreme Court of Illinois has said: "Where the Constitution requires the performance of an act, but provides neither officers, the means or the mode in which the act shall be performed, in such a case there is no other means of carrying such a provision into effect but by appropriate legislation. In such cases the Constitution does not execute such provisions." Phillips v. Quick, 63 Ill. 448. See, also, Washingtonian Home v. Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798. Applying the rule above expressed it becomes clear that the section of the Constitution which we are considering is not self-executing. If the members of the constitutional convention had intended to take the subject of change of venue in these cases entirely away from the Legislature, it seems most highly probable that they would have provided in the Constitution all of the machinery for transferring the case—the custody of the prisoner, the transmission of the records and all of those matters which are treated in sections 1033 to 1038, inclusive, of the Penal Code. In other words, if there had been an intention, for some undeclared reason, to provide for change of venue which would exclude legislative interference, all chance of misapprehension would have been obviated by expressing in the Constitution itself not only the reason which would justify a change but also all of the steps necessary to present the matter to the court and to give effect to its order. This was not done.

No reason appears to us in the language itself of section 9 of article 1 in the history of that section, nor in the nature of the actions to which it applies, which would justify the conclusion that it is or was intended to be self-executing.

It follows herefrom that the views expressed by the trial judge are sound in point of law, and that the petitioner is entitled to a change of venue, if at all, upon no other ground than that expressed in section 1033 of the Penal Code. Wherefore the application for mandate is denied.

We concur: HENSHAW, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.

157 Cal. 711

WILLIAMS v. BOARD OF TRUSTEES OF CITY OF BAKERSFIELD et al.

(S. F. 5,482.)

(Supreme Court of California. May 24, 1910.)

1. MUNICIPAL CORPORATIONS (§ 35*)—CONSOLIDATION—EFFECT.

Act March 11, 1909 (St. 1909, c. 184), provides (section 1) for the consolidation of contiguous municipal corporations into one "to be thereafter governed in the name and under the general municipal incorporation under which the greatest of them in population, by the last federal census, may be governed." By section 2, the question submitted to the electors in such case is whether such municipal corporations shall be consolidated into one municipal corporation, to be governed in the name and as a city of the class under the general municipal incorporation law, under which the greatest in population may be governed when such petition is so received. Section 3 provides that when the consolidation is complete the property shall ipso facto be vested in the new corporation, or in the officer or board thereof which has the power to hold or control such property under the law under which the greatest in population of the municipal corporations so consolidated was theretofore governed, and that all ordinances of the municipalities except those of the one having the greatest population shall be deemed repealed, and that those shall be ipso facto operative throughout the combined territory, and that cases pending in justice's court, police court, etc., shall be deemed ipso facto transferred to the appropriate court of the municipality of the greatest population. *Held*, that it was clearly intended that the consolidated corporation should exist and be governed, in accord with the law in force in the municipality having the greatest population, ascertained as prescribed by law when the petition for submission of the question of consolidation was presented, and not that the consolidated corporation should become a city of another class, or be governed in accordance with the class to which it would belong if classified pursuant to the classification act of March 2, 1883 (St. 1883, c. 17), as amended by St. 1899, c. 102, based on the aggregate population of the consolidated municipalities.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 102, 103; Dec. Dig. § 35.*]

2. Statutes (§ 93*)—Special Laws—Consolidation of Municipal Corporations.

In so far as Act March 11, 1909 (St. 1909, c. 184), relating to the consolidation of municipal corporations, provides that, regardless of the aggregate population of consolidated cities, the consolidated municipalities shall be of the class to which the municipality greatest in population belonged when the petition was filed, and be governed by the charter provided for cities of that class, it does not violate Const. art. 11, § 6, forbidding the creation of municipal corporations by special laws, but allowing the Legislature to provide by general laws for the incorporation and organization of cities and towns, and their classification in proportion to population, which laws may be altered, amended, or repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

3. Statutes (§ 93*)—Special Laws—Consolidation of Cities—Powers of Legislature—Classes.

The Legislature may provide a general scheme of consolidation for municipalities desiring consolidation, involving the practical disincorporation of the smaller in population and the annexation of its territory to the greatest, as is done by Act March 11, 1909 (St. 1909, c. 184), providing that a consolidated municipality shall be of the class to which the greatest in population belongs at the time of filing the petition and be governed by the charter provided for cities of that class.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

4. Statutes (§ 93*)—Classification for Government—Changes in Population—Effect.

Conceding a corporation must, on its original incorporation under the general act, necessarily take the organic act of the class to which it belongs by reason of its population, it retains that act regardless of changes in population, till its electors decide on reorganization under another act, and there is nothing requiring otherwise in Const. art. 11, § 6, forbidding creation of corporations by special laws, but allowing the Legislature to provide, by general laws, for incorporation, organization, and classification in proportion to population, of cities and towns, which laws may be altered, amended, and repealed, and providing for the organization under general laws of cities and towns before organized, and that all charters framed or adopted by authority of the Constitution, except in municipal affairs, shall be subject to and controlled by general laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

5. Constitutional Law (§ 48*)—Unconstitutionality of Statute—Determination.

A statute will not be declared unconstitutional unless the violation of the Constitution is clearly made to appear.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

6. Elections (§ 32*)—Consolidation—Election of Officers—Time Therefor.

The provision in section 2 of Act March 11, 1909 (St. 1909, c. 184), for holding a special election to elect officers for a consolidated municipality within 90 days after filing in the office of the Secretary of State an abstract of the result of an election in favor of consolidation, is directory only, so that, though the time therefor may have gone by without a proper election, it may still be held on proper notice.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 22; Dec. Dig. § 32.*]

In Bank. Mandamus by J. R. Williams against the Board of Trustees of the City of Bakersfield and F. G. Munzer and others, trustees of such city. Peremptory writ denied, and alternative writ discharged.

E. L. Foster and E. G. Knapp, for petitioner. Matthew S. Platz, City Atty., for respondents.

ANGELLOTTI, J. This is an original proceeding in mandate, instituted by a resident, elector, and taxpayer of the town of Kern in Kern county, to obtain a writ requiring the defendants to set off the combined territory of the town of Kern and the city of Bakersfield in said county into six wards, and to call an election therein for the election of officers of cities of the fourth class.

The city of Bakersfield and the town of Kern are contiguous municipalities On October 18, 1909, proceedings were commenced for their consolidation under the provisions of the act entitled "An act to provide for the consolidation of municipal corporations," approved March 11, 1909 (St. 1909, p. 282), providing for the consolidation of two or more contiguous municipal corporations into one, "to be thereafter governed in the name and under the general municipal incorporation law, or freeholders' charter, as the case may be, under which the greater or greatest in population of such municipal corporations, as shown by the last federal census, may be governed." Section 1. The town of Kern was at such date a city of the sixth class, organized and existing under the provisions of the general municipal corporation act. St. 1883, p. 93, and amendments. According to the last federal census it had a population of 1,291. In 1907 an enumeration of the inhabitants had been made by the trustees under the provisions of section 3 of the act to provide for the classification of municipal corporations, approved March 2, 1883 (St. 1883, p. 24), which showed 3,242 inhabitants. The city of Bakersfield was a city of the fifth class, organized and existing under the same act, with a population, according to the last federal census, of 4,836, and with a population, according to an enumeration made by the trustees thereof in 1907, of 7,338. The classification act, as amended, provided that cities having a population of more than 10,000 and not exceeding 15,000 shall constitute the fourth class, that cities having a population of more than 3,000 and not exceeding 10,000 shall constitute the fifth class, and that those having a population of not exceeding 3,000 shall constitute the sixth class. Section 1. Under both the federal census and the special enumeration Bakersfield was thus a city of the fifth class, and Kern had taken no proceedings under its special enumeration to reorganize as a city of the fifth class (section 3), and was confessedly a city of the sixth class. The result of the special election held in these municipalities in accord with the law upon the question of consolidation was in favor of the proposition, and an order was regularly made declaring the result, and the proper abstract was filed in the office of the Secretary of State. It is not questioned that all of the proceedings up to this point were in strict accord with the provisions of the consolidation act. Under the provisions of this act, where the municipality having the greater or greatest population, "ascertained as hereinbefore provided," is not operating under a freeholders' charter, the consolidation is not complete until a special election shall have been held in the combined territory "for the election of the officers required by law to be elected in corporations of the class to which the consolidated municipal corporation shall belong when such consolidation is completed," the returns thereof canvassed, and the result declared and entered. Section 2. In accord with the requirements of the statute in that regard, the trustees of the city of Bakersfield regularly ordered such an election to elect officers as designated for cities of the fifth class, the theory being that the consolidated municipal corporation will be a city of the fifth class. The claim of plaintiff is that, by reason of the fact that according to the special enumeration of 1907 the combined territory has a population of over 10,000, viz., 10,580, the consolidated municipality will be a city of the fourth class, and will operate under the charter provided by the Legislature for cities of that class, and that the election should be for officers of a city of that class, instead of a city of the fifth class, the elective officers of the two classes differing in many respects. A division into wards is also essential in cities operating under charters provided for cities of the fourth class. Accordingly plaintiff seeks the writ of mandate hereinbefore described. The facts stated appear in plaintiff's petition. The matter has been submitted for decision upon a demurrer thereto.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is apparent that plaintiff is entitled to no relief if the consolidated municipal corporation is to be governed by the provisions of the charter provided by the Legislature for cities of the fifth class. If the plain language of the consolidation act is to control in this matter, it appears clear to us that such corporation will be governed by such charter. As we have seen, the sole provision for a consolidation is for a consolidation "into one municipal corporation, to be thereafter governed in the name and under the general municipal incorporation law, or freeholders' charter, * * * under which the greater or greatest in population of such municipal corporations, as shown by the last federal census, may be governed." Section 1. By the express terms of section 2, the question submitted to the qualified electors of each of the municipalities is "whether such municipal corporations shall become consolidated into one municipal corporation to be governed in the name, and under the freeholders' charter, *or as a city of the class under the general municipal incorporation law*, as the case may be, *under which the greater or greatest in population of such municipal corporations* ascertained as hereinbefore provided, *may be governed at the time such petition is so received.*" Section 3 provides that, when the consolidation is complete, the property of the former corporations shall ipso facto be vested in the new corporation, "or any officer or board thereof which has the power to hold or control such property under the freeholders' charter, *or other law under which the greater or greatest in population of the municipal corporations so consolidated was theretofore governed.*" The same section provides that upon such consolidation being effected, all ordinances of the municipalities except those of the one having the greater or greatest population shall be deemed repealed, and that the ordinances of the municipality having the greater or greatest population shall ipso facto operate throughout the combined territory, and also that all cases then pending in any justices' court, police court, recorder's court, etc., of any of the other municipalities shall be deemed ipso facto to be transferred to the appropriate court of the municipality of the greater or greatest population. There is absolutely nothing in the act that detracts from the effect of these provisions, and the act clearly shows the intent that the consolidated municipal corporation shall exist and be governed in accord with the law in force in the municipality having the greater or greatest population, ascertained in the manner prescribed by law, at the time the petition for the submission of the question of consolidation was presented to its legislative body. Under the provisions of the act it is immaterial whether or not the special enumerations by the trustees of the respective cities in 1907 control the federal census of 1900, but we do not desire to be understood as intimating that such special enumerations may be looked to at all in proceedings under this act. Both under the federal census and the special enumerations, Bakersfield was, at the time of the filing of such petition, the greater city in population, had a population of not less than 3,000 nor more than 10,000, and was in fact governed as a city of the fifth class under the general municipal incorporation law, the class to which it would belong by reason of its population if it was being incorporated for the first time, under the provisions of such law. If the language of the consolidation act is to govern, the consolidated municipal corporation will therefore operate under the charter provided by the Legislature for cities of the fifth class.

It is claimed by counsel for plaintiff that if the consolidation act be construed in this manner, it is in violation of section 6, art. 11, of our Constitution, in so far as it provides that, regardless of the aggregate population of the consolidated cities, the consolidated municipality shall be of the class to which the municipality greater or greatest in population belonged at the time of the filing of the petition and be governed by the legislative charter provided for cities of that class. This amounts to a claim, as well put by counsel for defendant, that in view of section 6, art. 11, of the Constitution, the Legislature has no power, by general law, to give "to the electors of two or more municipal corporations, the right to decide, by their votes, whether or not those two or more municipal corporations shall be consolidated, to be thereafter governed" until they see fit to change their government in a legal manner, by a law which, in effect, constitutes the charter of the city greater or greatest in population at the time of the initiation of the consolidation proceedings. In the absence of constitutional inhibition, there can, of course, be no question as to the absolute power of the Legislature in this regard. We shall assume, purely for the purposes of argument, that the special enumerations prevail over the federal census, and that the aggregate population of the two cities at the time of the initiation of these proceedings had been officially ascertained to be 10,580.

The constitutional provision, so far as material, is as follows: "Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization, and classification in proportion to population, of cities and towns, which laws may be altered, amended or repealed."

We do not think that this provision inhibits such legislation as is here involved. It is clear, of course, that the consolidation act of March 11, 1909, is in no sense of the word as used in our Constitution, a "special" law. Its provisions are applicable in every case of contiguous municipalities desiring to consolidate into one municipality, and have a uniform operation in all such cases. It is appropriate, and, in fact, necessary that such an act shall contain provisions as to the government of the consolidated municipality, made up of two or more municipalities having different organic acts, until such time as the electors thereof may, if entitled by reason of their population to do so, reorganize under other laws. A very natural and reasonable provision for such cases would appear to be the one made by the Legislature in this act, viz., that the consolidated municipality shall have the name, ordinances and organic act of the municipality greater or greatest in population, whether the organic act of that municipality be a freeholders' charter, or one of the charters created by the general municipal corporation act. Under the method here adopted, while the proceeding is styled a "consolidation" of two or more municipalities into one, it is practically and substantially an annexation of the municipality or municipalities having the lesser populations to the municipality greatest in population, just as much an annexation as we have where unincorporated territory is annexed to an existing municipality. The name, laws, and organic act of the greatest in population continue in force, and, by reason of the proceedings taken, become effectual throughout the new territory. We do not think that it can be disputed that the Legislature may provide a general scheme of consolidation for municipalities desiring to consolidate, involving the practical disincorporation of the smaller in population or the municipalities to be consolidated and the annexation of the territory included therein to the municipality greatest in population. This is what, in our judgment, they have done by the act under consideration. If there is in the proceeding provided by this act any creation, incorporation, or organization of a new corporation, it is so only in a most limited sense, and not at all in the sense that requires such corporation to adopt the organic act of the class of municipal corporations to which, by reason of its population, it may be entitled. So far as practical effects are concerned, the result of the proceeding given by the act is the same as it would have been had there first been a disincorporation of the smaller municipality, and a subsequent annexation of the territory incorporated therein to the municipality greater in population. We do not understand that it is claimed that where a municipality existing under the general municipal incorporation act attains a population entitling it to reorganize as a city of the higher class, whether by reason of the annexation of additional territory or any other cause, it ipso facto becomes subject to the organic act of cities of such higher class. The classification act itself expressly provides that this result can be accomplished, where the increase is shown only by a special enumeration and not by a federal census, only by a vote of the electors of the municipality on the question of reorganization at a general or special election, after a petition for the submission of that question, signed by not less than one-fifth of the qualified electors (section 3, Classification Act), and that such a vote is necessary in all cases to effect such a change of organic act is fully recognized by all the opinions in the case of Ex parte Fedderwitz, 130 Cal. xviii, 62 Pac. 935, a case very much relied on by counsel for plaintiff. Even in the opinion of the Chief Justice therein, specially relied on by plaintiff, it is said: "A city of the fourth class, organized under the charter of that class, retains its charter notwithstanding an increase of population which put it in the third class." While, therefore, it may be conceded that in the case of an original incorporation under the general municipal corporation act, the municipality must necessarily take the organic act of the class to which it belongs by reason of its population, under the views expressed in the case last cited, it retains that organic act regardless of changes in population, until its electors decide upon reorganization under another act, and there is nothing in section 6 of article 11 of the Constitution requiring otherwise. In the concurring opinion of Justice Henshaw, in Ex parte Mitchell, 120 Cal. 390, 392, 52 Pac. 799, cited in Ex parte Fedderwitz, supra, it is declared that the class originally fixed for a municipality continues, notwithstanding future fluctuations and changes in population, until further legislative action changing the class has been adopted, and that such a condition of the statute is in accord with the sense and meaning of the constitutional injunction requiring a classification of cities by population. If there is nothing in the constitutional provision inhibiting laws warranting such conditions, in view of what we have already said, we are unable to see therein any inhibition of such provisions of the consolidation act as those under discussion. As we have said, for all practical purposes the conditions are the same. It is a rule emphatically declared by this court on very many occasions that an act of the legislative department of the state will not be declared by the courts to be opposed to the state Constitution unless its violation of some provision thereof is clearly made to appear. We are satisfied that no such condition confronts us in the case at bar.

There are other points made by defendants against plaintiff's claim for a writ of mandate, but, in view of our conclusion on the matter already discussed, it will be unnecessary to notice them here. It should perhaps be further said, in view of what is said in the briefs as to the necessity of holding the election for officers within a designated time, that we regard such provision as directory only, so that, although such time may now have passed without a proper election being held, the election may still be held on proper notice thereof. See Wheeler v. Herbert, 152 Cal. 224, 241, 92 Pac. 353.

The application for a peremptory writ of mandate is denied and the alternative writ heretofore issued is discharged.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(157 Cal. 720)

ALLEN v. BOARD OF TRUSTEES OF CITY OF BAKERSFIELD et al. (S. F. 5,493.)

(Supreme Court of California. May 24, 1910.)

1. Municipal Corporations (§ 40*)—Consolidation—Election of Trustees—Division into Wards.

Act March 11, 1909 (St. 1909, c. 184), relating to consolidation, provides (section 2), that after a favorable vote and the canvass and filing of abstracts thereof, the legislative body of the municipality having the greater or greatest population, if not governed under a freeholders' charter, shall call a special election to be held in all of them to elect officers required in the class to which the consolidated corporation belongs when consolidation is completed. It provides further for canvass of the returns and entry of the result on the minutes of the body calling the election, and, further, that from and after such entry the consolidation shall be deemed completed and the corporation be deemed consolidated into a new one. *Held*, that in calling an election the only powers of the trustees, who are the agents of the state to effectuate the intent of the electors and who exercise powers specially delegated to them by statute, were those expressly conferred by the act or necessarily incident thereto, and they have no authority to divide combined territory into wards to elect the trustees therefrom, and neither does subdivision 14 of section 764 of the municipal corporation act (St. 1883, c. 49, and amendments [St. 1897, c. 136; St. 1901, c. 218]) giving such discretionary power to the board of trustees of cities of the class similar to that of a consolidated city authorize such division, and the election of trustees should be at large, and if, after the consolidated city is established, its trustees see fit to so divide its territory they may in their discretion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 112, 113; Dec. Dig. § 40.*]

2. Elections (§ 41*)—Consolidation—Election of Board of Education.

Where a consolidation will result in a city of the fifth class, government of which by Municipal Corporation Act (St. 1883, c. 49) § 751, includes a board of education of five members, a call to elect officers, required by law to be elected in corporations of this class, made pursuant to the consolidation act (St. 1909, c. 184), must include a call to elect such a board, though it will result in the destruction or dissolution of an existing school district, that being a matter entirely in the control of the Legislature.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 41.*]

3. MUNICIPAL CORPORATIONS (§§ 3, 27, 51*)—CREATION, ALTERATION, AND DISSOLUTION—CONTROL OF LEGISLATURE.

Creation, alteration, and dissolution of municipal or other subordinate public corporations is a matter entirely in the control of the Legislature, subject to constitutional restrictions on special legislation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2, 64, 144, 148; Dec. Dig. §§ 3, 27, 51.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 40*)—CONSOLIDATION OF CITIES — CREATION OF NEW DISTRICT—EFFECT ON EXISTING DISTRICT.

Creation of a new school district from territory of consolidated cities will not necessarily destroy an existing district including one of them, and much less will the mere election of a board of education for the new city have this effect, but it will merely withdraw from it a part of its original territory.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 70; Dec. Dig. § 40.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 40*)—CONSOLIDATION OF CITIES — CREATION OF NEW DISTRICT—EFFECT ON EXISTING DISTRICT.

Evil possibly arising from withdrawing part of a school district where part within a city is detached when a new city is created by its consolidation with another is obviated by Pol. Code, § 1576, and Municipal Corporation Act (St. 1883, c. 49) § 795, authorizing the county board to annex outlying territory to the city for school purposes.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 70; Dec. Dig. § 40.*]

In Bank. Mandamus by T. F. Allen against the Board of Trustees of the City of Bakersfield, and F. G. Munzer and others, trustees of such city. Peremptory writ ordered to issue as prayed.

C. E. Arnold, for petitioner. Matthew S. Platz, City Atty., for respondents.

SLOSS, J. The petitioner, a resident, elector, and taxpayer of the city of Bakersfield, applied for and obtained from this court an alternative writ of mandate requiring the trustees, in calling an election for the election of officers for a consolidated city composed of said city of Bakersfield and the town of Kern, to call the election of the board of trustees of such consolidated city at large and not from wards, and also to embrace in their call a board of education. The facts alleged in the petition are, for the purposes of this hearing, admitted, the respondents relying solely upon a demurrer. The proceedings heretofore taken for the consolidation of the two municipalities under the act approved March 11, 1909 (St. 1909, p. 282), are set forth in the opinion in Williams v. Board of Trustees of Bakersfield (S. F. No. 5,482) 109 Pac. 482. It was there held that the consolidated city was to be organized as a city of the fifth class. This is the class to which the city of Bakersfield belonged under its prior incorporation. Kern has been a town of the sixth class.

1. It is averred, in the petition now before us, that neither municipality was, prior to January 31, 1910, divided into wards, and that all elections held in either for officers have been at large. On said 31st day of January, 1910, following the determination that a majority of the electors of Kern and of Bakersfield had, at an election called for that purpose, voted in favor of consolidation, the board of trustees of Bakersfield, the body charged, under the law, with the duty of calling an election for the election of officers of the consolidated city, adopted an ordinance dividing the territory of the combined municipalities into five wards. On the same day they adopted an ordinance calling an election of officers of the consolidated city, and designating, among such officers, "a board of trustees to consist of five members, one to be elected from each ward, by the qualified electors resident in such ward of said consolidated city." The petitioner contends that the said trustees were without power to so divide the combined territory into wards, or to call an election of trustees by wards.

The power of the board of trustees of the city of Bakersfield to call the proposed election of officers for the consolidated city is derived from section 2 of the consolidation act above cited. That section provides (St. 1909, p. 286) that, after a favorable vote upon consolidation in each of the cities proposed to be consolidated, and the due canvassing of the votes and the filing of certain abstracts thereof, the "legislative body of the one of such municipal corporations so proposed to be consolidated having the greater or greatest population," if it be not governed under a freeholders' charter, "shall proceed to call a special election to be held in all the municipal corporations so proposed to be consolidated, for the election of the officers required by law to be elected in corporations of the class to which the consolidated municipal corporation shall belong when such consolidation is completed." The section further provides for the canvass of the returns of such election, and the entry of the result thereof on the minutes of the body calling the election. Then follows the further provision that, "from and after the date of such entry, such consolidation shall be deemed to be completed, and such municipal corporation shall be deemed to be consolidated into a new municipal corporation." It is apparent that, inasmuch as the new or consolidated corporation is not brought into existence until the entry of the returns of the special election of officers, the board of trustees of the larger city are not, in calling such election, acting as the legislative body of the new or consolidated city. They are taking one of the steps necessary to the complete formation of such consolidated city, and in so doing are exercising an authority specially delegated to them by the statute providing for consolidation. They may be said to be the agents of the constituent municipalities, or, rather, of the state, for the purpose of carrying into effect the declared intent of the electors of the two cities. That they are the legislative body of one of the cities is a merely accidental circumstance, which adds nothing to their powers. The Legislature might, if it had seen fit, have confided the duty of calling a special election to the county board of supervisors, or to some other board or officer. It follows that the only powers possessed by the board of trustees in connection with calling a special election are those conferred by the act in express terms, or such powers as are necessarily incident to those conferred. The consolidation act nowhere gives authority to divide the combined territory into wards for the purpose of electing trustees from wards. The respondents seek to find authority for such division in the municipal incorporation act (St. 1883, p. 93, and amendments). Section 764, subd. 14, of that act, gives to the board of trustees of cities of the fifth class power "in its discretion to divide the city, by ordinance, into a convenient number of wards, not exceeding five" and, when such division has been made, to designate the number of trustees to be elected from each ward. But this is a power conferred on the board in its capacity of legislative body for the municipality. The trustees of the existing city of Bakersfield are not exercising such power for the proposed consolidated city. They are authorized merely to call an election of officers for the city to be. If such election, in cities of the fifth class, were required to be by wards, the power to call an election might well be said to carry with it, by necessary implication, the power to divide into wards. Since, however, such division is not essential, but rests in the discretion of the legislative body of the city when formed, we can find no warrant for the contention that the trustees of the existing city of Bakersfield have authority, in calling an election of officers to govern the consolidated cities, to divide the territory of both into wards. The election of trustees should be at large. If, after the consolidated city is established, its trustees see fit to divide its territory into wards, they may, in their discretion, do so.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. The call issued fails to provide for an election of members of a board of education for the consolidated city. There are now existing two school districts, which include the territory of the present cities of Kern and Bakersfield. The Sumner school district embraces all the territory within the town of Kern, and also a large territory without the corporate limits of said town. The Bakersfield school district embraces all the territory within, and much territory without, the corporate limits of the city of Bakersfield. It is alleged in the petition that the Sumner school district is the owner of large amounts of real and personal property all of which is situate within the corporate limits of the town of Kern. This district existed prior to the incorporation of said town, and, as is averred, no separate school district was ever in fact formed out of the territory embraced within the town of Kern.

The consolidated city, for which officers are to be elected, will be a city of the fifth class. The municipal corporation act provides that the government of cities of this class shall be vested in various officers, including a board of education, to consist of five members (section 751); and that from and after the organization of each of such cities, the same shall constitute a separate school district, which shall be governed by the board of education of such city. Section 795; Board of Education v. Board of Trustees, 129 Cal. 599, 62 Pac. 173, 605. Section 1576 of the Political Code likewise provides that "every city or incorporated town unless subdivided by the legislative authority thereof, shall constitute a separate school district, which shall be governed by the board of education or board of school trustees of such city or incorporated town. * * *" It is questioned by counsel for respondents whether a town or city of the sixth class (e. g., the town of Kern), which is not, by the terms of the municipal incorporation act, given a department of education, is intended to be included within the operation of this Code section. We do not regard this question as important to the determination of the present controversy. Let it be assumed that the incorporation of the town of Kern did not ipso facto create such new school district, and that the Sumner school district continued to be de jure, as well as de facto, a district comprising territory within as well as without the corporate limits of Kern. The proposed consolidation, when completed, will result in a city of the fifth class, composed of the territory within the corporate limits of the present municipalities of Bakersfield and Kern. Under the plain terms of the statutes above cited, such city will form a school district, to be governed by the board of education of such city. A board of education, composed of five members, is a part of the governmental machinery of cities of the fifth class, and it would, therefore, seem plain that a call for the "election of the officers required by law to be elected in corporations" of this class (St. 1909, p. 286) must include a call for the election of five members of the board of education. The respondents seek to avoid this conclusion by the claim that the Sumner school district constitutes a distinct and independent body politic, free and independent of any control by either of the existing municipalities, and that the electors of the cities of Kern and Bakersfield cannot, by voting to consolidate, destroy, or dissolve said Sumner school district. If the proposed consolidation would result in such destruction or dissolution, the contention would be sufficiently answered by the statement that the creation, alteration, and dissolution of municipal or other subordinate public corporations is a matter entirely in the control of the Legislature, subject to constitutional restrictions on special legislation. Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067. We have just held, in Williams v. Board of Trustees, supra, that the consolidation act of 1909 is a general law, and if it, together with the municipal incorporation act and the Political Code, has the effect of ending the life of existing school districts, the result is one due to the action of the Legislature acting within its proper sphere. But, in fact, the creation of a new school district, comprising the territory of the consolidated city will not necessarily destroy the Sumner school district. Much less will the mere election of a board of education for the new city, which is all that is sought by the present proceeding, have this effect. If the Sumner school district now exists as a valid corporate entity, exercising jurisdiction over territory within and without the town of Kern, the incorporation of the territory within said town into a new district will not dissolve the old one. It will merely withdraw from it a part of the territory originally comprised within its boundaries. Such was held, in Bay View School Dist. v. Linscott, 99 Cal. 25, 33 Pac. 781, to be the effect of incorporating a city with boundaries including a part of the territory of an existing school district. "The portion of Bay View district which was included within the exterior boundaries of the city," says the court, "has ceased to constitute a part of that district." See, also, Vernon School Dist. v. Board of Education, 125 Cal. 593, 58 Pac. 175. The situation is similar where a portion of a school district is added to an adjacent municipality by annexation (see Kramm v. Bogue, 127 Cal. 122, 126, 59 Pac. 394), or where, as here, the territory of two municipalities is, by the process of consolidation, brought into a single municipality. Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44, cited by respondents, is not in point. The court was there discussing the extent to which the adoption of a freeholders' charter by a city may affect the existence of a school district formed under the general law. No such question arises here, where every right claimed is based upon a general law.

The respondents urge the hardship that will be worked upon the inhabitants of those parts of existing school districts not included within the new city. The law furnishes a method of obviating such evil by authorizing the board of supervisors of the county to annex outlying territory to the city, for school purposes. Pol. Code, § 1576; Mun. Corp. Act, § 795.

A peremptory writ will issue as prayed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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13 Cal. App. 212

PEOPLE v. HOLMES. (Cr. 154.)

(Court of Appeal, Second District, California. April 13, 1910.)

1. CRIMINAL LAW (§ 576*)—DISMISSAL OF PROSECUTION—GROUNDS—FAILURE TO FILE INFORMATION.

Pen. Code, § 1382, authorizing the court to dismiss a prosecution on failure to file the information within 30 days after commitment, prescribes a penalty for the failure of the district attorney to comply with section 809 by filing the information within 30 days after the examination and commitment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1301; Dec. Dig. § 576.*]

2. INDICTMENT AND INFORMATION (§ 41*)—FILING OF NEW INFORMATION—STATUTES.

Pen. Code. § 809, requiring the district attorney to file an information within 30 days after commitment, does not fix the time within which a new information may be filed, and, where the first information was filed before the expiration of the 30 days, the filing of a new information pursuant to the order of the court for the purpose of giving a more complete statement of the facts must be presumed to be based on the examination before the magistrate, and no preliminary examination was necessary.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 41.*]

3. CRIMINAL LAW (§ 576*)—DELAY IN BRINGING ACCUSED TO TRIAL—EFFECT.

Under Pen. Code, § 1382, authorizing the court to dismiss the prosecution, where accused was not brought to trial within 60 days after the filing of the information, unless good cause to the contrary is shown, a motion to dismiss a prosecution because accused was not brought to trial within 60 days after the filing of the original information, though within 60 days after filing of a new information, on which the trial was had, was properly denied, where it was shown that the accumulation of business in the criminal courts made it impossible to bring the cause to trial at an earlier date, though it be assumed that the date of the filing of the original information was the one which should be considered on the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1297; Dec. Dig. § 576.*]

4. CRIMINAL LAW (§ 576*)—DELAY IN BRINGING ACCUSED TO TRIAL—EFFECT.

Where accused and his counsel were present in court at the time the case was set for trial, and no objection was made to the setting of the case for trial on a date more than 60 days after the filing of the information, the court properly refused to dismiss the prosecution under Pen. Code, § 1382, for failure to bring accused to trial within 60 days.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1297; Dec. Dig. § 576.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. EMBEZZLEMENT (§ 48*)—DEFENSES—GOOD FAITH OF ACCUSED.

Pen. Code, § 511, providing that it is a sufficient defense to a charge of embezzlement that the property was appropriated openly and avowedly, and under a claim of title, preferred in good faith, is predicated on an avowed claim in good faith of the entire title to the property appropriated, and a charge on a trial for the embezzlement of notes and a mortgage that, if accused transferred his interest therein openly and avowedly, he was not guilty, was properly refused because it failed to include the element of claim of title in good faith.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72–75; Dec. Dig. § 48.*]

6. EMBEZZLEMENT (§ 48*) — DEFENSES — GOOD FAITH OF ACCUSED.

An instruction that if accused believed that the notes and mortgage were a part of a copartnership fund belonging to himself and prosecutor he should be acquitted was properly refused under Pen. Code, § 511, for failing to include the essential element of claim of title preferred in good faith.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72–75; Dec. Dig. § 48.*]

7. EMBEZZLEMENT (§ 48*)—DEFENSES—GOOD FAITH OF ACCUSED—INSTRUCTIONS.

Where, on a trial for embezzlement of notes and a mortgage, the evidence authorized the inference that accused's right to the notes and mortgage did not ripen until certain property had been purchased, and that he merely held the notes and mortgage in trust as an earnest of the prosecutor's good faith that he would become a partner when the purchases were completed, which contingency never occurred, and there was no evidence that accused ever gave any consideration for the notes and mortgage, or that he made any purchase of any property, or that he made any effort to close any transactions on which his rights to the notes and mortgage depended, and the evidence showed that as soon as he converted the property he immediately left the state, there was no evidence on which good faith and belief of ownership could be predicated, and an instruction in the language of Pen. Code, § 511, relating to the good faith of accused, was properly refused.

[Ed. Note.—For other cases see Embezzlement, Cent. Dig. §§ 72, 73; Dec. Dig. § 48.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

William Holmes was convicted of embezzlement and he appeals. Affirmed.

S. G. Barker, Charles E. Williams, and G. M. Spicer, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was informed against for the crime of embezzlement charged to have been committed in the county of Los Angeles on March 5, 1909, by appropriating and converting to his own use three promissory notes of the value of $150 each and a mortgage for $450 executed to him by one Nellie Messinger and which had been intrusted to his control and possession. An information was filed July 17, 1909, on which defendant was arraigned and to which he filed a demurrer which was overruled; and thereafter he entered a plea of not guilty and the trial of the cause was set for September 20, 1909. August 10, 1909, a new information was filed by order of the court, on which defendant was arraigned and given until August 18, 1909, to plead. On that day, and before entering a plea, he made a motion to set aside the information on the ground that he had not been legally committed by a magistrate, and also a motion to dismiss the action because the new information had not been filed within 30 days after he had been held to answer. Both of these motions were denied, whereupon he filed a demurrer to the new information, which being overruled he entered a plea of not guilty to the charge contained in the new information, and thereupon, by consent of defendant, the trial of the cause was set for September 17, 1909. In the minutes of the court for September 17, 1909, appears the following order: "The district attorney with the defendant and his counsel being present in court, and this being time set for trial of this cause, and the time of the court being occupied with other matters, trial of this cause is set for September 27, 1909, at 10 a. m." On September 27th defendant filed a motion to dismiss the prosecution of the action on the ground that the cause had not been brought on for trial within 60 days after the filing of the information. Leave and time were given to the district attorney to file affidavits excusing the delay in bringing the cause to trial, and to the defendant to file counteraffidavits if he desired. No showing other than the record was made by the latter, but the attorney in charge of the cause filed his own affidavit setting out the foregoing matters, the accumulation of business in the criminal courts and the conditions of the calendar and facts tending to show that it was not possible to bring the cause to trial at an earlier date. The motion was overruled and the cause proceeded to trial and the defendant was found guilty as charged. After his motions for a new trial and in arrest of judgment were overruled, he was sentenced to imprisonment in the state's prison for five years; the defendant appealing from the judgment in open court.

The rulings of the trial court upon all the foregoing motions made by defendant were excepted to and are assigned as error for review on this appeal. Only the two motions to dismiss the prosecution, made under the provisions of section 1382 of the Penal Code, however, are specially presented, and the only authority cited in support of appellant's contention in respect to these is the section itself. Defendant also assigns as error the refusal of the trial court to give to the jury two certain instructions requested by him. The first of these reads as follows: "You are instructed that, if the evidence shows that the defendant sold, assigned, and transferred all his right, title, and interest in and to the notes and mortgage openly and avowedly, the defendant believing he had the right so to do, that you should acquit the defendant." The second as follows: "You are instructed that if the evidence shows that the defendant believed the notes and mortgage was a part of a copartnership fund belonging to the defendant and Mrs. Messinger that you should acquit the defendant."

The motion to dismiss a prosecution because the information has not been filed within 30 days after the defendant is held, which may be made under section 1382 of the Penal Code, is but a penalty prescribed for a violation of section 809 of the Code, which requires the district attorney to file the information within 30 days after examination and commitment by the magistrate, but this section has nothing to do with the time within which a new information may be filed. People v. Lee Look, 143 Cal. 216, 221, 76 Pac. 1028. The first information was filed in this cause before the expiration of the 30 days, and the new information was for the same offense, giving a more complete statement of the facts, for the purpose of supplying a defect in the original. The latter was filed upon the order of the court, and, for the purpose of this motion, must be presumed to be based upon the examination before the preliminary magistrate. No new preliminary examination is necessary. Ex parte Nicholas, 91 Cal. 643, 28 Pac. 47.

In presenting the motion to dismiss because the cause was not brought on for trial within 60 days after the filing of the information, the date of the filing of the original information is relied upon by appellant, instead of the date of the filing of the information upon which the trial was had. If it be conceded that the date of the filing of the original information is the one which should be considered in connection with this motion, the motion was nevertheless properly denied. The affidavit filed and showing made by the district attorney in excuse of the delay was sufficient to justify the court in denying the motion as the matter in the affidavit showed "good cause to the contrary." Section 1382, Pen. Code; People v. Moran, 144 Cal. 48, 56, 77 Pac. 777. In addition to this, it does not appear from the record that the defendant objected to the setting of the cause for trial on a date more than 60 days after the filing of the information, he and his counsel being present in court at the time when the case was set for trial on September 27, 1909. People v. Douglass, 100 Cal. 1, 4, 34 Pac. 490.

The first instruction refused by the court was no doubt an attempt to state the law covered by section 511 of the Penal Code: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable." The instruction fails to include the transactions intended to be covered by section 511. It contains no element of claim of title in good faith by the defendant, but informed the jury that if defendant transferred his interest in the notes and mortgage, believing that he had the right to transfer his interest therein, he should be acquitted. Section 511 is predicated upon an avowed claim in good faith of the entire title to the property appropriated. We think, also, there is an absence of any express claim upon the part of defendant that he in good faith owned the notes and mortgage at the time he converted them to his own use, and of evidence from which a reasonable inference to this effect could be drawn.

The second instruction was only another way of stating the same legal proposition attempted to be covered by the first, but limiting the claim of title to a special or copartnership right in the property. There is the same failure to include the essential element of claim of title preferred in good faith which is apparent in the first instruction. Whether we accept the theory of the prosecution that the deposit of the notes and mortgage with defendant related to the purchase of only one rooming house, or that of the defendant that it also included the purchase of others or another, the only reasonable inference to be drawn from the evidence is that the defendant's right to the notes and mortgage did not ripen until the rooming house or houses had been purchased, and that he merely held them in trust as an earnest of the complaining witness' good faith that she would become a partner when the purchase or purchases were completed, and this contingency never occurred.

There is no evidence that defendant ever gave anything as a consideration for the notes and mortgage. He never made any purchases of any rooming house, and, according to the uncontradicted evidence of the witness best qualified to say, he never even had an option on the property in connection with which he claimed the right to use the complaining witness' notes. He made no effort to close up any of the transactions upon which his right to the notes depended, and, as soon as he converted the property which he is charged with embezzling, he immediately left the state. We are unable to see any evidence upon which good faith and belief of ownership could have been predicated, if either of the instructions had been within the letter of section 511.

No cause for a reversal being presented, the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

13 Cal. App. 292

In re GOETZ'S ESTATE. (Civ. 771.)

(Court of Appeal, First District, California. April 20, 1910.)

1. WILLS (§ 775*)—LEGACIES—LAPSE BY LEGATEE'S DEATH.

Before the amendment of Civ. Code, § 1310, in 1905 (St. 1905, c. 155) a legacy lapsed by the legatee's death before the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1997; Dec. Dig. § 775.*]

2. WILLS (§ 775*)—LEGACIES—LAPSE BY LEGATEE'S DEATH.

Under a will providing that "and devise so bequeathed by me should die, prior to my death the legacies to them * * * shall lapse * * * and form a part of my residuring estate," a legacy lapsed by the legatee's death, where the will as a whole showed that testator used the words "devise" and "legacy" interchangeably; Civ. Code, § 1322, making a clear bequest unaffected by other words not equally clear, being inapplicable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1997; Dec. Dig. § 775.*]

3. WILLS (§ 440*)—CONSTRUCTION—INTENTION OF TESTATOR.

To deduce testator's intention, the whole will may be examined, and words may be interpolated or transposed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the Matter of the Estate of Joseph Goetz, deceased. From an order denying petitions for partial distribution, Louis Bartlett appeals. Affirmed.

See, also, 109 Pac. 105, 145.

Louis Bartlett, for appellants. P. A. Bergerot and Jellett & Meyerstein, for respondents Louis A. and Joseph Goetz. Loewy & Gutsch, for respondents Camille, Marie, and Chas. Goetz.

KERRIGAN, J. This is an appeal from an order denying petitions for partial distribution of the above-named estate. Joseph Goetz by his last will, executed May 11, 1904, bequeathed to his nephew Jules Lesage the sum of $30,000. Toward the end of that year Jules Lesage died. Three years later the testator died. The appellants are children of Jules Lesage and the respondents are the executors of the will and certain beneficiaries thereunder. The provisions of the will involved in this appeal read as follows:

"Third: I give and bequeath to Jules Lesage my nephew who resides in the city of Mulhausen Alsace Germany the sum of Thirty thousand dollars ($30,000)."

"Twelfth: and devise so bequeathed by me should die, prior to my death the legacies, to them mentioned in this will shall lapse, and such legacies shall form a part of my residuring estate."

At the time of the execution of the will, and at the time of the death of Jules Lesage, section 1310 of the Civil Code provided that a devise to a relative of the testator, in case of the death of the devisee before that of the testator, should be taken by the lineal descendants of such devisee; but the section was silent in the case of a legacy under the same conditions, and consequently, following the general rule of law, such legacy lapsed. Estate of Ross, 140 Cal. 282, 73 Pac. 976. Two years before the testator's death this section was amended so as to prevent the lapsing of such legacies, and it now reads as follows (the portion added by the amendment being indicated by italics): "When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator."

Appellants' chief contentions are (1) that the will took effect at the death of the testator, and that under the section of the Code above quoted, as amended in 1905, they are entitled to the legacy bequeathed to their father; (2) that clause 12 of the will is less clear and distinct than is the so-called legacy to the children of Jules Lesage, and that therefore, under section 1322 of the Civil Code, the legacy is not affected by clause 12. Independently of what may be the correct solution of appellants' first contention, we think the order of the trial court in denying the petition for partial distribution should be affirmed on the ground that from the twelfth clause of the will it satisfactorily appears that the testator intended that legacies given to persons who predeceased him should lapse, and such intention under the circumstances of this case must control. Although this clause of the will is not as clear as could be desired, nevertheless, the intention that the testator sought to express therein can be readily ascertained. In order to learn his intention the whole will may be examined, and words may be interpolated or transposed. Mitchell v. Donohue, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; Estate of Stratton, 112 Cal. 513, 44 Pac. 1028; Estate of Wood, 36 Cal. 75. And in this connection it is also important to remember that the words "devise," "bequeath," and corresponding terms, are not invariably used with technical accuracy, but on the contrary they are frequently employed interchangeably, and especially by testators who are not lawyers, and who draw their wills. In re White, 125 N. Y. 551, 26 N. E. 909; Logan v. Logan, 11 Colo. 44, 17 Pac. 99; People's Trust Co. v. Smith, 82 Hun, 494, 31 N. Y. Supp. 522. In Underhill on Wills, volume 1, page 498, it is said: "Some words are so frequently misused by testators that very little argument is needed to move the court to reject them and to substitute others in their place. Thus, for example, the words "devise and bequeath and 'devise and legacy,' 'heir,' 'legatee or devisee' are used interchangeably in common parlance, and very frequently are incorrectly employed by testators unfamiliar with technical language who write their own wills." See, also, 14 Cyc. 28.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the will before us in clauses 4 and 5, in referring to real estate the testator uses the words "bequeath" and "bequeathed." In clause 12 he places the words "devise" and "bequeathed" in juxtaposition. The word "devisee" is not correctly spelled anywhere in the whole will. In the 14th clause the testator provides that if "any person" named in this will should contest the same, the legacy or bequest made to the person so contesting shall be canceled; and in lieu thereof the sum of $50 shall be given to said person so contesting. It is evident to us that the testator, by the use of the words "legacy or bequest" in this provision of his will, meant to include a devise also. The testator was a man advanced in years and a foreigner by birth, and the instances just given, as well as many others which might be referred to, show that he was unable to express himself in the English language with technical or even ordinary accuracy. In clause 12 presumably the testator wanted to use the word "devisee," but spelled it "devise." Again, this clause is in a part of the will which deals with contingent events, and we think the testator intended this clause to commence with the word "if," and that the word "and" at the beginning of the clause was intended for the word "any." In fact it is not seriously disputed that the clause should read: "If any devisee * * * should die prior to my death, the legacies to them in this will shall lapse," etc. At all events, upon a consideration of the law and of the whole will we do not hesitate to hold, as did the trial court, that the testator intended that clause 12 should at least apply to all the legacies mentioned in the will, including that to Jules Lesage. But appellants claim that clause 12 cannot affect the legacy said to belong to the children of Jules Lesage, because that clause is not as clear and distinct as the legacy to them. This position is based on section 1310 of the Civil Code already quoted, and on that portion of section 1322 of the Civil Code which reads as follows: "A clear and distinct * * * bequest cannot be affected * * * by any words not equally clear and distinct, or by inference or argument from other parts of the will."

Section 1322 lays down a rule of construction of a will, to be applied where a clear and distinct devise or bequest is sought to be affected by a provision of the will not equally clear and distinct; and it is obvious that it has no application whatever to the question under consideration, for here the language of clause 12 does not affect or modify the legacy to Jules Lesage, but merely directs the disposition of the fund constituting the legacy in case the legatee should predecease the testator. The argument of appellants is based upon the theory that the legacy was to the children of Jules Lesage, or that the statute makes them the beneficiaries of the legacy, in case of the death of their ancestor, in spite of the intention of the testator expressed to the contrary. Here there was no legacy to the children, clear and distinct or otherwise; and section 1322 does not provide that when one may be entitled to a legacy by force of statute, any intention of the testator to prevent the operation of such statute must be as clear and distinct as the statute itself. That section does not come into play as between provisions of the law and clauses of a will, but it is a rule of construction of the will itself under the circumstances plainly stated in the section. Assuming that a will made prior to the amendment of 1905 (St. 1905, c. 155) to section 1310 falls under the operation of the amendment, still the statute can only be applied where there is no intention to the contrary expressed by the testator in his will; and it is sufficient if that intention can be fairly ascertained from the language used, and it need not be in clear and precise terms. Here such an intention is expressed, and it is incontrovertible, we think, that that intention must control, and that section 1322 is inapplicable.

The order is affirmed.

We concur: COOPER, P. J.; HALL, J.

13 Cal. App. 322

PEOPLE v. CROWLEY et al. (Cr. 115.)

(Court of Appeal, Third District, California. April 27, 1910. Rehearing Denied by Supreme Court June 23, 1910.)

1. Criminal Law (§ 231*)—Preliminary Examination — Informing Defendant of Right to Counsel.

Pen. Code, § 858, providing that the magistrate, before whom one is brought for preliminary examination shall inform him of his right to counsel, is satisfied by simply informing him of the right; appointment of counsel, or sending for one without request, not being required.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 480, 481; Dec. Dig. § 231.*]

2. Criminal Law (§ 351*) — Evidence — Attempt to Escape.

On a trial for an offense, evidence that defendant after being arrested therefor made an attempt to escape, with the circumstances thereof, is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 779; Dec. Dig. § 351.*

3. Criminal Law (§ 351*) — Evidence — Attempt to Escape Arrest Without Warrant—Felony.

The offense for which one was arrested being a felony, a warrant of arrest was not necessary, so that his being arrested without a warrant did not justify his attempt to escape.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 779: Dec. Dig. § 351.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. ROBBERY (§ 24*) — SUFFICIENCY OF EVIDENCE.

Evidence on a prosecution for robbery *held* sufficient for a conviction.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 32; Dec. Dig. § 24.*]

5. ROBBERY (§ 30*)—PUNISHMENT.

Twenty years' imprisonment for the defendant the more culpable, and 15 years' for the other, was not excessive punishment for waylaying and assaulting a somewhat intoxicated old man, and severely injuring him, and robbing him of all he had.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 43; Dec. Dig. § 30.*]

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Daniel Crowley and Frank Wilson were convicted of robbery, and appeal. Affirmed.

Geo. B. Finnegan, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendants were convicted upon an information charging them jointly with the crime of robbery. Defendant Crowley was sentenced to imprisonment at Folsom for the term of 20 years, and defendant Wilson was sentenced to imprisonment at San Quentin for the term of 15 years. Defendants appeal from the judgment and from the order denying their motion for a new trial.

1. The first point made by appellants is that the court erred in denying defendants' motion to set aside the information for the reason that at the preliminary examination, they "were not fully informed of their rights by the magistrate as to their right to counsel." Citing section 858, Pen. Code. Conceding that the failure of the magistrate to comply with the provisions of said section is cause for setting aside the information (People v. Napthaly, 105 Cal. 643, 39 Pac. 29), we think the record shows sufficient compliance therewith. The following proceedings took place before the magistrate: "The Court. Q. What is your name? A. Dan Crowley. Q. What is your name? A. Frank Wilson. There is a complaint filed in this court charging you with a felony. The district attorney will read the complaint. The complaint was then read by Mr. Rutherford. The court then said: 'You and each of you have a right to a preliminary examination, and the right to procure counsel and the right to be admitted to bail, pending the examination. When will you be ready to proceed with the examination?' To this the defendants replied: 'We will be ready at any time.' The Court: 'Mr. Rutherford, what time?' Mr. Rutherford: 'Two o'clock this afternoon.' The Court: 'Very well. In the meantime you will be held in bonds of $8,000, to appear here at two o'clock this afternoon for examination. You will be in the custody of the officer until you give such bail. It is ordered that you attend at the coroner's inquest as witnesses.'" Having been thus informed of their rights they should have asked time in which to obtain counsel, if they so desired. Instead, however, they answered, when asked when they would be ready to proceed with the examination, "We will be ready at any time." The statute does not require the magistrate to appoint counsel on the request of defendant at the preliminary examination, as is the case upon his arraignment (section 987, Pen. Code); but provides that "upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name."

2. Error is assigned in that the court permitted proof to be made of "the commission by defendants of another crime, separate and distinct from the one on which they were being tried and committed after it." While defendants were in jail Constable Schumpf went to the prison with a young man named King, the latter carrying with him the breakfast for the prisoners confined in the jail, there being others besides the defendants. The evidence showed that after the constable had opened the door leading to the prisoners, defendant Wilson stood beside defendant Crowley near the door. Schumpf testified: "I opened the large padlock and opened the swinging door. I unlocked that and pulled it back and opened the door and I stepped inside the door here. It swings to my right and I stepped outside of the door to let the young man pass in the with the tray of meals. He no more than got inside than Crowley stepped up to me and he says 'throw up your hands.' He stepped up to me like this, and he says 'throw up your hands' and I made the remark 'go to hell' and I tried to throw the bolt against the door and he throwed the gun against me like that. The door was open and I could not close the door; the door was open about two feet and a half, and I hollered for help; I cried for help, and I made a grab for his gun and caught it." It appeared further that Schumpf drew his own gun and shot Crowley, the ball passing through his body and killing King. The facts relating to this encounter and its regrettable result came out in connection with the attempt of defendants to make their escape and for that purpose alone. The evidence was admissible. In State v. Wrand, 108 Iowa, 73, 78 N. W. 789, a somewhat similar case, the court said: "The sheriff detected the defendants, while in jail, attempting to escape by sawing the iron bars of their cell. They insist that evidence of this was inadmissible, because tending to prove a distinct offense. True, the commission of another crime may not be proven for the sole purpose of showing that the defendant would be the more likely to have committed that charged. State v. Rainsbarger, 71 Iowa, 746, 31 N. W. 865. See State v. Brady, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 500. But, if the evidence is material and relevant to

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection. People v. Place, 157 N. Y. 584, 52 N. E. 576. That an attempt to escape is a circumstance proper to be shown and considered by the jury, is put beyond controversy by the authorities. State v. James, 45 Iowa, 412; State v. Arthur, 23 Iowa, 430; State v. Ruby, 61 Iowa, 86, 15 N. W. 848; State v. Stevens, 67 Iowa, 558, 25 N. W. 777." The fact that defendants were arrested and confined without warrant did not justify their attempt to escape. A warrant of arrest was not necessary, the crime for which they were arrested being a felony. The arrest was made late on Saturday night, July 3d, and the occurrence above mentioned took place the next morning.

3. It is claimed that the evidence was insufficient to justify the verdict. Two witnesses testified to having seen defendants in the act of "going through" their victim and watched them until they came past the witnesses where it was light, saw them both plainly and at once looked up Constable Schumpf and with him found the men shortly afterwards. The evidence was ample to warrant the verdict.

4. It is urged that "the sentences imposed were excessive and disproportionately severe in light of the crime committed." The crime consisted of waylaying and assaulting a somewhat intoxicated old man and severely injuring him and while prostrated on the ground, robbing him of all the money he had—"three five dollar gold pieces" and "a silver cased watch." There was evidence tending to show that defendant Crowley was the more culpable and got no more than he deserved, and that Wilson got less is not matter of which either can complain.

5. It is claimed that the venue was not proven. In this defendants are mistaken. There was evidence that the crime was committed in the town of Truckee and in the county of Nevada.

6. It is also urged that "the instructions of the court to the jury were unfair to the defendants; more especially for the reason that the court assumed that the defendants had been legally arrested and charged with crime, and made an attempt to escape." The court instructed the jury as to the statute law under which a peace officer may make an arrest, but went no further in its instruction. The court also instructed the jury that an attempt to escape by one under arrest, accused of crime "is a circumstance to be weighed by the jury as tending in some degree to prove consciousness of guilt, and entitled to more or less weight, according to the circumstances of the particular case. In this particular case, whether or not the defendants did attempt to escape from the jail at Truckee after being placed therein by the officers and whether if any attempt was so made, such attempt tends in any degree to show a consciousness of guilt of the crime alleged in the information, are matters for you to decide." And the court instructed the jury that the acts surrounding the alleged attempted escape are to be considered by you for one purpose only, namely—whether or not they proceeded from a consciousness of guilt on the part of defendants or either of them, of the crime alleged in the information. We discover no error in these instructions.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

13 Cal. App. 354

PEOPLE v. HOLDEN. (Cr. 122.)

(Court of Appeal, Third District, California. April 29, 1910.)

1. Robbery (§ 17*) — Information — "Assault" with Intent to Rob.

Pen. Code, § 950, requires an information to contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended"; and section 952, subd. 3, provides that "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense" must be stated. Section 211 defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." *Held*, that an information under section 220, providing that "every person who assaults another with intent to commit * * * robbery * * * is punishable," etc., need not allege how or by what means the assault was made, nor set forth the means used to constitute force or excite fear, nor that the prosecuting witness was in possession of personal property, and that an information was sufficient which charged that the assault was made with force and violence, and that the intent was to feloniously, and by force, violence, and intimidation, steal, take, and carry away the property of the prosecuting witness, and against his will.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 16–26; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, vol. 1, pp. 532–538; vol. 7, pp. 6258–6264; vol. 8, pp. 7582, 7792.]

2. Criminal Law (§ 829*)—Instructions—Requests.

Where the jury were instructed that they must look alone to the evidence, it implied that they were not at liberty to act on their "own unaided suspicions," or on account of "any prejudice they may have conceived prior to or during the trial," and defendant was not prejudiced by the refusal of an instruction which was but an elaboration of the instruction given as to such implications.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. Criminal Law (§ 829*) — Instructions — Requests.

Where a jury were correctly and fully instructed as to what constitutes a reasonable doubt, there was no error in refusing to repeat the instruction.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. Criminal Law (§ 829*)—Instructions—Requests.

Accused was not prejudiced by refusal of an instruction correctly stating the law as to circumstantial evidence, when the jury were many times and in various forms told that they must be guided wholly by the evidence, and such instructions embraced both direct and circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. Criminal Law (§ 784*)—Instructions—Circumstantial Evidence.

When the jury are fully instructed that they must be guided entirely by the evidence, and must be convinced by it beyond a reasonable doubt, the instruction goes to both direct and circumstantial evidence, and it must be assumed the jury will so apply it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883–1888; Dec. Dig. § 784.*]

6. Criminal Law (§ 784*) — Instructions — Circumstantial Evidence.

Where substantially all the evidence of guilt is direct, it does not call for an instruction on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883–1888; Dec. Dig. § 784.*]

7. Criminal Law (§ 807*)—Argumentative Instruction.

An instruction opening with the declaration that "with respect to all verbal admissions it may be observed that they should be received with great caution" was properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

8. Criminal Law (§ 1178*)—Appeal—Waiver of Alleged Errors.

Where there is no oral argument, and the alleged errors, in admitting evidence which appellant in his brief states were to be dwelt on more fully in the opening argument, are not shown in any brief, it must be assumed that they have been waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011–3013; Dec. Dig. § 1178.*]

Appeal from Superior Court, Placer County; N. D. Arnot, Judge.

Edward Holden was convicted of an assault with intent to commit robbery, and he appeals from a judgment of conviction, and from an order denying a new trial. Affirmed.

L. L. Chamberlain, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, and Charles A. Tuttle, for the People.

CHIPMAN, P. J. Defendant and one Edward Hansen were jointly charged with the crime of an assault with intent to commit robbery upon one John Connolly on September 28, 1909. A demurrer to the information was overruled, and defendant Holden was tried separately and found guilty as charged. A motion for a new trial was denied, and defendant was sentenced to imprisonment in San Quentin for three years. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The information charges the crime of felony as follows: "Assault with intent to commit robbery, committed as follows: The said Edward Holden and Edward Hansen on or about the 28th day of September, A. D. 1909, at the said county of Placer, in the said state of California, and before the filing of this information, in and upon one John Connolly, feloniously and with force and violence did make an assault with intent the money, goods and chattels of the said John Connolly, from the person and immediate presence and against the will of him, the said John Connolly, then and there feloniously and by force, violence and intimidation to steal, take and carry away, contrary to the form," etc.

1. It is urged that the demurrer should have been sustained, first, because the information does not state that the prosecuting witness had any "money, goods and chattels" upon his person or in his immediate presence at the time of the alleged assault; second, that the circumstances of the assault are not set forth nor what kind of force or violence or intimidation was used. Section 220, Pen. Code, provides: "Every person who assaults another with intent to commit * * * robbery * * * is punishable," etc. Section 950 requires "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended"; and section 952, subd. 3, provides that "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense" must be stated. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Pen. Code, § 211. "An assault is an unlawful attempt coupled with a present ability to commit a violent injury on the person of another." Id. § 240

The argument is that the crime charged is a composite crime (Pen. Code, § 220)—an assault coupled with the intent to rob being the complete offense—and hence the particular circumstances of the offense charged must be set forth in the information and that it is not sufficient to charge the offense in the language of the statute. Citing People v. Perales, 141 Cal. 581, 75 Pac. 170; People v. Mahony, 145 Cal. 104, 78 Pac 354; People v. Shearer, 143 Cal. 66, 76 Pac 813. People v. Perales is claimed "to be almost a parallel case." The charge there was "assault by means likely to produce great bodily injury," the means described being "with a heavy wooden stick." The court held that there was "no proper or particular designation of the means which it is claimed were used in its commission." The court laid down this rule: "Where the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted." It is urged now that it is impossible "to tell whether defendant is charged with having made an assault with a weapon; whether he knocked the prosecuting witness down with his fist; whether he intimidated him by threats of prosecution for some crime by holding a loaded revolver at his heart, or an ax over his head. There is absolutely nothing to show what means or force were used to intimidate him." In People v. Weir, 10 Cal. App. 460, 102 Pac. 539, the information charged that the assault was made with "deadly weapon," to wit, a "revolver," and was held sufficient in following the language of the statute.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the case here the crime charged is "assault with intent to commit robbery," and is unlike the Perales Case, supra. It was not necessary to allege how or by what means the assault was made. Nor was it necessary to set forth the means used to constitute force or to excite fear. Neither was it necessary to aver that the prosecuting witness was at the time in possession of personal property. Highwaymen do not first ascertain whether their victim has money or other property before attacking, and it would be unreasonable to hold that an intent to rob could not be shown without averring and showing that the victim had something of which he could be robbed. The crime consists of the assault with intent to rob. The information charged that the assault was made with force and violence, and also charged that the intent was to feloniously and by force, violence, and intimidation, steal, take, and carry away the money, goods, and chattels of the prosecuting witness and against his will. The information was sufficient.

2. Defendant asked an instruction (marked "6") to the effect that the jury must be guided according to the law as given by the court. It was refused and without prejudice, for it was substantially given elsewhere.

3. Instruction marked "11" was refused, and, it is claimed, to defendant's prejudice. This instruction is but an elaboration of the instruction elsewhere given that the jury must look alone to the evidence. By this is implied that they were not at liberty to act upon their "own unaided suspicions," or on account of "any prejudice they may have conceived prior to or during the trial." We must assume that the jury were intelligent men, and when told that they must be governed by the evidence and that only, we cannot say that they acted otherwise because not particularly cautioned not to be influenced by prejudice or by their suspicions.

4. The modification of instruction 12 by omitting a portion of it did not detract from its force, or fail to distinctly state that the defendant was entitled to the individual judgment of each juror.

5. The jury were correctly and fully instructed upon what constitutes a reasonable doubt. It was not error to refuse to give it again as was asked by instruction 19.

6. Instruction 20, asked by defendant and refused by the court, correctly stated the law as to circumstantial evidence, but we do not think that the defendant was prejudiced because not given. They were many times and in various forms told that they must be guided wholly by the evidence, and such instructions embraced all the evidence, direct and circumstantial. Where the case rests entirely or chiefly upon circumstantial evidence, it is desirable that some direction be given the jury as to the necessity for establishing each fact, beyond a reasonable doubt, which is essential to complete the chain of circumstances tending to establish the crime charged. But we are not prepared to say that a refusal to give such an instruction would necessarily be prejudicial error, for the law makes all competent evidence admissible, whether direct or circumstantial, and leaves the jury to determine its relative weight in each case. When, therefore, full instructions are given that the jury must be guided entirely by the evidence, and must be convinced by it beyond a reasonable doubt, the instruction goes to both classes of evidence, and it must be assumed that the jury will so apply it. Furthermore, in the present case, substantially all of the evidence of defendant's guilt was direct, and there was no call for an instruction upon circumstantial evidence. Instructions 21, 22, 23, 24, and 25 were along the same line and need not be further noticed.

7. Instruction 26, asked by defendant, was properly refused. It is argumentative, and is an instruction concerning matters of fact. The instruction opens with the declaration that "with respect to all verbal admissions it may be observed that they should be received with great caution." In Goss v. Steiger Terra Cotta, etc., Wks., 148 Cal. 155, 82 Pac. 681, a similar instruction was refused and the court held that it was not prejudicial error. The cases on the point are

there reviewed. Instructions 27 and 29 were in substance given elsewhere. In instructions 45, 49, and 50 we discover no error.

It is suggested in the brief of the defendant that the court erred in admitting certain testimony, and states that "these errors are specifically pointed out in the motion for new trial, and will be dwelt upon more fully in the opening argument." There was no oral argument, and the alleged errors are not shown to us in any brief. We must assume that they have been waived.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

13 Cal. App. 301

PEOPLE v. SCOTT. (Cr. 220.)

(Court of Appeal, First District, California. April 26, 1910. Rehearing Denied May 25, 1910. Denied by Supreme Court June 23, 1910.)

1. ARSON (§ 37*)—EVIDENCE—SUFFICIENCY.
Evidence *held* to sustain a conviction of arson.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71–73; Dec. Dig. § 37.*]

2. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—MATTER COVERED.
It is not error to refuse an instruction covered by those given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. CRIMINAL LAW (§ 1144*)—JUDGMENT—TIME FOR PRONOUNCEMENT.
Under Pen. Code, § 1191, as amended in 1909 (St. 1909, c. 589), requiring judgment to be pronounced within 5 days after conviction, but allowing 10 days under a motion for new trial, where continuances of pronouncement under a conviction before the amendment took effect were regular up to that time, a further continuance of 8 days will be presumed, in the absence of a showing by the record to the contrary, to have been ordered to enable the court to hear the motion for a new trial, thus defeating accused's right to a new trial because more than 10 days elapsed between the conviction and pronouncement of sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3035, 3036; Dec. Dig. § 1144.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Steth A. Scott was convicted of arson, and he appeals. Affirmed.

Carl E. Lindsay, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was convicted of the crime of arson of the second degree and sentenced to imprisonment in the state prison for the period of 10 years. This is an appeal from the judgment and from an order denying defendant's motion for a new trial.

The fire occurred on the third story of a building situated at No. 25 Third street in San Francisco on February 21, 1909, shortly after 1 o'clock in the afternoon. For some time prior to that date one Miss Williams conducted a shorthand and typewriting school in rooms situated upon said third floor, and the defendant was the manager of the school and an instructor under Miss Williams. It is conceded that a portion of the premises was burned and that the fire was of incendiary origin; but the defendant contends that the verdict convicting him of the crime of arson is not sustained by the evidence. We have carefully examined the record with a view to determining this point, and are constrained to hold that the evidence is sufficient. The theory of the prosecution was that the defendant set fire to the premises in order to enable Miss Williams to collect on her policy of insurance. Evidence was introduced showing a close and strong friendship between defendant and Miss Williams. On the subject of the fire itself two painters, who were at work painting on the third floor of the building, testified that the defendant was there as late as 12:45 p. m., which was shortly before the discovery of the fire, although defendant claimed that he left there an hour earlier. Another witness who knew the defendant testified that when the fire engines and other fire apparatus were being hurried to the scene of the fire, the defendant was at a point within two blocks of the place and going away from it. The defendant on the other hand testified that at that time and for half an hour prior thereto he was a mile away, taking luncheon with Miss Williams and another woman. When Miss Williams insured the furniture and equipment of the school originally, and again when she increased the amount of her policy, the defendant was present and took an active part in the transactions; yet after the fire he disclaimed to the fire marshal having any knowledge at all on the subject of her insurance, and in an investigation into the origin of the fire, the defendant, in order to account for his whereabouts from the time he claimed to have left the building until he arrived at Larkin and Ellis streets for luncheon, stated that he had an engagement with one W. F. Berrill, and that he walked to the place of appointment at Seventh and Howard streets, and failing to find Berrill that he walked from there to Larkin and Ellis streets. Berrill, however, testified that he had no engagement with the defendant on that day. Other circumstances in the case pointing to the guilt of the defendant are that although it was desired that the painted portions of the third story should dry as quickly as possible, so that a session of school might be held on Tuesday, February 23d, the defendant, against the advice of the painters, ordered the window curtains drawn, the windows left open six inches from the bottom, the inner doors open and the outer doors locked. Immediately after the fire a certain book was found on the defendant's desk, with a leaf turned down at a part of the book entitled, "How to collect insurance." The evidence is wholly circumstantial, and while it appears from a reading of the entire record that the case is a close one, nevertheless, we think that it is sufficient to sustain the verdict.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant complains of the action of the trial court with regard to certain instructions. The first instruction requested by defendant was marked by the court "Given"; and, although, according to the reporter's transcript of the proceedings, it was not given in the exact language proposed, yet it was given in substance, and the subject-matter thereof was fully covered. As to the other instructions criticized, it is sufficient to say that it clearly appears that the jury was fully and fairly instructed by the trial judge on every phase of the law appertaining to the case. No error was committed in the admission or rejection of evidence.

The verdict finding the defendant guilty was rendered on May 11, 1909. The pronouncement of sentence and judgment was continued from time to time until June 14, 1909, and upon that date was again continued until June 22d (being 41 days from the finding of the verdict) when sentence and judgment were finally pronounced. Section 1191 of the Penal Code, as amended in 1909 (St. 1909, c. 589), provides in part that the court must pronounce judgment within not less than 2 nor more than 5 days after the verdict or plea of guilty, but that, for the purpose of hearing and determining a motion for a new trial, this time may be extended not more than 10 days, etc. In Rankin v. Superior Court, 106 Pac. 718, it was held that unless the trial court pronounced its judgment within the 5 days specified in the section, or within an extension of time therein authorized, the defendant is entitled to a new trial. The verdict of the jury in the present case was rendered before the amendment to section 1191 became law, the amendment being approved April 14, 1909, and becoming effective June 13th following. The continuances prior to the one of June 14th were under the old law and were regular. The judgment was pronounced and the appeal taken after the amendment in question became operative; and it becomes necessary to consider the effect of the last order of continuance, viz., that of June 14, 1909.

This appeal was taken under section 1191 of the Penal Code as amended, and the record does not show that the continuance of June 14th (which was for more than five days) was made for the purpose of hearing and determining a motion for a new trial. Defendant therefore contends that he is entitled to a new trial. But such motion was in fact heard and denied; and in the absence of a showing by the record to the contrary we will presume that the court acted regularly, and that the continuance of June 14th was ordered for the purpose of enabling the court to hear and determine such motion. People v. Russell, 105 Pac. 416.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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13 Cal. App. 331

DOLLAR v. INTERNATIONAL BANKING CORPORATION et al. (Civ. 771.)

(Court of Appeal, Second District, California. April 28, 1910. On Petition for Rehearing May 28, 1910; Denied by Supreme Court June 27, 1910.)

1. Appeal and Error (§ 837*)—Questions Reviewable—Matters of Law.

The incompetency of parol evidence to vary a writing may be considered on appeal as a matter of law, though no objection was made in the trial court to the introduction of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3275; Dec. Dig. § 837.*]

2. Appeal and Error (§ 1195*)—Law of the Case.

The decision of the court, on appeal from a ruling on a demurrer to the complaint in an action on an instrument that the instrument was nonnegotiable but assignable, is the law of the case on a subsequent trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

3. Bills and Notes (§ 275*)—Indorsement—Nonnegotiable Instruments — Rights of Indorsee.

Under Civ. Code, § 1459, authorizing the transfer by indorsement of nonnegotiable contracts to pay money, subject to equities in favor of the maker at the time of the indorsement, the indorsee of a nonnegotiable instrument obtains no better title than his indorser had, though indorsed before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 738; Dec. Dig. § 275.*]

4. Banks and Banking (§ 154*)—Deposits—Right to Recover—Promise to Pay Certificate of Deposit.

The right to recover the amount of a certificate of deposit, based on an agreement by the bank receiving the deposit and issuing the certificate to pay the amount thereof, provided a judgment is obtained, and the judgment is obtained, is founded on estoppel in the form of a new cause of action, and to be available must be pleaded; and the holder of the certificate who seeks a recovery on the theory of an express or implied contract may not recover on the new cause of action.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502, 503, 510; Dec. Dig. § 154.*]

5. Judgment (§ 724*)—Res Judicata—Findings—Conclusiveness.

A finding in a suit, dismissed without prejudice, which is not necessary to the judicial action taken by the court, does not affect the rights of either of the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1254; Dec. Dig. § 724.*]

6. Banks and Banking (§ 152*)—Certificate of Deposit—Assignment—Liability of Bank.

A bank receiving a deposit and issuing a certificate therefor, which the depositor assigns, is concerned only in knowing before paying to the assignee that the assignment binds the assignor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 478; Dec. Dig. § 152.*]

7. CORPORATIONS (§ 411*)—OFFICERS—POWERS.

The general manager of a corporation intrusted with the management of its affairs may assign the choses in action of the corporation to its creditors, either in payment of or as security for the payment of a precedent, corporate debt, without express authority from the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1650, 1653; Dec. Dig. § 411.*]

8. CORPORATIONS (§ 411*)—OFFICERS—POWERS.

Under Civ. Code, §§ 2300, 2317, providing that an agency is ostensibly created when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent, and that the authority of such an agent is such as the principal allows third persons to believe the agent possesses, the court, in the absence of bad faith of a third person performing services for a corporation at the request of its manager and taking a certificate of deposit in the name of the corporation in payment for the services, must presume that the third person became a bona fide assignee of the certificate and stood in the place of the corporation as owner, subject only to such equities as the bank issuing the certificate might set up against the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1650, 1653; Dec. Dig. § 411.*]

9. BANKS AND BANKING (§ 152*)—CERTIFICATES OF DEPOSIT—LIABILITY OF BANKER.

Where a bank received a deposit from a corporation through its managing officer, and issued a certificate of deposit therefor stipulating that the money could not be withdrawn unless the certificate was returned signed by the depositor, etc., an oral contract, made between the bank and the managing officer to the effect that the managing officer must show his authority to act for the corporation before the deposit can be withdrawn, did not prevent the corporation or a bona fide assignee from collecting the deposit, without complying with the oral agreement.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 471, 478; Dec. Dig. § 152.*]

10. EVIDENCE (§ 441*) — PAROL EVIDENCE — VARYING TERMS OF WRITTEN AGREEMENT.

Contemporaneous parol agreements between parties to a written obligation to pay money, as to the manner of its negotiation, may not be set up as a defense against payment under the contract in an action by the payee, or his assignee, for such agreements are within the parol evidence rule, which applies whether the instrument is negotiable or nonnegotiable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2043; Dec. Dig. § 441.*]

11. LOST INSTRUMENTS (§ 18*)—ACTIONS—INDEMNITY.

Where it can be shown that the party liable on a lost instrument may be injured if he pays it, he may require an indemnity bond; but he cannot require such a bond in any other case.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 41, 43; Dec. Dig. § 18.*]

12. LOST INSTRUMENTS (§ 18*)—ACTIONS—INDEMNITY.

A bond will not be required before entering judgment on a lost instrument where the instrument is not negotiable, or where, though negotiable, it is payable to order and is unindorsed or specially indorsed, or where the instrument is clearly shown to have been destroyed, or where it has been traced to the maker's custody, or where the maker is protected by limitations.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 43; Dec. Dig. § 18.*]

13. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in permitting a witness to state conclusions is not prejudicial where the conclusions were accompanied by a statement of the facts from which the same were drawn.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162; Dec. Dig. § 1051.*]

14. DAMAGES (§ 125*)—CONTRACTS FOR THE PAYMENT OF MONEY — MEASURE OF DAMAGES.

Where demand for the payment by a bank of a certificate of deposit was regularly made by the holder, the damages for failure to pay are regulated by Civ. Code, § 3336, providing that the detriment caused by the wrongful conversion of personalty is presumptively the value of the property at the time of the conversion, with interest from that time, etc., so that the holder may recover the market value of the certificate when payment was refused, together with interest.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 339; Dec. Dig. § 125.*]

On Rehearing.

15. EVIDENCE (§ 384*)—PAROL EVIDENCE TO VARY WRITING—GROUNDS FOR EXCLUSION.

The proposition that in the absence of objection secondary evidence is sufficient to support findings based thereon, does not apply to the use of parol evidence to vary a written instrument, since whether a contract in writing may be varied by parol is a question of substantive law, while the question of admission or rejection of secondary evidence is governed by the rules of evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 384.*]

16. EVIDENCE (§ 442*)—PAROL EVIDENCE TO VARY WRITING — WRITTEN CONTRACTS — PRIOR AND CONTEMPORANEOUS NEGOTIATIONS.

Under the express provisions of Civ. Code, § 1625, a contract reduced to writing, whether required by law to be in writing or not, supersedes all negotiations and stipulations; and where the terms as agreed on are not all reduced to writing, the omitted terms can only be supplied by an appropriate proceeding or under proper allegations, as authorized by Code Civ. Proc. § 1856.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

17. TRIAL (§ 105*)—RECEPTION OF EVIDENCE—EFFECT OF ADMISSION — PAROL EVIDENCE VARYING WRITING.

Parol, or secondary evidence, unobjected to, may show the terms of a contract reduced to writing, and so furnish sufficient proof to sustain a finding; but parol evidence is not admissible to vary the writing, and if admitted without objection, it is insufficient to support a finding varying the writing.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Robert Dollar against the International Banking Corporation and another. From a judgment for plaintiff against defendant the International Banking Corporation, it appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

See, also, 10 Cal. App. 83, 101 Pac. 34.

Rehearing denied; Beatty, C. J., dissenting.

Lloyd M. Robbins, George J. Leovy, and Platt & Bayne, for appellant. J. Wade McDonald, for respondent. Puterbaugh & Puterbaugh, for defendant Lamme.

TAGGART, J. This is an action by the assignee of the indorsee of a deposit receipt to recover the value in United States money of 2,000 Mexican dollars deposited with the banking house of the defendant corporation, located in Hongkong, China. Judgment was for plaintiff against the banking corporation, and the latter appeals from the judgment and the order denying its motion for a new trial.

The depositor, the American Commercial Company, was incorporated in the District of Columbia for the purpose of doing a general brokerage business wherever such business could be lawfully conducted. Its certificate of incorporation, dated August 13, 1904, provides that "the concerns of the company for the first year shall be managed by not less than three nor more than fifteen directors, namely" (naming five persons as to whom it is important here to say only that one is "E. Edwards"). The main office is fixed in the city of Washington. So far as the record in this case discloses, it has never done any business except in China. On November 26, 1904, Mr. E. Edwards, accompanied by two of the other directors of the American Commercial Company, their names not being disclosed, deposited with the branch bank of the defendant corporation located at Hongkong, China, 2,000 Mexican dollars, receiving therefor a receipt as follows: "Notice of withdrawal given 26 November, 1904, due 26 November, 1905. International Banking Corporation. Deposit Receipt. Not transferable. Hong Kong, 26 November, 1904. 2,000 Locally. Received from Messrs. The American Commercial Company Dollars Two Thousand Locally as a deposit repayable here, bearing interest at the rate of five per cent. per annum, to remain until twelve months notice on either side expires. No. 3/134. For the International Banking Corporation. L. L. Fespner, Accountant. Chas. C. R. Scott, Manager."

On the back of said receipt were the following words in print: "N. B. The within sum cannot be drawn, unless this receipt is returned, signed by the depositors; nor can the amount be drawn against in separate sums by cheque or draft. The interest will cease at the expiration of notice of withdrawal." From the deposition of Manager Scott, who signed the foregoing receipt, it appears that when Mr. Edwards called, accompanied by the other gentlemen as above stated, he, Scott, acting on behalf of the defendant corporation, at first refused to receive the money because "Mr. Edwards could show me no authority for acting as managing director of the American Commercial Company. He, however, declared that he would be able to produce the necessary papers, which I told him would have to be signed by the British or other foreign consul in the United States before he could withdraw the money, and he made the deposit on that understanding." No objection was made to the introduction of this testimony, but the incompetency of parol evidence to vary a writing may be considered as a matter of law.

Through transactions had with E. Edwards, acting in the name of the American Commercial Company, the latter became indebted to the defendant Lamme who, in an action brought in the United States consular court at Shanghai, China, on July 27, 1905, recovered judgment against the American Company in the sum of 2,150 Mexican dollars, with interest. On October 2, 1905, he also procured from the same court what is designated as a "supplemental decree and order of satisfaction of judgment," wherein it is recited that the deposit receipt above set out "was by the defendant duly assigned, transferred, and delivered to the plaintiff by the defendant on or about the 10th day of March, 1905, to secure the debt due from the defendant to plaintiff upon which the judgment in this cause was rendered." It is further recited that plaintiff is willing to take the instrument in satisfaction of the judgment, and ordered that the title of the plaintiff in the receipt and the money evidenced thereby be confirmed and quieted in him, and the same credited on said judgment in full payment and satisfaction thereof. The recital in the judgment in this consular action as to service of summons and acquiring jurisdiction of the defendant is as follows: "That the defendant has been duly served with summons by delivering a copy of the same to Edward Edwards, the vice president, a director and agent of said defendant, he being the highest officer of said defendant company found within this jurisdiction, and the said defendant having appeared by said Edwards and filed its answer herein, admitting all the allegations of plaintiff's complaint." The only showing of jurisdiction to enter the "supplemental decree" is that which appears in the original judgment roll resulting in the judgment in favor of Lamme against the American Company.

The "deposit receipt" indorsed: "The American Commercial Company, by Edward Edwards, (Per) Manager," was thereupon presented at its maturity to the defendant bank at Hongkong, on behalf of Lamme, accompanied by a copy of the consular judgment and decree above mentioned, but payment was refused because no showing was made of Mr. Edwards' authority to indorse for the company, and thus give the bank a legal discharge. Afterwards, to wit, on December 29, 1905, Lamme brought another action in the consular court of Shanghai against the International Banking Corporation and the American Commercial Company. The former appeared and the latter defaulted (there being a recital in the "Findings and Judgment" that the American Company had "been duly served with summons" and failed to appear). In this action the court found all the facts substantially as above set forth as to the indebtedness of the American Company to Lamme, the making of the judgment of July 27, 1905, and the decree of October 2d; the presentation of the receipt and the defendant bank's refusal to pay; also, that no one else had made any claim upon the money; that there were no liens, claims or demands against it, and that the bank had no set-off or demands against it, but "that the said money having been so deposited with the said International Banking Corporation at Hongkong and the said deposit receipt being nonnegotiable, the same is collectible only under adequate authority from the said American Commercial Company." Only inferentially is it found that adequate authority was not shown, but the court's conclusion of law is that plaintiff is not entitled to recover in this action, and the judgment is that the action be dismissed without prejudice to the plaintiff in bringing any other on account of the subject-matter of this action. The date of this judgment, as stated in the record, is February 24, 1905, but it is apparent that it should be 1906. No appeal was ever taken therefrom.

Subsequently the receipt of deposit was lost (March, 1907) and later (January 2, 1908), the rights of defendant Lamme in the instrument in question and the funds which it represented were assigned to plaintiff, and, after demand made by plaintiff on the San Francisco house of defendant, this action was brought to recover the value of the Mexican money in United States gold coin at Hongkong on the date of the demand made by Lamme (November 27, 1905), together with interest thereon at the rate of 5 per cent. per annum from November 26, 1904.

The instrument in question was by this court declared to be an assignable instrument but not negotiable in the sense that the term "negotiable" is used when applied to commercial paper. Dollar v. International, etc., 10 Cal. App. 83, 101 Pac. 34. By the law of the case, then, the instrument must be considered as nonnegotiable, and while it might be transferred by indorsement, the indorsee obtained no better title to the instrument than his indorser, notwithstanding it was indorsed to him before maturity. Civ. Code, § 1459. It was also held by this court, passing upon the allegations of the complaint, that, although the instrument was payable at Hongkong, yet after proper demand had been made at that place and payment refused, suit might be brought in this state "where the parties enter an appearance and question only the sufficiency of the pleading as stating a cause of action."

Whether or not proper demand was made at the place of payment becomes important in determining the right to bring the action in a court of this state, as well as in ascertaining upon what basis the value of the "money" so deposited is to be fixed, if the plaintiff is entitled to recover. The judgment of the consular court of July 27, 1905, even if it were conceded to be based upon proper service on the American Commercial Company, established no more than that that company was indebted to Mr. Lamme in the sum named in the judgment. The so-called "supplemental decree" whereby the court attempted to transfer the title of the American Company to the receipt to Mr. Lamme was ineffective for that purpose and did not affect the contract between that company and the appellant. The only possible application it could have would be in connection with the testimony of Mr. Lamme to the effect that Mr. Scott made a statement under oath that he had a conference with General Bragg, the latter acting on behalf of Mr. Lamme, wherein there was "practically" an arrangement, and Scott consented, that if the judgment in the consular court first above mentioned were obtained and the certificate applied upon it "that the money would be paid on presentation." Such an estoppel being in the form of a new cause of action should have been pleaded to become the basis of a recovery. If plaintiff recovers in this action he must do so on the theory of an enforcement of the express contract made by Edwards, or the implied contract of a depositor, no estoppel being pleaded.

Both appellant and respondent rely upon the "findings and judgment" in the second consular action which were rendered on February 24, 1906. No finding made therein, however, which was not necessary to the judicial action taken by the court, can affect the rights of either of the parties, and the judgment, as above stated, is one of dismissal without prejudice to the plaintiff's right to bring another action. Rosenthal v. McMann, 93 Cal. 505, 509, 29 Pac. 121. The findings made on behalf of the plaintiff are conclusive upon no one, and there is no express finding of fact from which it can be determined that the judgment of dismissal was rendered because the authority accompanying the presentation of the instrument was not adequate. It is only argumentatively that this can be assumed to be the basis of the court's dismissal. Neither can this be implied or presumed from the judgment itself.

It appears from Mr. Lamme's testimony on the trial that he knew from dealings had by him with Edwards in the name of the American Commercial Company, from papers and documents seen by him while acting as attorney for the company on the employment of Edwards, from his knowledge that Edwards appointed agents and subagents for the corporation in Canton, Shanghai, and other places in China, and created debts against the company and paid them in its name, and from the fact that no other person acted as its agent in these places during this time, and that he never heard the authority of Edwards questioned except in this transaction, as well as from Edwards' own statement, that he (Edwards) was the vice president, one of the directors of and the general manager for the American Commercial Company in China. It is not shown that any of this information was brought home to the defendant bank, or that the bank had any other way of knowing that Edwards had such authority or occupied such a position, but from Mr. Lamme's testimony it appears that Mr. Scott stated at the trial before the consular court that "the only reason for refusal to pay the money was that there had been no power of attorney presented at the bank showing the authority of Edwards," etc. "He wanted a resolution of the board of directors."

The defendant bank is concerned only in knowing that the assignment of the evidence of debt or chose in action is of such character as to bind the assignor. Greig v. Riordan, 99 Cal. 323, 33 Pac. 913. If the American Commercial Company had itself presented the deposit receipt, no compliance with the oral contract as to the evidence of authority of Edwards could have been made a condition precedent to payment, if it be assumed in this connection that such a parol contract was admissible in evidence, or, being in evidence, could be considered by the court. Indeed, it could not well be contended that, in the absence of this contract, Mr. Edwards could not himself, in his capacity of manager, have withdrawn the money upon signing the name of the American Commercial Company, or have made a valid assignment or indorsement of the instrument as manager. As said in McKiernan v. Lenzen, 56 Cal. 61, 64: "The result of the cases seems to be, that where the management of the affairs of a corporation is intrusted to a general managing agent, he has power to assign the choses in action of the corporation to its creditors, either in payment of, or as security for the payment of, a precedent debt of the corporation, without express authority from the board of directors, and an assignment so made is valid. The presumption is that the assignment was made by one having competent authority." No special resolution authorizing him to act in this respect was necessary. Tuller v. Arnold, 98 Cal. 523, 33 Pac. 445; Greig v. Riordan, supra, page 323 of 99 Cal. (33 Pac. 913).

An ostensible agency is created when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. The authority of such an agent is such as the principal allows such persons to believe the agent to possess. Civ. Code, §§ 2300, 2317. There is no attack here made upon the good faith of Mr. Lamme in performing services for the American Commercial Company at the request of Mr. Edwards, or in taking the receipt in full payment for his services so rendered, and this must be assumed in considering the question before us. Mr. Lamme then stood in the shoes of the American Commercial Company as owner of the paper, subject only to such equities as the bank might set up against that company. If the oral, contemporaneous agreement as to what should constitute a showing of Mr. Edwards' authority would not constitute a defense against the demand of the company, neither would it against the demand of Mr. Lamme. The latter being the bona fide assignee of the Commercial Company, his acquittance to the bank would be sufficient defense to any subsequent demand made upon the bank by such company. Contemporaneous parol agreements made between the parties to a written obligation to pay money, as to the manner of its negotiation, cannot be set up as a defense against payment of the money under the contract in an action by the payee or his assignee. Such agreements come within the rule that written contracts cannot be varied by parol agreements, and the rule is applicable to such agreements, irrespective of whether the instrument be negotiable or nonnegotiable in character. Johnson v. Washburn, 98 Ala. 258, 13 South. 48; Erwin v. Saunders, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520; Frost v. Everett, 5 Cow. (N. Y.) 497; Dow v. Tuttle, 4 Mass. 414, 3 Am. Dec. 226; Knox v. Clifford, 38 Wis. 655, 20 Am. Rep. 28; Reed v. Reed, 11 U. C. Q. B. 28; Gorrell v. Home Life Ins. Co., 63 Fed. 371, 11 C. C. A. 240, 246.

It also appears from the written opinion of the trial judge found in the record that the findings as to the rights of plaintiff were predicated to some extent, at least, upon the showing that if there had been any real question as to the authority of Edwards to act in the premises, his principal would have made known its objections to the defendant bank within the time that elapsed from the date of the deposit of the money until the bringing of the action. So, also, in this connection may be considered the materiality of the evidence of Lamme tending to establish, not only that Edwards was the manager, but that there was no other representative of the company in China, and that no one questioned his authority to act in this sole and unrestricted manner. There was no showing upon the part of the defendant bank with respect to the absence of authority of Edwards or any denial of his powers generally, and the evidence mentioned tended to show that all the business of the company in China was performed by him or those whom he appointed and directed, and was competent for that purpose.

No indemnity bond was essential in giving judgment, on account of the loss of the instrument sued on. The rule as to indemnity is simply that if it can be shown in any way that the defendant may be wrongfully injured by paying, he may require security, but only then. The rule in courts of equity that a bond will be required before entering judgment upon a lost instrument has several well-recognized exceptions, to wit: (1) Where the note is not negotiable; (2) where, though negotiable, it is payable to order and unindorsed, or specially indorsed; (3) where the instrument is clearly shown to have been destroyed; (4) where the lost instrument has been traced to the defendant's custody; and (5) when it is shown that the defendant is protected by the statute of limitations. Daniel on Neg. Inst. (5th Ed.) § 1481. The evidence would justify a finding that the instrument in this case has been lost, but no finding in this regard was made; however, it is clear that the instrument itself is nonnegotiable in character.

The testimony of the witness Lamme as to his knowledge of the capacity in which Edwards was acting for the American Commercial Company contained some things which were in the nature of conclusions or inferences, but these were accompanied by a statement of the facts from which the inferences were drawn, and we do not think the evidence objected to could have prejudiced appellant's case before the trial court.

The demand for payment having been regularly made by Lamme at Hongkong on November 27, 1905, the damages for failure to pay are to be computed under the rule declared in subdivision 1 of section 3336 of the Civil Code. This would entitle plaintiff to the market value at Hongkong when payment was refused, together with interest as allowed in the judgment. Indeed, it would not have been unwarranted had the court allowed interest at 7 per cent. after the date of maturity of the receipt, but no complaint is made by respondent in this respect.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

On Petition for Rehearing.

PER CURIAM. Appellant presents a petition for a rehearing on this appeal wherein, among other things, exception is taken to the following language contained in the opinion of this court, filed April 28, 1910, to wit: "No objection was made to the introduction of this testimony, but the incompetency of parol evidence to vary a writing may be considered as a matter of law." In support of the contention that this is not a correct declaration of the law, a number of cases are cited to sustain the proposition that, in the absence of objection, secondary evidence is sufficient to support the findings of a court based thereon. The rule declared by this court is entirely distinct from that applied in those cases. Whether or not a contract in writing may be varied by parol evidence is a question of substantive law, while the admission or rejection of secondary evidence is governed by the rules of evidence. Greenleaf on Evidence (16th Ed.) vol. 1, § 305a. Where a contract is reduced to writing, whether required by law to be written or not, the writing supersedes all other negotiations and stipulations concerning the matter made at the time or prior thereto. Civ. Code, § 1625. If the terms as agreed upon have not all been reduced to writing, these can be supplied only by an appropriate proceeding, or under proper allegations. Section 1856, Code Civ. Proc; Germain Fruit Co. v. Armsby Co., 153 Cal. 595, 96 Pac. 319. By way of illustration of the distinction between the rule declared by this court and that cited by appellant, it may be said that parol or secondary evidence, unobjected to, might supply the terms or purport of a contract which had been reduced to writing, and, in this form, furnish sufficient proof to sustain a finding; but parol evidence would neither be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original written contract which the parties entered into. The purpose of the rule relating to the varying of a writing by parol evidence is to prohibit this from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced. These rules are in no way inconsistent, and the rule as to secondary evidence is not applicable here. The other matters presented were duly considered in the original opinion.

The petition for a rehearing is denied.

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13 Cal. App. 329

COLUSA MILLING CO. v. DRAPER DRAY & STORAGE CO. (Civ. 726.)

(Court of Appeal, Third District, California. April 27, 1910.)

1. APPEAL AND ERROR (§ 373*)—UNDERTAKING UNNECESSARY.

A bond on appeal from a money judgment is not essential to appellate jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001–2004; Dec. Dig. § 373.*]

2. APPEAL AND ERROR (§ 627*)—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Under the express terms of District Court of Appeal, rules 2, 5, a civil appeal is properly dismissed on motion for failure to file the transcript within 40 days after the appeal is perfected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744–2749; Dec. Dig. § 627.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Colusa County; H. M. Alberry, Judge.

Action by the Colusa Milling Company against the Draper Dray & Storage Company. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Ernest Weyand, for appellant. Thomas Ruthledge, for respondent.

CHIPMAN, P. J. It appears that judgment was made and entered in the above-entitled cause on November 30, 1909, in favor of plaintiff for the sum of $557.50, with interest at the rate of 7 per cent. per annum from said date, together with costs taxed—$63.62; that on December 13, 1909, defendant moved to vacate and set aside said judgment, and on said last-mentioned date the court made and entered its order denying said motion; that on January 29, 1910, defendant filed in said court its notice of appeal to this court from said judgment and order, which said notice of appeal was duly served upon plaintiff, on January 29, 1910; that "no statement on appeal or bill of exceptions has been made, settled or filed in said cause"; that no proceedings are pending for the settlement of any proposed statement or bill of exceptions in said cause; and that appellant has not requested the clerk to certify to a correct or any transcript. Defendant also claims that the undertaking is defective in certain essential particulars.

The grounds for the motion to dismiss the appeal are: (1) That no sufficient undertaking on appeal has been given by appellant; (2) that no transcript of the record in said cause has been made or filed in this court.

No bond on appeal was required to give this court jurisdiction. Mitchell v. California, etc., S. S. Co., 154 Cal. 731, 99 Pac. 202; Russell v. Banks, 11 Cal. App. 450, 105 Pac. 261.

Rule 2 requires the transcript in a civil action to be filed within 40 days after the appeal is perfected, except under certain circumstances not here made to appear. Rule 5 provides that the appeal may be dismissed on motion, upon notice given, if the transcript be not filed within the time prescribed.

The appeals from the judgment and order are dismissed.

We concur: HART, J.; BURNETT, J.

(158 Cal. 51)

In re TIMKEN'S ESTATE. (L. A. 2,564.)

(Supreme Court of California. June 17, 1910.
Rehearing Denied July 14, 1910.)

1. TAXATION (§ 872*)—INHERITANCE TAX—COMPUTATION OF AMOUNT—EXEMPTION.

St. 1905, c. 314, § 1, imposes a tax on the market value of all property passing by will, etc., but only on the excess over exemptions allowed in the act. Section 2 fixes the rates when the property exceeds in value the exemption, and does not exceed $25,000. Section 3 fixes an increasing scale of rates, based on those fixed by section 2, for property in excess of $25,000. Section 4 allows exemptions of different amounts to various classes. *Held*, that all the property over $25,000, including the exemption, is taxable at the rates prescribed by section 3. and the exemption is deducted from the first $25,000, taxable at the rate prescribed by section 2.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 872.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CONSTITUTIONAL LAW (§ 229*) — EQUAL PROTECTION OF LAW—INHERITANCE TAX—EXEMPTION.

St. 1905, c. 314, §§ 1–4, construed as requiring the deduction of the exemption from inheritance tax from the first $25,000, taxable at the lowest rate, rather than from the total amount of a legacy, does not discriminate against persons succeeding to larger amounts, since it creates a uniform exemption.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 229.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

In the matter of the estate of Henry Timken, deceased. From an order fixing the amount of inheritance tax, the State appeals. Reversed, with directions.

U. S. Webb, Atty. Gen., and H. S. Utley, Dist. Atty., for the State. Haines & Haines, for respondents.

SLOSS, J. Appeal by the state from an order fixing the amount of inheritance tax payable on certain legacies and devises.

By the will of Henry Timken $5,000 was given to Cord Ringen, a nephew of the decedent, and the residue of the estate to the testator's five children in equal shares.

After determining that the net value of the interest passing to each child was $63,736.40, the court deducted from such amount the exemption of $4,000, and computed the tax on the balance of $59,736.40 as follows:

Tax on $25,000.00 at 1 %..........	$250 00
Tax on $25,000.00 at 1½%..........	375 00
Tax on $ 9,736.40 at 2 %..........	194 72
Tax on $59,736.40 share of each child	$819 72

The contention of the appellant is that the exemption of $4,000 should have been deducted from the first $25,000, instead of from the distributive share as a whole. The result of this would have been to tax $21,000 at the rate of 1 per cent., $25,000 at the rate of 1½ per cent., and $13,736.40 at the rate of 2 per cent., thereby adding $40 to the tax upon the share of each child, or $200 in all. Such was the method of computation employed in Estate of Bull, 153 Cal. 715, 96 Pac. 366. The precise point here involved was not, however, raised in that case. While the decision cannot, therefore, be regarded as authoritative for the present purpose, we are satisfied that it illustrates the proper interpretation of the statute.

Section 1 of the act imposing the tax (St. 1905, p. 341), after declaring that all property passing by will, etc., shall be subject to a tax, provides that "the tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted." Section 2 fixes certain rates, varying according to the degree of kinship between the decedent and the successor, "when the property * * * exceeds in value the exemption hereinafter specified and shall not exceed in value twenty-five thousand dollars." Section 3 declares that the "rates in section 2 are for convenience termed the primary rates," and fixes an increasing scale of rates, consisting of multiples of the primary rates, for property in excess of $25,000. Section 4 allows exemptions of different amounts to various classes of persons and corporations.

The position of the appellant that the exemption should be deducted from the amount to which the primary rates are applied is based upon the language of section 2. Under that section those rates are to be effective when the property exceeds in value the exemption but does not exceed $25,000. It is clear that, for the purpose of determining whether the property is within this class, the entire value, including the exemption, is to be considered. If, for example, the gift be to a widow, whose exemption is $10,000, a gift of $35,000 could not be treated as subject to the primary rate, on the theory that $10,000 thereof was exempt, and but $25,000 remained subject to taxation. The language of the section excludes such idea. The primary rate is made to apply where the gift exceeds the exemption but does not exceed $25,000.

The entire amount, whether exempt or not, is considered for the purpose of fixing the rate of taxation. It follows necessarily that where the property, including the exemption, exceeds $25,000, the excess is taxable at the increased rates declared by section 3. Sections 2, 3 and 4 are to be read together, and, where the gift exceeds $25,000, the amount thereof which comes within the limits of section 2 is to be taxed at the primary rate. Estate of Bull, supra. The only way in which this can be accomplished is by deducting the exemption from the first $25,000, rather than from the entire gift. The latter method, which is the one followed by the trial court, results in applying the primary rate to so much of the gift as equals $25,000, over and above the amount of the exemption. But, as we have seen, such rate is to be applied only to the first $25,000, inclusive of exemptions.

The computation of the tax payable by the several children should, accordingly, have been fixed as follows:

Tax on first $25,000.00 (less exemption) 1%..........................	$210 00
Tax on $25,000.00 to $50,000, 1½%..	375 00
Tax on $50,000.00 to $63,736.40, 2%..	274 73
	$859 73

It is urged by the respondents that this construction is inconsistent with the provision of section 1 that the tax is imposed only upon the excess over the exemptions. There is no such inconsistency. The exemptions are allowed under either method of figuring. The only difference is that under the one the exemption is allowed on that part of the property which pays the lowest (primary) rate, while, under the other, it is deducted from the part paying the highest rate. In any view, the exemption is a matter of grace on the part of the Legislature, and cannot be claimed beyond the extent to which the lawmaking body has seen fit to allow it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It will be observed, further, that the rule herein declared has the advantage of making the exemption uniform in amount, regardless of the extent of the property passing. If there were no exemption at all, the additional tax payable by the beneficiary would, in every case, be measured by the primary rate on the sum which is, under the act as it now reads, declared exempt. The person receiving the property is relieved of the payment of taxes to this amount. Under the method contended for by the respondents, the recipient of an amount exceeding $25,000 would obtain a deduction equivalent to a tax at a higher rate upon the amount exempt. There is therefore no foundation for the contention that the interpretation contended for by the appellant works any improper discrimination against persons succeeding to larger amounts.

The order is reversed, with directions to the trial court to enter an order in conformity with the views herein expressed.

We concur: SHAW, J.; ANGELLOTTI, J.

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158 Cal. 14

SOUTHWICK et al. v. CITY OF SANTA BARBARA et al. (L. A. 2,561.)

(Supreme Court of California. June 11, 1910. Rehearing Denied July 11, 1910.)

1. MUNICIPAL CORPORATIONS (§ 450*)—STREET IMPROVEMENTS — ASSESSMENT DISTRICTS — PROPERTY INCLUDED.

Inclusion of two district sections of a city, separated at their nearest points by nearly one-half mile, in an assessment district for district street improvements, is not authorized by the local improvement act of February 26, 1901 (St. 1901, c. 38), which authorizes the inclusion of "one or more streets in the same proceeding," such provision applying to improvements constituting an entirety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1073; Dec. Dig. § 450.*]

2. MUNICIPAL CORPORATIONS (§ 450*)—STREET IMPROVEMENT "DISTRICT."

A street improvement "district" is a single portion of a city set off as specially benefited by the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1073; Dec. Dig. § 450.*

For other definitions, see Words and Phrases, vol. 3, pp. 2136–2138; vol. 8, pp. 7639, 7640.]

3. MUNICIPAL CORPORATIONS (§ 513*)—STREET IMPROVEMENTS — ASSESSMENTS — OBJECTIONS.

Objection to the improper inclusion of distinct parts of a city in a single street improvement district is available in a suit to enjoin collection of the assessment for the improvement, though not made before the city council.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 513.*]

4. MUNICIPAL CORPORATIONS (§ 296*)—STREET IMPROVEMENTS — ENGINEER'S REPORT — ESSENTIALS.

Under the local improvement act of 1901 (St. 1901, c. 38, §§ 3, 5), permitting a street improvement to proceed only after filing of the engineer's report, substantial compliance with the requirements of section 4 respecting such report is necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 296.*]

5. MUNICIPAL CORPORATIONS (§ 296*)—STREET IMPROVEMENTS — DESCRIPTION — ESSENTIALS.

In a street improvement proceeding under the local improvement act of 1901 (St. 1901, c. 38), the description in the engineer's report and in the subsequent proceedings of the exterior boundaries of the benefited district should be as definite as possible.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 296.*]

6. MUNICIPAL CORPORATIONS (§ 458*)—STREET IMPROVEMENTS—ASSESSMENTS—AMOUNT.

If it is determined by the city that any part of the cost of a projected street improvement is to be paid out of the treasury of the municipality, the amount so to be paid should be deducted from the estimated cost, and only the remainder assessed against the property or district specially benefited.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 458.*]

Department 1. Appeal from Superior Court, Santa Barbara County; Frank R. Willis, Judge.

Action by Franklin B. Southwick and others against the City of Santa Barbara and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions.

J. L. Barker, for appellants. W. P. Butcher, for respondents.

ANGELLOTTI, J. This case involves the question of the validity of certain proceedings for the doing of street work in the city of Santa Barbara had under the act of February 26, 1901, known as "The Local Improvement Act of 1901." St. 1901, p. 34. It is an action by certain property owners assessed for the contemplated street improvements to enjoin the further carrying on of the proceedings on the ground that, because of alleged failures to comply with certain provisions of the statute, the assessment made for the improvement is void. A portion of plaintiffs' complaint was stricken out on motion of defendants, and a demurrer to the complaint was sustained. Judgment was thereupon given for defendants, and plaintiffs appeal from such judgment.

The general scheme of the act involved is as follows: The legislative body of the city or town may include in one proceeding thereunder practically any of the street work described in the general street law known as the Vrooman act, to be done upon "one or more streets." Before ordering any work done, it must, by resolution, refer the proposed work to the city engineer, instructing him to make a report in writing containing his recommendations as to the best method of doing the work. The engineer is required to file such report, and annex to it certain exhibits, showing, among other things, a description of the exterior boundaries of the district which will be benefited by the proposed improvement and should be specially assessed to pay the cost thereof, an estimate of the expense of said improvement, a map showing the district above referred to and also the subdivisions of the property therein as ascertained by the engineer, each of which subdivisions shall be given on said map a separate number in red ink, a list referring to said subdivisions by said numbers and showing the names of the owners if known, the valuation of each as the same appears on the last assessment roll or as estimated by the engineer, also "the dimensions, areas, and his estimates of the benefits which the respective parcels will receive from said improvement." "After the report" has been filed, the legislative body shall consider the same, and "have the power" to adopt it as filed or as modified by it and "levy the assessment accordingly." The legislative body must by the same resolution give all parties interested an opportunity to be heard by fixing a day, hour, and place "when and where all persons may appear before the legislative body and show cause * * * why said improvement provided for in said resolution should not be carried out in accordance therewith," which shall be at least 30 days after the passage of the resolution, and shall also give therein a description of the exterior boundaries of the district declared by it to be benefited by the improvement and assessed therefor. Notice of this resolution must be posted and published, which notice shall contain, among other things, "a description of the district covered by the resolution by the exterior boundaries thereof * * * in bold face type." Any person objecting must file his verified written objections, stating the ground thereof. A hearing must be had thereon, at the close of which the legislative body shall pass a resolution setting aside, modifying or confirming the previous resolution. Where the same is confirmed or modified, the lien of the assessment provided for therein shall immediately become attached to the respective parcels of land in accord with the confirmed or modified resolution. "Any action to contest an assessment" must be commenced within 30 days thereafter. Upon the expiration of said 30 days if no such action has been brought, or upon the determination of such actions as are so brought, the clerk shall transmit the map and list, as modified by the legislative body, to the tax collector, who shall proceed to collect the amounts shown due thereby. The act makes elaborate provision for the collection of such amounts, providing for the sale of the property for nonpayment or the taking of installment agreements from the owners, which agreements include a waiver of all objections to the proceedings, and against which installment agreements bonds may be issued and sold. When, as a result of these proceedings, the funds for the work are actually in the hands of the treasurer, contracts for the work may be let. If the first assessment prove insufficient a second may be made, and if an assessment shall realize a larger sum than is necessary, the excess shall be refunded, pro rata, to the parties by whom it was paid. It appears to be conceded that this action was commenced within 30 days after the making of the order disposing of objections filed and confirming the assessment as modified by the legislative body, and it is in effect an action to contest the assessment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In plaintiffs' brief several particulars are referred to as alleged in the complaint wherein the proceedings are claimed to have been at variance with the requirements of the act to an extent sufficient to require the whole proceedings to be held invalid. It appears from the complaint that the engineer reported as "the district to be benefited by said improvement," which improvement consisted of grading, curbing, guttering, and paving two separate and distinct sections of the city that are not contiguous, and that are alleged to be separated at their nearest points to one another by nearly one-half of a mile, giving the exterior boundaries of each section. It is further alleged that the portions of some of the streets on which the work is to be done are wholly within one of these sections, and the remainder wholly within the other section. It is further alleged that these two sections have no community of interests, and that the real property of either one of said sections will not receive any benefit from street improvement made in the other. The city council adopted this part of the engineer's report, apportioning the total cost of the proposed work on all the streets as estimated by him, $104.793.29, to the real property in the two sections. In this connection it is further to be noted that the complaint shows that the character and cost of work to be done on some of the streets in one section was different from that in the other section. For instance, there was to be grading on some streets and none on others, and the cost of grading on different streets was different, and there was to be asphalt paving on some of the streets and petrolithic paving at less than half the cost on others. We are satisfied that the inclusion of these two widely separated sections of the city in one assessment district, all the property of which is to be specially assessed to pay the aggregate cost of all the improvements proposed, was not authorized by the act.

It was never designed by the authorization to "include one or more streets in the same proceeding" to empower the legislative body to so include in one proceeding street work in widely separated sections of a city as to result in imposing a portion of the cost of improving a street in one of such sections on property not benefited thereby, situated in the other section, simply because it is benefited to some extent by an improvement made upon another street in the section in which it is located. That this might well be the result under the procedure here adopted is very clear. It is manifest in view of the allegations of the complaint and the engineer's report, which is set out in full in the complaint, that the projected improvements in one section have no connection with those in the other section, and that the property in the other section can receive no special benefit therefrom. The proposed improvements in one section are a matter of no special concern whatever to the property owners in the other section. Yet the cost of all the improvements is necessarily taken into consideration in fixing the amount of assessment on each lot; that aggregate cost being apportioned to each lot in one section in proportion to the special benefit it will derive from the improvements to be made in that section alone. The cost of the latter improvements should alone be considered with reference to such property. The projected improvement may be much more costly in one section than it is in the other, while the benefit to the property in each section from the improvements made therein may be as great in the one section as in the other. In such a case the cost of all being apportioned according to the benefit to each parcel of land in both sections would necessarily result in imposing a portion of the expense of the more costly work upon the property of the section in which it is not located. If the first assessment prove insufficient to complete the whole improvement, a second may be made in the same manner as nearly as may be. Section 20. Such insufficiency may be due wholly to a greater expense in doing the work in one of the sections, and yet the property of the other section will be called upon to assist in supplying the deficiency, the proportion of benefit from the whole improvement having already been established by the proceedings on the first assessment. If a larger sum is realized from an assessment than is necessary for the whole improvement, the excess is to be refunded "pro rata, to the parties by whom it was paid." Section 21. Such an excess may be entirely due to an overestimate as to the improvements in one only of the sections. In such event, unless the property owners in the other section have already paid something on account of the work in the former section as to which the overestimate occurred, they should not, of course, participate in the return. We mention these things to show the impracticability under the act before us of uniting in one proceeding and assessment improvements in two widely separated sections of a city, where the property of one section derives no special benefit from the improvement in the other section, in a manner that would place the cost of the improvement upon the property in proportion to the special benefit accruing from the improvement. To our minds no such construction was contemplated by the act. Learned counsel for the city necessarily relies on the provision in subdivision 1 of section 4, calling for a description of the work in the engineer's report, that "said work may include one or more streets in the same proceeding." In view of the other provisions of the act we think the provision referred to means no more than this: It was contemplated that some particular improvement, constituting what might reasonably be called an entirety but including more than one street, might be of special benefit, as distinguished from the general benefit to all the property of the city, to property in its immediate vicinity, and that it would be proper to authorize the formation of an assessment district including all such property. Hence the authorization to include more than one street in the same proceeding. But clearly there is to be but one "district" in any proceeding, and, as we understand the word "district" in the connection in which it is used, it means a single portion of the territory of the city set off as being specially benefited by a street improvement to be made therein. Learned counsel relies somewhat on the fact that it has been held that in the case of improvements under the Vrooman act work on different streets may be included in one resolution of intention. But it was declared in the first opinion so holding that the work on each street was a distinct and several improvement, and that its distinct and several character is to be observed in the subsequent proceedings. Bates v. Twist, 138 Cal. 52, 54, 70 Pac. 1023. It may be that under the act before us various streets in widely separated sections of the city may be included in the preliminary resolution referring the work to the engineer for consideration, but it seems clear to us that, if he finds that the work to be done embraces in the matter of special benefit separate and distinct districts, he must make a separate report as to each of such districts, so that the expense of the work in any one district may be apportioned to and borne by the property of that district alone.

We have no doubt that the objection we have considered is available to the plaintiffs in this action, notwithstanding their failure to make objection before the legislative body. Such a report by the engineer as is contemplated by section 4 of the act is essential to the jurisdiction of the legislative body to proceed in the matter of levying the assessment. By the express provisions of sections 3 and 5 it is only "after" such a report has been filed that such body "have the power" to proceed. A substantial compliance, at least, with the provisions of section 4 in the matter of such report, is certainly essential to jurisdiction. In view of what we have heretofore said, the report here was defective in matter of substance.

Other points are made against these proceedings which may easily be obviated in any new proceeding and hence the question of their validity need not be determined on this appeal. It is proper to say, however, that the description in the engineer's report and the subsequent proceedings of the exterior boundaries of the district which will be benefited and is to be specially assessed should be as certain and definite as it can be made. It is likewise proper to say that the law requires the engineer to state in the list provided for by subdivision 6 of section 4, the "dimensions" and "area" of the various subdivisions shown on the map provided for by subdivision 5 of the same section. These are matters expressly required to be contained in the report, and it may well be doubted whether we could hold that any of such requirements is without "semblance of benefit to the owner." See Dehail v. Morford, 95 Cal. 460, 30 Pac. 593. It is further proper to say that, if it is determined by the city that any part of the cost of a projected street improvement is to be paid out of the treasury of the municipality, the amount so to be paid should be deducted from the estimated cost and the remainder only assessed against the property of the district specially benefited.

The judgment is reversed and the cause remanded, with directions to the trial court to overrule the demurrer of defendants herein.

We concur: SHAW, J.; SLOSS, J.

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158 Cal. 7

MUSICK CONSOL. OIL CO. v. CHANDLER et al. (L. A. 2,461.)

(Supreme Court of California. June 10, 1910. Rehearing Denied July 7, 1910.)

1. FRAUDS, STATUTE OF (§ 56*)—LANDS—PAROL PARTNERSHIP AGREEMENT.

A partnership in lands may be formed by an agreement in parol, and such agreement is valid, and may be enforced between the parties.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 136; Dec. Dig. § 56.*]

2. PLEADING (§ 259*)—ANSWER—AMENDMENT—MISCONDUCT.

An amendment to an answer alleging a mistake in the drafting of a deed offered at the times of trial, and claiming an intent to describe the property other than as described in the deed, was properly refused, where it did not give any particulars concerning the discovery of the mistake, nor that the other parties to the conveyance had notice of any facts at the time the conveyance was made showing such mistake.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 783–792; Dec. Dig. § 259.*]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the Musick Consolidated Oil Company against Burdette Chandler and others. From an interlocutory judgment of partition, and from an order denying a new trial, said Chandler appeals. Reversed.

A. J. King, R. V. Bouldin, and C. P. Kaetzel, for appellant. M. E. C. Munday and W. H. Spencer, for respondents.

SHAW, J. Appeals from an interlocutory judgment of partition and from an order denying Chandler's motion for new trial. The complaint asks partition of certain oil lands, known as the Musick Consolidated Petroleum & Asphalt placer mining claim, containing some 718 acres. The court found that the plaintiff owns $^{31}/_{48}$ of the land, that Burdette Chandler owns $^{8}/_{48}$, that Bernard Sinsheimer owns $^{6}/_{48}$, and that Abraham Stone and four others, as heirs of Jacob Stone, own $^{3}/_{48}$. (There were 20 average acres to be taken from the plaintiff's share and added to Chandler's share, concerning which there is no dispute.) Chandler claims, in addition, an interest of $^{4}/_{48}$, to be taken from the shares allotted to Sinsheimer and the Stone heirs.

Prior to October 23, 1899, the defendant Burdette Chandler and one A. B. Hasbrouck had become the owners of the lands in controversy which at that date were unpatented. The principal controversy in the case arises over the claim of Chandler to an undivided $^{4}/_{48}$ of the property. To facilitate an understanding of the points in the case, we state the history of the title as disclosed in the record. On October 23, 1899, Hasbrouck and Chandler executed a contract to Parcels and his associates whereby it was agreed that the Parcels parties should within 12 months thereafter expend at least $4,000 in putting down oil wells for the development of the property, and that, in consideration of said work, Hasbrouck and Chandler would convey to Parcels and his associates an undivided two-thirds interest in the land. On October 30, 1899, Parcels and Holden conveyed a $^{1}/_{48}$ interest to J. Alex. Brown, and on December 26, 1899, Brown conveyed the same to Jacob Stone. This interest still remains in the heirs of Stone, and no controversy has arisen over it. Its effect was to reduce the interest of the successors of Parcels and others to $^{31}/_{48}$. The plaintiff company now holds this $^{31}/_{48}$. On May 19, 1902, the patent was issued from the United States to Chandler and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Hasbrouck. On June 2, 1902, Hasbrouck conveyed to Jacob Stone an undivided one-fourth interest, and on the same day Stone conveyed to Bernard Sinsheimer an undivided one-eighth interest in all the land. A dispute arose between Parcels and his associates, on the one hand, and Hasbrouck and Chandler, on the other, concerning the performance of the Parcels' contract. Parcels and his associates brought an action against Hasbrouck and Chandler and the persons then interested in the property to enforce their contract for the conveyance of the two-thirds, alleging that they had performed the contract on their part. Judgment in that action was given in favor of the plaintiffs on February 9, 1907, and, in pursuance thereof, the undivided $^{31}/_{48}$ of the land was conveyed to the plaintiffs in the action, and they afterwards conveyed to plaintiff in this action. Jacob Stone died on August 5, 1905, and whatever interest he had in the property at that time has been distributed to his heirs above mentioned. While the action of Parcels v. Hasbrouck was on trial and before the decision was rendered, to wit, on January 18, 1907, Hasbrouck executed a deed purporting to convey to Chandler all his interest in the property. The disputed point in the case depends upon the effect of this conveyance.

For the purpose of showing that at the time of this conveyance to Chandler Hasbrouck still retained an interest in the land, the defendant Chandler filed a cross-complaint. Therein he alleged that on October 23, 1899, the Parcels' contract was executed, stating its terms; that on June 2, 1902, Hasbrouck and Stone entered into a contract by which it was agreed that Stone should furnish one-half, to wit, $500, of the expense which Hasbrouck would have to pay or had paid to secure the patent from the United States, in consideration whereof Hasbrouck and Stone should become partners in the half interest in the property which Hasbrouck then held; that for the purpose of carrying out this agreement Stone paid the $500 and Hasbrouck executed the deed of date June 2, 1902, conveying to Stone a one-fourth interest in the property in controversy; and that they thereby became equal joint owners and copartners in the one-half interest in the land formerly held by Hasbrouck, and that, when the contract to Parcels and others was enforced, they remained the joint owners as partners of an undivided one-sixth thereof.

If this partnership had been effected as thus alleged, the result would be as claimed by Chandler; that is to say, Stone and Hasbrouck would be equal partners in the half interest formerly held by Hasbrouck, and, when the Parcels' contract was enforced, the two-thirds thereby transferred to those parties would be taken equally from the interests of both Stone and Hasbrouck, and they would remain equal partners in what was left of the one-half, namely, a one-sixth interest. In that case the subsequent conveyance of Hasbrouck to Chandler would convey to Chandler an undivided one-half of the one-sixth interest belonging to the partnership of Stone and Hasbrouck, and he would thus become the owner of an undivided one-twelfth interest in the land. The effect of the conveyance from Stone to Sinsheimer of an undivided one-eighth of the land on June 2, 1902, would depend on Sinsheimer's knowledge of the equities between Hasbrouck and Stone. If he knew of the partnership, he would take no greater interest than Stone had to convey. If he was ignorant thereof, and paid a valuable consideration for the conveyance of one-eighth, he would hold the one-eighth free from any equities existing between Stone and Hasbrouck. That conveyance, however, included only one-eighth of the land. If its effect was to convey that interest absolutely to Sinsheimer, there still remained the difference between ⅙ and ⅛, namely, $^{2}/_{48}$, belonging to the partnership existing between Stone and Hasbrouck. The defendants who claim as heirs of Stone would have no higher right than Stone himself possessed. The result of this would be that this $^{2}/_{48}$ interest would remain the partnership property of Hasbrouck and Stone's heirs, and it would follow that the deed from Hasbrouck to Chandler would transfer to Chandler a $^{1}/_{48}$ interest in the property. If the Sinsheimer deed was taken by Sinsheimer with knowledge of the relations between Hasbrouck and Stone, the deed of Hasbrouck to Chandler would convey to him the $^{4}/_{48}$ interest which he claims. If there are partnership accounts to be settled, of course, the firm property should be set off in one body.

Upon the trial, Hasbrouck was called as a witness on behalf of Chandler, and was asked to testify as to the partnership alleged to exist between himself and Stone at the time of the conveyance from Hasbrouck to Stone of the undivided one-fourth. Objection was made to this evidence upon the ground that it was incompetent and immaterial, and not the best evidence. The objection was sustained. No evidence was allowed to be introduced to prove the allegations of the cross-complaint of Chandler concerning the partnership between Stone and Hasbrouck in the lands in controversy. The court found that no such partnership existed, and that the allegations of the cross-complaint relating thereto were untrue. This ruling and the finding are assigned as error.

We are satisfied that the issue tendered was a legitimate one and that the evidence offered was competent and material proof of the allegations. The objection that the agreement of partnership was not in writing is not well taken. A partnership in lands may be formed by an agreement in parol. Such parol agreement is valid, and may be enforced between the parties. Koyer v. Willmon, 150 Cal. 787, 90 Pac. 135, and cases there cited. The ruling of the court below seems to have been based upon the theory that no proof could be made of this character, unless the agreement was in writing. In view of the decisions above referred to, this theory was erroneous. The evidence should have been admitted. There was no allegation that Sinsheimer received his conveyance from Stone of the undivided one-eighth with notice of the partnership existing between Stone and Hasbrouck. An amendment to the answer of Chandler was offered at the time of the trial, alleging a mistake in the drafting of that conveyance, and claiming that the intention was to describe the property conveyed as the undivided one-half of Hasbrouck's interest, instead of as the undivided one-fourth interest in the property. At the time this deed was executed, Hasbrouck owned the legal title to an undivided one-half of the property, and the conveyance of one-fourth would make Stone an equal partner, in so far as the legal title was concerned. It was, of course, subject to the Parcels' contract. It was alleged that Stone understood the Parcels' contract and took subject thereto. The court refused to allow the amendment stating the mistake. It did not allege notice on the part of Sinsheimer. Furthermore, it did not give any particulars concerning the discovery of the mistake. Whether the proposed amendment was rejected for this reason or not we cannot determine, but, in view of the fact that the case must be reversed because of the refusal to receive the evidence of the partnership aforesaid and in view of the probability that some similar amendment may be offered before another trial, we think it proper to call attention to the rule governing applications for such relief as stated in 5 Pomeroy's Equity Jurisprudence, § 36: "The party who appeals to the conscience of the chancellor in support of a claim, when there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how be came to be so long ignorant of his rights, * * * and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor must refuse to consider his case upon his own showing without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." Upon this condition of the record and the possibility that there may be evidence of notice on the part of Sinsheimer, we consider it inadvisable to express any opinion concerning his rights. Conceding that he had no notice and would take free from the equities arising from the partnership, the fact would still remain that, if the partnership did exist, Chandler would have an undivided $^{1}/_{48}$ interest in the land, and the judgment appealed from did not award it to him.

The court made an order that the property be divided by a surface petition and refused to order a sale. The appellant strenuously asserts that this sort of partition cannot be made in the case of mining claims. As the case must go back for trial and a different judgment may be had and a sale ordered, we do not express any opinion on this subject. We note, however, that the authorities are not uniform. It has been decided in this state that a mere mining right is not an estate which may be made the subject of a partition. Smith v. Cooley, 65 Cal. 48, 2 Pac. 880. It has also been decided that the question whether a placer mine can be divided according to area so as to make a just partition between tenants in common is a matter of fact for the trial court. Mitchell v. Cline, 84 Cal. 418, 24 Pac. 164. Other authorities expressing various opinions on the proposition are the following: Hall v. Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791; Dangerfield v. Caldwell, 151 Fed. 558, 81 C. C. A. 400; Smelting Co. v. Rucker, (C. C.) 28 Fed. 223; Conant v. Smith, 1 Aikens (Vt.) 67, 15 Am. Dec. 669; Lenfers v. Henke, 73 Ill. 410, 24 Am. Rep. 263; Kemble v. Kemble, 44 N. J. Eq. 454, 11 Atl. 733; Adam v. Briggs, 7 Cush. (Mass.) 366.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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158 Cal. 50

DOUDELL v. SHOO et al. (S. F. 5,613.)

(Supreme Court of California. June 16, 1910.)

APPEAL AND ERROR (§ 382*)—BOND—AMOUNT.

Code Civ. Proc. §§ 943, 945, do not give the Supreme Court jurisdiction to fix the amount for which appellants shall give an undertaking where the judgment appealed from directs the delivery of both real and personal property, but the trial judge must fix the amount in such cases, and, if he refuse, the remedy is to apply to the Supreme Court for writ of mandate.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 382.*]

In Bank. Appeal from Superior Court, Fresno County; Geo. C. Church, Judge.

Action by John Doudell against John J. Shoo and others. Judgment for plaintiff, and defendants appeal. Application for an order fixing the amount for which appellants shall give undertaking. Application denied.

Carter & Carter and Carl F. Wood, for appellants. C. K. Bonestell, for respondent.

PER CURIAM. The application of the appellants for an order of this court fixing the amount for which the appellants shall give an undertaking on appeal, under sections 943 and 945 of the Code of Civil Procedure, is denied. The judgment appealed from directed the delivery of both real and personal property. In such cases the above-named sections require the judge of the court from which the appeal is taken to fix the amount of the undertaking to be given to obtain the statutory stay of proceedings on that part of the judgment. The Supreme Court has no jurisdiction to fix the amount for such undertaking. If the judge of the court below refuses to perform his plain statutory duty in this respect, the remedy of the appellant is to apply to this court for a writ of mandate to compel him to do so.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

158 Cal. 47

BYRON JACKSON MACH. WORKS v. DUFF. (L. A. 2,507.)

(Supreme Court of California. June 16, 1910.)

SALES (§ 179*)—DELAY IN DELIVERY—WAIVER—ACCEPTANCE.

A sale of certain pumps provided for delivery at a certain time if not delayed by conditions over which plaintiff had no control, and it was agreed that they should show a certain mechanical efficiency to be tested in the seller's factory in the presence of the buyer's engineer or representative. After some delay, excusable within the contract, the buyer urged the shipment of the pumps, and on their receipt they were installed without question as to their efficiency or without test, and no objection made until more than three months afterwards. *Held*, in an action for the price, that damages for the delay were waived.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 458; Dec. Dig. § 179.*]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Byron Jackson Mach. Works against Hugh P. Duff. From the judgment and order denying a new trial, plaintiff appeals. Affirmed.

Edwin A. Meserve (Paul H. McPherrin, of counsel), for appellant. Gibson, Trask, Dunn & Crutcher, for respondent.

ANGELLOTTI, J. This is an action brought to recover the price of certain pumps and pumping machinery furnished defendant by plaintiff. The claim of plaintiff amounted to $6,580.48, being for three pumps at an agreed aggregate price of $6,400 and certain other articles, less $1,200 paid in cash on November 28, 1906, and $164.40 in merchandise, or $5,216.08, for which last-named sum, with $803.76 interest, judgment was awarded plaintiff. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The controversy on the trial was as to the pumps, and principally as to the first two pumps furnished, defendant claiming to have been damaged in a large amount by reason of the nondelivery of such pumps at the time originally agreed on, and by reason of the alleged fact that such pumps did not show a mechanical efficiency to the extent guaranteed.

The agreement for the first two pumps was made about January 31, 1906. It consisted of a written proposition by plaintiff, accepted by defendant. It was for two 10-inch special Jackson vertical centrifugal pumps, with necessary fittings, at an agreed price of $4,000, to be constructed, delivered and installed on or before April 1, 1906, "if not delayed by elements or conditions over which they [plaintiff] have no control." It was agreed that said pumps "shall show a mechanical efficiency of not less than 72% when working under the conditions named herein, same to be tested in our [plaintiff's] factory in the presence of your engineer or representative." No question appears to be raised on this appeal as to the third pump, the agreed price of which was $2,400. The first pump was not delivered on the ground until June 11, 1906, or installed until July 14, 1906, on which date it was accepted by defendant without objection of any kind either on account of delay in delivery or lack of efficiency, and has ever since been used and operated by him. The second pump was delivered on the ground on July 20, 1906, and installed August 11, 1906, when it was likewise accepted by defendant without objection or claim of any kind, and has ever since been used and operated by him. No claim of any damage by reason of delay or lack of efficiency or anything else was ever made until after the payment of the $1,200 on account. It was found that at the time of the great San Francisco fire, April 18, 1906, the two pumps were practically ready for shipment, but were destroyed by such fire, and that defendant being notified by plaintiff of all the facts acquiesced in and agreed to their subsequent reconstruction. The evidence clearly indicated that the delay occurring prior to such destruction was with the full acquiescence of defendant. The findings of the trial court in regard to the matter of the delay in delivering the pumps, so far as attacked, are sustained by the evidence, and warranted the conclusion that defendant had waived any and all claims for damages which he might otherwise have had by reason of such delay.

The same conclusion was reached by the trial court on the question of the efficiency of the first two pumps, and we think that this conclusion of the learned trial judge is sustained by findings of fact based on sufficient evidence. The written proposition of plaintiff in this regard clearly contemplated a settlement of the question of mechanical efficiency prior to installation of the pumps on the ground, and the acceptance thereof by the defendant. The language of the writing was that the test in this regard was to be "in our [plaintiff's] factory in the presence of your engineer or representative." No suggestion as to a test of the efficiency of either of said pumps was made by defendant until months after their installation and acceptance by defendant. The defendant had continually urged their shipment as soon as possible, and on their receipt they were installed and accepted without any question raised as to their efficiency. It may be that under the circumstances appearing defendant could have refused to accept the pumps after they were shipped from the factory until a satisfactory test had been made in the presence of his own engineer or representative, or that, in accepting them, he could have reserved the right to object to the quality if they did not measure up to the guaranty, but this he did not do. On the contrary, he, necessarily knowing that no such test as was prescribed had been made, and, further, having full opportunity to examine and test the pumps, absolutely accepted, and thenceforth used and operated them without objection of any kind until after November 28, 1906. The facts were such as to warrant the conclusion that, so far as the guaranty was concerned, defendant accepted the pumps, in discharge of the contract, and thereby waived all claims for damages on account thereof. The case of Jackson v. Porter Land, etc., Co., 151 Cal. 32, 90 Pac. 122, is in line with our conclusion. See, also, Albin Co. v. Kentucky Table Co. (Ky.) 67 S. W. 13; Guernsey v. West Coast Lumber Co., 87 Cal. 249, 25 Pac. 414.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Our conclusion upon the points discussed practically disposes of all contentions of the appellant requiring discussion.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J

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157 Cal. 762

TROWER v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 5,325.)

(Supreme Court of California. May 28, 1910.)

1. Appeal and Error (§ 1097*)—Subsequent Appeal—Law of the Case.

The doctrine of the law of the case is limited to rulings on questions actually presented and considered on the former appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368; Dec. Dig. § 1097.*]

2. Municipal Corporations (§ 1001*) — Claims—Presentation and Allowance—Necessity.

The requirement of presentation to and allowance of claims by various officers and boards of the city and county of San Francisco, as required by Consol. Act (St. 1856, c. 125) § 90, when construed in connection with St. 1856, pp. 167–175, art. 6, regulating the finances and revenues of the city, applies only to such claims as the consolidation act itself makes payable out of the treasury of the city and county, and therefore does not require the prior presentation and allowance of a claim to recover illegal fees exacted of executors and administrators for filing inventories and appraisements in probate proceedings, under an unconstitutional statute.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1001.*]

3. Counties (§ 153½*)—Claims—Validity.

Consol. Act (St. 1856, c. 125) § 95, declares that demands on the treasury of the city and county of San Francisco may be made for the following objects, and none others, enumerating 15 subdivisions specifying the kinds and character of demands and the objects for which public money may be expended, none of which embrace a cause of action against the city for money illegally exacted from administrators for filing inventories and appraisements, under an unconstitutional statute. *Held*, that such section did not preclude a recovery of moneys so illegally collected, in an action for money had and received.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 153½.*]

4. Executors and Administrators (§ 171*)—Claims of Administrators—Requisites—Order of Court.

Where administrators paid fees to the county clerk of the city and county of San Francisco for filing inventories and appraisements as required by an unconstitutional statute, it would be presumed that the probate court refused to give them credit for such payments in their accounts, and that they were chargeable to them individually, and hence being recoverable in their individual capacities, they were authorized to assign their claims without an order of court; such assignments not being within Code Civ. Proc. § 1517, providing that no sale of any property of an estate shall be valid unless made under order of the superior court.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 171.*]

5. Pleading (§ 236*)—Amendment—Discretion.

The granting or refusal of leave to amend an answer, where leave is required, is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

6. Limitation of Actions (§ 184*)—Pleading—Amendment to Plead Statute.

It is within the discretion of the trial court to permit an amendment of defendant's answer to plead limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 693; Dec. Dig. § 184.*]

7. Appeal and Error (§ 959*)—Pleading—Amendment—Review.

Exercise of the trial court's discretion in granting or refusing an application to amend pleadings will not be interfered with on appeal in the absence of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3833; Dec. Dig. § 959.*]

8. Appeal and Error (§ 918*)—Record—Review—Presumptions.

Where a bill of exceptions disclosed only a motion for leave to amend the answer and an order granting the motion over plaintiff's objection, based on the records and files in the action, but what those records and files consisted of, beyond the pleadings, was not stated, nor did the bill purport to exhibit the showing made by defendant in support of its motion, it would be presumed that the court's discretion was properly exercised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3710–3712; Dec. Dig. § 918.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. **Limitation of Actions (§ 28*)—Application of Statutes—Money Received.**

An action for money had and received, to recover fees collected from executors and administrators for filing inventories and appraisements in probate proceedings, under an unconstitutional statute, was an action on an obligation or liability not founded on an instrument in writing, to which the two years' statute of limitations (Code Civ. Proc. § 339, subd. 1) was applicable, and not an action on a liability created by statute within Pol. Code, § 3804, authorizing a recovery of taxes illegally collected, since such section applies only to claims based on the payment of illegal or excessive taxes, penalties, and costs pursuant to an assessment of property under Pol. Code, §§ 3607-3900.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 28.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Charles E. Trower against the City and County of San Francisco. Judgment for plaintiff for part of the relief demanded, and both parties appeal. Affirmed.

Albert H. Elliot and Edward H. Stearns, for appellant. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., for respondent.

SLOSS, J. The plaintiff, assignee of various persons who had, as guardians, executors, or administrators, paid to the treasurer of the city and county of San Francisco fees upon filing inventories and appraisements, brought this action to recover the amounts so paid. The act under which the county clerk had exacted the payments was unconstitutional, as held by this court in a case decided after the payment of the fees here involved. Fatjo v. Pfister, 117 Cal. 83, 48 Pac. 1012. The defendant answered and thereupon moved for judgment upon the pleadings. The motion being granted and judgment entered accordingly, the plaintiff appealed to this court, which reversed the judgment complained of. Trower v. City and County of San Francisco, 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183. Upon the return of the case to the superior court the defendant, by leave of court, amended its answer by adding a plea that the action and each count thereof was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. Before such amendment the answer had consisted of denials of certain allegations of the complaint (including, inter alia, a denial of the assignments to plaintiff), and also of a separate defense that the causes of action were barred by the provisions of section 90 of the consolidation act, the organic act governing the city and county of San Francisco at the time the action was commenced. St. 1856, p. 145.

The findings showed that the respective claims had been assigned to plaintiff, but coupled this with a further finding, to which we shall refer more particularly hereafter. It was found that none of the claims had been presented to or allowed by the board of supervisors in the manner or within the time specified by said section 90. The findings further showed that, with respect to seven of the claims involved, payment had been made to the treasurer more than two but less than three years before the commencement of the action. As to these the court concluded that the bar of section 339, subd. 1, Code Civ. Proc., applied. Judgment was given in favor of plaintiff for the amount of the claims not so barred. From this judgment both parties appeal, the plaintiff from the portion of the judgment denying him a recovery on the seven claims held to be within the operation of section 339, and the defendant from so much of the judgment as gave plaintiff a recovery on the remaining claims. Both appeals are on the judgment roll.

The defendant's principal contention is that the plaintiff should have been denied any relief by reason of the failure to comply with the requirements of section 90 of the consolidation act.

At the outset it may be said that there is no merit in the plaintiff's contention that the question of the applicability of said section 90 is foreclosed by the decision on the former appeal in this case. The argument is that this court held on the first appeal that the complaint, which contains no allegation of compliance with the terms of this section, stated a cause of action. If the section be applicable, an allegation of such compliance is, as is claimed, a necessary part of the complaint, and it is therefore said to be "the law of the case" that claims of the kind here involved are not within the provisions of section 90. But the doctrine of the law of the case is limited to rulings upon questions which were actually presented and considered upon the former appeal. Anderson v. Hancock, 64 Cal. 455, 2 Pac. 31; Ehrlich v. Ewald, 66 Cal. 97, 4 Pac. 1062; People v. Hamilton, 103 Cal. 488, 37 Pac. 627. It appears from the opinion in 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183, that counsel did not make, nor did the court consider, the point of the necessity of compliance with the provisions of section 90. The sole question considered and decided was whether or not a payment, made under the circumstances alleged in the complaint, was of such voluntary character as to deprive the plaintiff of a right of recovery. The ruling made became the law of the case only so far as to preclude any future attack based upon the objection there held to be untenable.

Section 90 of the consolidation act reads as follows: "The salaries, fees and compensation of all officers, including policemen and employés of all classes, and all teachers in common schools or others, employed at fixed wages, shall be payable monthly; and any demand whatsoever upon the treasury hereafter accruing, shall not be paid, but shall be forever barred by limitation of time unless the same be presented for payment, properly audited, within one month after such demand became due and payable; or if it be a demand which has to be passed and approved by the board of supervisors or board of education, then within one month after the regular session of the proper board, held next after the demand accrued. * * *"

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

If this section stood alone there might be good ground for the contention that its effect was to bar a claimant who had not complied with its provisions from recovering upon a demand of any character upon the treasury. But it is only one of a number of sections contained in the article of the consolidation act dealing with the subjects of finance and revenue, and an examination of this article as a whole (article 6, St. 1856, pp. 167–175) shows that section 90 was not intended to have the broad scope which might be indicated by some of its terms. This court has on several occasions been called upon to consider the effect of the various sections of the consolidation act governing the auditing, allowance, and payment of claims against the treasury of the city and county of San Francisco. The result of the decisions has been to establish the rule that the requirement of presentation to and allowance by the various officers and boards of the municipality applies only to such claims as are by the terms of the consolidation act itself made payable out of the treasury of the city and county. This construction, with the reasons leading to it, is very clearly set forth by Thornton, J., in his concurring opinion in Ex parte Reis, 64 Cal. 233, 30 Pac. 806, where it was held to be the duty of the treasurer to pay phonographic reporters in criminal cases the compensation fixed by the court (pursuant to Code Civ. Proc. §§ 269–271), without the necessity of approval or audit by any city and county officer. The power of the court to fix the compensation of the reporter and to order payment of the same is affirmed in Stevens v. Truman, 127 Cal. 158, 59 Pac. 397. In Aid Society v. Reis, 71 Cal. 634, 12 Pac. 796, the court held that the approval of the supervisors was not necessary to the validity of a claim for the support of a minor committed to the custody of a charitable corporation under Pen. Code, § 1388. In Ex parte Widber, 91 Cal. 367, 27 Pac. 733, it was held that a demand ordered paid by the judge for the necessary expenses of providing him with a suitable courtroom was not within the limitations of the consolidation act. Corbett v. Widber, 123 Cal. 154, 55 Pac. 764, was a proceeding to compel the treasurer to refund to the plaintiffs a portion of taxes paid in advance of the fixing of the tax rate, and found to be in excess of the rate actually levied. It was held that payment of this demand was not authorized by the consolidation act, and that the plaintiff, therefore, was not required to present his claim or have it audited pursuant to the terms of that act.

We think the rule established by these cases is applicable here. The city and county exacted from the plaintiff's assignors and holds in its treasury moneys to which it had no legal or equitable right. The plaintiff is entitled to recover the amount so paid. Trower v. City and County, 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183. His right of recovery rests, not on any provision of the consolidation act, but on the general rule of law which authorizes the recovery of money not justly due to the payee but paid by compulsion. It may be said here, as was said in Corbett v. Widber, supra, that "Section 95 of the consolidation act declares that 'demands on the treasury may be made for the following objects, and none others.' Under 15 subdivisions of the sections are enumerated the kinds and characters of such demands, and the objects for which the public moneys of the city and county may be expended. The section will be read in vain to discover any authority whatsoever for the payment of a demand such as the one in question. It is not within the contemplation of the consolidation act, yet clearly it is within the contemplation of the law * * * that such moneys should be repaid on demand."

The defendant relies strongly upon our decision in Farmers', etc., Bank v. City of Los Angeles, 151 Cal. 655, 91 Pac. 795, where it was held that the presentation of a demand to the city council was a necessary prerequisite to the maintenance of an action for the recovery of taxes paid under protest. But the distinction between that case and the one at bar is plain. The provisions of the Los Angeles charter were such as to require the presentation of all claims and demands whatever against the city (with certain exceptions not material to the case) and to prohibit any payment from the city treasury unless upon a demand audited as provided in the charter. But the consolidation act, as we have seen, makes the presentation and allowance of demands a prerequisite only where the claim is one authorized to be paid by the terms of that act itself.

The defendant makes a further point with reference to the assignments of the various claims to the plaintiff. The finding is that the claim for the return of each of said sums was duly assigned to plaintiff by the person or persons as executors or administrators or guardians of each estate on behalf of which the payment had been made, but that none of said executors, administrators or guardians procured from the superior court having jurisdiction of the probating of the estate an order authorizing the execution of an assignment of the claim to plaintiff. The assignments are claimed to be invalid under section 1517 of the Code of Civil Procedure which provides that "no sale of any property of an estate of a decedent is valid unless made under order of the superior court. * * * All sales must be * * * confirmed by the court before the title * * * passes." We think this section has no application here. We may assume, if the assumption be necessary to make the judgment comport with the findings, that the assignments to plaintiff were made for collection merely. It may be doubted whether such assignments are "sales" within the meaning of the Code section. But even if they be so regarded, the claims in question were not a part of the property of the estates of the respective decedents. In each instance the executor or administrator had, after his appointment, made a payment which was unauthorized by law. It must be presumed that the probate court refused to give to such executors or administrators credit for these payments in their accounts. The payments were chargeable to them individually. They, therefore, had the right to recover them in their individual capacities, and the corresponding right to make assignments.

On plaintiff's appeal, the first point made is that the court erred in permitting the defendant, after the reversal of the first judgment, and after the cause had, on the second hearing, been submitted, to amend its answer by pleading section 339 in bar of the action. It is, however, thoroughly settled that the granting or refusing of leave to amend an answer, where leave is required, is a matter committed to the sound discretion of the trial court. This is true of amendments for the purpose of setting up the statute of limitations, as well as other amendments. The cases cited by plaintiff (Cooke v. Spears, 2 Cal. 409, 56 Am. Dec. 348; Stuart v. Lander, 16 Cal. 373, 76 Am. Dec. 538) proceed upon this very theory. In those cases it was held that the court below had not erred in denying leave to amend by pleading the bar of the statute. Here the trial court granted the leave. But since the matter rests in the discretion of the court, its action on the application, whether favorable or unfavorable, will not be disturbed on appeal unless it appears that there was an abuse of discretion. No such abuse is shown. The bill of exceptions discloses only that the motion for leave to amend was granted over the objection of plaintiff, who based his objection on the records and files in the action. What those records and files consisted of, beyond the pleadings, is not stated, nor does the bill purport to exhibit the showing made by the defendant in support of its motion. Under these circumstances, we must presume that the trial court properly exercised its discretion.

We think it clear that the action was one governed by the statute of limitations so pleaded. Code Civ. Proc. § 339, subd. 1. As we have said, in discussing defendant's appeal the action is one to recover moneys unjustly exacted and retained by defendant. It is assumpsit for money had and received, and, therefore, an action "upon a contract, obligation or liability not founded upon an instrument in writing." The plaintiff seeks to base his right of recovery upon the terms of section 3804 of the Political Code, and claims, accordingly, that the suit was properly begun within three years, the period of limitation for "an action upon a liability created by statute." But section 3804 has reference only to claims based upon the payment of illegal or excessive taxes, penalties, or costs pursuant to an assessment of property under the provisions of title 9 of the Political Code. This is apparent, not only from the language of the section itself, but from its location with reference to other Code sections. O'Brien v. County of Colusa, 67 Cal. 504, 8 Pac. 37; Grimley v. County of Santa Clara, 68 Cal. 575, 9 Pac. 840. The payments here sought to be recovered were, as already stated, made under an act purporting to fix fees for filing inventories and appraisements in probate proceedings. They were not payments of the class covered by section 3804.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

157 Cal. 781

CITY OF PASADENA v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (L. A. 2,499.)

(Supreme Court of California. June 6, 1910.)

1. INJUNCTION (§ 183*)—TEMPORARY INJUNCTION—REINSTATEMENT AFTER DISSOLUTION.

Where the court in a suit for an injunction, possessing the power to grant a temporary injunction pending an appeal from a decree denying relief, was misled by the stipulation of the parties to believe that a temporary injunction had been issued prior to the hearing, and made an order continuing such injunction in force when in fact no such injunction had been issued, it could, on discovering the error, amend its order and make an effective injunctive order as originally intended.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 394; Dec. Dig. § 183.*]

2. COURTS (§ 125*)—JURISDICTION—CONSTITUTIONAL PROVISIONS.

Under Const. art. 6, § 5, vesting the superior court with original jurisdiction in all cases in equity, the superior court has equity powers equal to those exercised by the chancery courts in England.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 385; Dec. Dig. § 125.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

3. APPEAL AND ERROR (§ 447*)—INJUNCTION PENDING APPEAL—JURISDICTION.

The chancery courts in England possess the power to maintain the status quo pending an appeal in a suit for an injunction, notwithstanding the denial of the right to a perpetual injunction, which was the primary object of the suit; and hence the superior court, possessing the same equity powers, on denying a perpetual injunction has power under Const. art. 6, § 5, to continue in force a preliminary injunction, so as to maintain the status quo of the subject-matter of the litigation pending an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2207; Dec. Dig. § 447.*]

4. APPEAL AND ERROR (§ 447*)—INJUNCTION PENDING APPEAL—JURISDICTION.

Civ. Code, §§ 3420, 3422, declaring that preventive relief is granted by an injunction, provisional or final, and providing for cases in which a final injunction may be granted, without providing for the maintenance in force of the status quo of the litigation pending an appeal, and Code Civ. Proc. § 525, providing the cases in which the court may or may not grant injunctions, without referring to the right to grant a provisional injunction maintaining in force the status quo of a litigation pending an appeal, do not deprive the superior court of its power to grant a provisional injunction maintaining in force the status quo pending an appeal, though Civ. Code, § 3421, declares that provisional injunctions are regulated by the Code of Civil Procedure, and though section 3274 provides that preventive relief can only be granted in specified cases, since sections 3366, 3368, provide that preventive relief may be given as provided by the laws of the state, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2207; Dec. Dig. § 447.*]

5. APPEAL AND ERROR (§ 447*)—INJUNCTION PENDING APPEAL—JURISDICTION.

Under Civ. Code, § 3368, providing that preventive relief is given by prohibiting a party from doing that which ought not to be done, the superior court, denying relief in a suit by a telephone company to restrain the officers of a city from enforcing an ordinance declaring the use of the streets by the company a nuisance, may grant an injunction maintaining the status quo, pending an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2207; Dec. Dig. § 447.*]

6. APPEAL AND ERROR (§ 447*)—INJUNCTION PENDING APPEAL—POWER OF COURT.

A trial court, though reasonably certain that its conclusion in denying a perpetual injunction is correct, may not be entirely free from doubt, and where the losing party seeks to avail himself of the right of appeal and is prosecuting the right diligently, the court may, in its discretion, protect the subject-matter of the litigation from destruction, pending the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2207; Dec. Dig. § 447.*]

7. APPEAL AND ERROR (§ 447*)—INJUNCTION PENDING APPEAL—POWER OF COURT.

The power of the court to maintain the status quo of the litigation, pending an appeal from its decree denying a perpetual injunction, is discretionary, and must be exercised only under such conditions as will fairly protect the successful party in the benefits of the decree in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2207; Dec. Dig. § 447.*]

In Bank. Application for writ of prohibition by the City of Pasadena against the Superior Court of Los Angeles County and the judge thereof. Denied.

J. P. Wood, City Atty., and Wm. J. Carr, for petitioner. Pillsbury, Madison & Sutro, for respondents Sunset Telephone & Telegraph Co. and another.

LORIGAN, J. This is an application for a writ of prohibition. On March 25, 1908, the Sunset Telephone & Telegraph Company, in conjunction with the Pacific Telephone & Telegraph Company, brought an action in the superior court of Los Angeles county against the city of Pasadena, and certain of its officers, to enjoin and restrain said city from enforcing one of its municipal ordinances relative to the use of streets thereof by telegraph and telephone companies requiring franchises and fixing charges to be paid for such use, and forbidding the maintenance of certain telegraph and telephone lines, and declaring them nuisances, and to restrain and enjoin the city from destroying or removing (as it was alleged the city threatened and intended to do under said ordinance) the poles, wires, and appliances of the plaintiffs erected and used in the streets, alleys, and public places of said city.

A temporary restraining order was issued on the filing of the complaint and thereafter, on November 12, 1908, upon a hearing it was ordered that an injunction pendente lite issue. A trial of the cause being had, the court, on May 27, 1909, entered an order directing a judgment for the city for costs and "that the temporary injunction theretofore issued be forthwith dissolved," and immediately thereafter the city, through its officers, without notice to plaintiffs, commenced the destruction of the companies' telephone system in Pasadena, by cutting 12 of their cables, a total of 1,350 pairs of wires, disconnecting 2,400 subscribers and 3 exchanges, besides 4 toll lines. The next day a conference was had between the attorneys for the respective parties, and a stipulation entered into, wherein it was agreed that the lines of the companies might be reconnected, pending an effort to come to some understanding whereby conditions might remain in statu quo pending the final determination of the action; the plaintiffs contemplating an appeal from the judgment.

In this connection it may be said that while an order that an injunction pendente lite issue was made November 12, 1908, no injunction was in fact issued. It was assumed, however, by the attorneys in the stipulation referred to, that such an injunction had in fact been issued, and it was provided thereby that if the parties could agree as to the conditions under which the subject-matter might be maintained in statu quo pending the contemplated appeal, that "an injunction as heretofore issued shall issue and continue in force pending the final determination of the action," and if unable to agree, the plaintiffs might apply to the court for the issuance of an injunction pending such final determination.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

An agreement could not be reached and plaintiff moved the court to restore and continue in force such preliminary injunction pending the final determination of the cause which, on June 28, 1909, the court granted, being of opinion, as declared in its order, that the status quo between the parties should be maintained pending the final determination of the action. This order was made by the court on certain conditions, namely, that plaintiffs should within 10 days perfect their appeal to the Supreme Court from the judgment in the action; that within that time they deposit with the clerk of the court for the benefit of the city $3,578.12, being 2 per cent. of the gross receipts of the companies from their telephone business at Pasadena between August 7, 1907 (that being the alleged date of the expiration of one of the franchises granted by the city to the Sunset Company) and the 29th day of May, 1909; that each six months thereafter and pending final determination of the cause, they should make a similar deposit; that the plaintiffs deposit with the clerk an agreement duly executed by them, whereby they should agree that in the event of a final determination of the action in favor of the city, if the plaintiffs or either of them, or their successors, should apply to the city and secure a franchise for doing a telephone business in said city, under which the grantee of said franchise should be required to pay more than 2 per cent. of the annual gross receipts from such business in said city, they would pay to the city the difference between the percentage of gross receipts required by said franchise and 2 per cent. of said gross receipts, accruing between the 7th day of August, 1907, and the date of granting such franchise, and that the plaintiffs within 10 days give a bond, to be approved by the court, in the sum of $15,000 for the faithful performance of all the terms and conditions imposed. All the conditions imposed were complied with by the plaintiffs. The order above referred to, restoring and enforcing the injunction pending the determination of the controversy, recited that it was made concurrently with the signing of the judgment ordered in the action, and at the same time it was made the court made and filed its findings of fact and conclusions of law in favor of the city, and signed a decree in its behalf which was entered June 30, 1909. There was nothing in the decree itself restoring or continuing the injunction in force, or referring to it at all.

On July 7, 1909, the defendant city moved the court to vacate said order of June 28, 1909, on several grounds, to wit, that no preliminary injunction had in fact ever been issued or been in effect in said action, and, further, that the court was without power or authority to make said order continuing in force the injunction until the final determination of the action. This motion was denied, but it being brought to the attention of the court for the first time on the hearing thereof (the judge trying the case not being the one who had ordered the issuance of the injunction pendente lite), that notwithstanding the stipulation of the parties recited that such an injunction had theretofore issued in the action it had not in fact issued. The court made forthwith a further order. In this order the court recited the erroneous assumption, in making the order of June 28, 1909; that it was the intention of the court by said order to preserve intact the subject-matter of the action, free from molestation or injury by defendant city until the final determination of the action, and thereby corrected and amended the order of June 28, 1909, by enjoining the defendant city, in express terms, from interfering in any manner with any of the poles, wires, appliances, or apparatus of plaintiffs pending the final determination of the action. The plaintiffs on July 7, 1909, after the foregoing proceedings, perfected their appeal to this court from the judgment, and have since been prosecuting such appeal in apparent good faith and with due diligence. Thereafter the present petition for a writ of prohibition was applied for and is now before the court for disposition upon the petition and the demurrer and answer of the respondent judge of the superior court, and similar pleadings on the part of the plaintiffs.

The main question in this controversy is whether a superior court in an action brought to obtain a perpetual injunction can, by an order made concurrently with the granting of a final judgment in the action denying the injunction, continue in force a preliminary injunction, or make an original injunctive order, restraining the successful party, pending an appeal by his adversary against whom the judgment, denying a right to any injunction whatever, runs.

While the petitioner here makes the point that the court had no power to make the order of June 28th continuing the injunction pending the appeal because there had, in fact, never been any preliminary injunction issued in the first instance upon which the order could operate, and likewise had no authority to make the order of July 7th amending the order of the former date, we attach no importance to these claims. If the superior court had the right to make any order concurrently with the final judgment continuing a preliminary injunction in force pending an appeal from the judgment, as counsel on both sides in their stipulation presented to the court conceded that an injunction pendente lite had issued, and was in force at the time the application to continue it was presented, and as the order of June 28th was made on that basis, neither party should be permitted to question it, or to question the validity of the order of July 7th made when when it was first disclosed to the court that, in fact, while ordered, no preliminary injunction had issued, and which later order amended the order of June 28th so as, in terms, to enjoin the plaintiff in the action pending the appeal. If the court had authority to make an order concurrently with the judgment in the case, continuing in force or granting an injunction pending an appeal it was the intention of the court by the order of June 28th to do so. Through the stipulation of counsel the court was inadvertently led to believe that an injunction had theretofore in fact issued, and the intent of its order was to continue it in force. Counsel had in their stipulation declared that such a preliminary injunction had issued, and was in force, and that the defendants in the action might move the court to continue it in force pending the appeal. As the court intended to enjoin the defendant city pending the final determination of the matter, if it had authority to do so at all, it could have effected it by continuing in force any injunction theretofore issued, or by making an original order for an injunction on June 28th, and being misled in carrying out its intent and purpose by assuming that the stipulation correctly stated that the preliminary injunction was then in force, it had a right, when it discovered the error, to amend its order and make an effective injunctive order as originally intended.

This point disposed of brings us back to the main question. The position of the petitioner is that under the law of this state a superior court is without jurisdiction to issue or continue in force an injunction pending an appeal, whether the order doing so is made prior to, or concurrently with, the judgment, or is embraced therein. The logical consideration of this question requires inquiry as to whether in this state a superior court, in an action brought to obtain an injunction, may in its judgment, denying the right to such injunction, provide nevertheless for continuing in force pending a final determination of the action an injunction preliminarily issued, because, if it can, we think that while the order here in question enforcing or continuing the injunction cannot strictly be said to be part of the judgment, still it must be considered as intended to operate concurrently therewith, as the court declared, and if it could stand if embodied in the judgment, has equal force as an order made independent of but concurrent therewith.

We think, on an examination of the authorities, that it is hardly open to serious question but that the superior court has the power in its final judgment to continue in force a preliminary injunction so as to maintain the status quo of the subject-matter of litigation pending an appeal, notwithstanding that the right to a perpetual injunction, which was the primary object of the action, may have been denied by the judgment itself. By article 6, § 5, of the Constitution of this state, the superior court is vested with "original jurisdiction in all cases in equity." A similar constitutional provision as to the jurisdiction of the district courts (predecessors to the present superior courts) is found in the old Constitution of 1849 as amended in 1862 (article 6, § 6), and as to such a provision it is said in People v. Davidson, 30 Cal. 379, 390, and likewise in Rosenberg v. Frank, 58 Cal. 387, 400, that "the equity jurisdiction with which the district courts are invested under the Constitution is that administered in the high courts of chancery in England." To this same effect is Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317.

It being determined, therefore, that the superior court has equity powers equal to those exercised by the chancery courts in England, it only remains to ascertain whether such courts possessed the power to maintain the status quo of the subject of litigation by continuing an injunction pending an appeal. While this is the first time that this exact question has been presented to this court for determination, we have no doubt that the power existed in the chancery courts in England, and that under the authorities from our sister states it is a power with which courts of general equity jurisdiction in this country are invested, certainly at least in the absence of any limitation by constitutional provision or legislative enactment. In some of the authorities, to be cited or quoted from, some discussion is had as to the power of the appellate court, on application therefor, to grant an injunction pending the appeal, as well as the right of the lower court under its original equitable power to do so. We are not now concerned with what may be the power of the appellate court in that respect, but are dealing solely with the right of the trial court in an equitable action to do so in its final decree, and limit ourselves to a consideration of this sole proposition.

Now as to the power of the English courts of chancery to preserve the subject-matter of litigation in statu quo, pending the final determination of a controversy, there can be no question. The existence of this power in such courts, and their right to exercise it in an equity suit, is thus generally declared: "Where an action has been altogether dismissed by a divisional court, the Court of Appeals will in a proper case grant an injunction to restrain any of the parties from parting with the property till the hearing of the appeal. If an appeal is dismissed by the court, the jurisdiction of the court is gone, and no order can be made to bind the parties pending an appeal to the House of Lords. Where a plaintiff whose appeal is about to be dismissed intends to appeal to the House of Lords he should ask that the decree dismissing the bill should be so framed as to keep alive the jurisdiction of the court. But the court has power on a proper case being made out, to restrain by injunction all dealings with a fund pending appeal to the House of Lords, although the court has decided against the title of the plaintiff and dismissed the action. The jurisdiction, however, will be exercised with care and so as not to encourage any one to present appeals for the purpose of delay." Kerr on Injunctions (3d Ed.) pp. 29, 30.

In Hovey v. McDonald, 109 U. S. 150, 160, 3 Sup. Ct. 136, 142 (27 L. Ed. 888), this power in the English courts of chancery is recognized, where the court says: "In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the House of Lords in 1807, and an order was made establishing the right of the chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the House on the same subject. See Palmer's Pract. H. L. 9, 10; 15 Vesey, 184; [Hart & Hoyt v. Mayor of Albany] 3 Paige, 383-385." And in that case the court, referring to the Slaughter House Cases, 10 Wall. 273, 19 L. Ed. 915, and still considering the power of the chancery courts of England to maintain by their order the status quo of the subject-matter of litigation pending appeal, says as to what was, and was not, decided by those cases: "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requirements for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised, when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or non-exercise is not an appealable matter."

In Polini v. Gray, 12 L. R. Chan. Div. 438, it is said by the Master of the Rolls: "It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party is to reap the fruit of that litigation and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of the first instance before the first trial, and to the court of appeals before the second trial, as to the court of last instance before the hearing of the final appeal." To the same effect are Huguenin v. Baseley, 15 Ves. Jr. 179; Galloway v. Mayor, etc., 3 De G., J. & S. 59; Daniell's Ch. Prac. (6th Am. Ed.) vol. 2, p. 1451.

In our sister states, where the question has arisen as to the power of courts of general equity jurisdiction to make orders maintaining the status quo of the subject-matter till final determination on appeal, the existence of such power has been confirmed by the appellate tribunals. Hart v. Mayor, etc., of Albany, 3 Paige (N. Y.) 381; Messonnier v. Kauman, 3 Johns. Ch. (N. Y.) 66; Disbro v. Disbro, 37 How. Prac. (N. Y.) 147; Jewett v. Dringer, 29 N. J. Eq. 199; State ex rel. v. Dearing, 180 Mo. 53, 79 S. W. 454.

We will refer particularly to the first and last cases cited, as the other cases mentioned equally sustain the existence of the power in a court of general equity jurisdiction to continue in force such injunction until the final determination of the action.

In Hart v. Mayor, etc., of Albany, supra, plaintiff sued to enjoin the officers of the municipality from removing an ark or floating storehouse from the Albany basin where plaintiff had moored it, contrary to an ordinance of the municipality. On filing his complaint he obtained a preliminary injunction which, on motion after answer, the court dissolved. Plaintiff appealed, but, notwithstanding this, defendants were proceeding to remove the ark. Application was made to the chancellor for an order restraining them from doing so pending the appeal, and the chancellor after reviewing the practice in the English courts of chancery, decided that he had the power to make the order. He said: "Having arrived at the conclusion that the provisions of the revised statutes do not suspend the operation of the order appealed from, so as to restore the injunction and entitle the appellants to an order to stay the proceedings of the defendants as a matter of strict right, it becomes necessary to inquire whether this court has the power to suspend the operation of the order until the decision of the Court for the Correction of Errors on the appeal; and if it has such power, whether this is a proper case for the exercise of the judicial discretion of the chancellor in this respect. * * * Such power, however, is frequently exercised by the superior courts over the suitors and parties therein, for the advancement of justice; and the granting a preliminary injunction in this court, before the rights of the parties are finally determined, always proceeds upon the same principle. The only reasonable ground of objection to such a proceeding, therefore, is, that it seems inconsistent for the court to make an order to restrain a party from proceeding, after it has, upon a full hearing of both parties, decided that he has both a legal and equitable right to proceed. But this objection would equally apply to all the orders in the English Court of Chancery to stay the proceedings on a decree, or order of the court by which the rights of the parties have been established by the same court. In the case of Lewis v. Morgan, 5 Price's Rep. 468, although it was admitted that applications of this kind were not to be encouraged, the Court of Exchequer in England suspended the proceedings under an order of that court, for a limited time, to enable the party against whom the order was made, to bring the case before the House of Lords by appeal." The order was granted on terms.

In the State ex rel. Dearing, supra, the proceeding in the Supreme Court was in prohibition, as here, and involved the question as to the power of the St. Louis City Circuit Court to continue in force in its final judgment denying plaintiffs an injunction and pending the appeal therefrom, a temporary injunction previously issued. In sustaining the power of the trial court to make the order, the court said: "The precise question presented by that contention is: Has a circuit court in this state in a suit in equity, in which a temporary injunction has been granted, in its final judgment in favor of the defendant on the merits, dissolving the injunction and dismissing the plaintiff's bill, the power to continue the temporary injunction in force pending the appeal taken from that judgment? By the Constitution and laws of this state, circuit courts are invested with general original jurisdiction of suits in equity, subject to the right of appeal to the Supreme Court or the courts of appeals, as the case may be, and in such cases are invested with all the powers inherent in an English court of chancery, except so far as those powers may have been limited by statute. As incident to their jurisdiction, the English chancery courts have power in a proper case to grant an interlocutory injunction to restrain a mischief complained of, and preserve matters in statu quo until the final determination of the issues therein."

After referring to and quoting from several authorities sustaining the power in the English Court of Chancery, the court also cited and quoted from American authorities equally sustaining the same power in courts of original, equitable jurisdiction in this country, and, as a conclusion from their consideration, said: "So in this country, the jurisdiction of courts of equity of the first instance to make all proper orders for the preservation of the subject-matter of the controversy in statu quo until the final determination thereof in the court of last resort has been uniformly maintained by the highest authority. * * * In the light of the authorities cited, to which many others might be added, we have no hesitation in holding, in conformity to the rulings of the highest authorities in England and America on the subject, that the St. Louis City Circuit Court, in the exercise of its jurisdiction as a court of equity, had full power, in its final judgment or decree in the case stated, to continue in force the interlocutory injunction granted at the beginning of the cause pending the appeal therefrom to the Supreme Court."

On this same subject it is said in Cyc., vol. 22, p. 974: "But a preliminary injunction may be continued pending an appeal from a decree dismissing complainant's bill * * * in case such continuance is necessary to protect the complainant and to maintain the subject-matter in such condition that the complainant will not be deprived of relief in case of his success on the appeal but not otherwise."

Counsel for both parties refer in their briefs to Eldridge v. Wright, 15 Cal. 88, and Hicks v. Michael, 15 Cal. 107, but neither of these cases has any bearing upon the precise question under consideration. The question there involved was as to the power of the Supreme Court to grant an injunction pending appeal. The question here involves only the power of the superior court by its final judgment and in the exercise of its original equity jurisdiction to grant it—entirely different questions involving the consideration of different principles of law, and, as heretofore stated, we limit our discussion to the latter question only.

While it is therefore quite clear from these authorities that the power existed in the courts of chancery under the English system to maintain the status quo of the subject of the litigation pending appeal, and that courts of general equity jurisdiction in this country are held to have like power, and that as to the superior courts of this state it has been directly decided that they possess the same equity jurisdiction as was possessed by the English chancery courts, it is nevertheless contended by counsel for petitioner that such general equity jurisdiction is subject to legislative control as far as provisional remedies are concerned, as such remedies are mere incidents to the jurisdiction of the courts, and are no part of its essential jurisdiction.

On this assumption, and in connection with it, it is urged that under the Code provisions of this state the superior courts, notwithstanding they are courts of general equity jurisdiction, are without power to issue injunctions, either permanent or provisional, except in such cases as are provided by the Code, and which it is insisted do not embrace power to continue in force pending an appeal, a temporary injunction theretofore issued. Conceding, without deciding, all that petitioner contends for, still, if the Legislature has not by some provision curtailed the power which, as courts of general equity jurisdiction invested with all the power exercised by courts of chancery in England, our superior courts possess, this power remains and may be exercised. If it has been shorn of power in this respect by legislation, it must be found in the code provisions as to the matter of injunctions, and a careful examination of these provisions, both in the Civil Code and Code of Civil Procedure, discloses nothing whereby the exercise of power in question has been curtailed.

It is provided by section 3420 of the Civil Code that "preventive relief is granted by an injunction, provisional or final." And "provisional injunctions are regulated by the Code of Civil Procedure." Civ. Code, § 3421. Section 3422, following, provides for cases in which a final injunction may be granted, and section 525 of the Code of Civil Procedure provides the cases in which the court may grant, and in which it cannot grant, injunctions. None of these provisions refer in any manner to the right of the court to grant a provisional injunction, in a final judgment, maintaining in force the status quo of the litigation pending an appeal. But from a consideration of these code provisions it is insisted by petitioner that they embody complete legislation on the subject of injunctions —final and provisional—and that the power of the court to grant injunctions in any other case, or under any other circumstances than those mentioned in the sections of the Code of Civil Procedure is denied. This contention of petitioner is based mainly on the terms of sections 3274 and 3421 of the Civil Code; the one declaring that preventive relief can only be granted in cases specified in "this part [part 1] of the Civil Code"; the other declaring that "provisional injunctions are regulated by the Code of Civil Procedure." But these sections, and the sections of the Code of Civil Procedure heretofore referred to, are not all the legislation on injunctions. Section 3366 of the Civil Code provides that specific or "preventive relief may be given as provided by the laws of this state" and section 3368 provides that "preventive relief is given by prohibiting a party from doing that which ought not to be done." Section 3274 is found in that part and title of the Code dealing with "Relief in General." Sections 3366 and 3368 are found in the title dealing with "Specific and Preventive Relief" in particular, and must be taken as a particular specification of cases under section 3274 when the court is authorized to grant preventive relief in addition to other cases mentioned in the Civil Code provision.

While the codes declare the law of the state (Civ. Code, § 4; Code Civ. Proc. § 4), they do not declare all of it. The constitutional provisions also constitute the law of the state, and when, as addressed to the particular matter in question, there is vested in the superior court as a court of general equity jurisdiction by the constitutional provision, the same jurisdiction which belonged to the court of chancery in England, and, as pertaining thereto, the right to restrain by injunction pending an appeal, if that power is curtailed by legislation it must be effected by legislation which unequivocally has that effect. Nowhere in the Code is there found any legislation of that character. While there is legislation prohibiting the granting of injunctions in certain specified cases, and power given to grant them, both temporary and final, in other actions pending in the court, there is nothing in the legislation on the subject which in terms, or by necessary implication, has divested the superior court of power in the exercise of its otherwise equitable jurisdiction to grant an injunction to maintain the status quo of the subject-matter of litigation pending an appeal. Not only do we think that there is nothing in the codes which attempts to curtail this power, but under section 3368 of the Civil Code which provides that "preventive relief is given by prohibiting a party from doing that which ought not be done," the power of the court to make the order in question remains undisturbed.

The precise matter in issue in the action below was the right of the plaintiffs in the case to maintain their poles, wires, and general telephone systems in the streets of Pasadena, where, with the permission of the municipality, they have been maintained for upwards of 20 years. The city was threatening to cut down these poles and destroy the systems and suit was brought to enjoin them, and a preliminary injunction was issued. Judgment went against plaintiffs and from that judgment they had a right to appeal, and in good faith were prosecuting it, when the city actually commenced the destruction of the telephone systems. Common fairness and a sense of justice readily suggests that while plaintiffs were in good faith prosecuting their appeals, they should be in some manner protected in having the subject-matter of the litigation preserved intact until the appellate court could settle the controversy. If the city could be permitted while the appeals were pending, to destroy the property of the plaintiffs, a reversal of the judgment would be of little consequence to the latter. They would have suffered the loss of their property, and consequent, great, and irreparable injury, without any advantage to the municipality. The suggestion of this result to the plaintiffs further readily suggests that if there is any power in the lower court to maintain the status quo of the subject-matter pending the appeal, it should be upheld. A trial court may be reasonably certain that the conclusion it has reached denying an injunction is correct, while at the same time the matter may not be entirely free from doubt in its mind. Under these circumstances, and where the losing party is endeavoring to avail himself of his right of appeal and is prosecuting that right diligently, the trial court ought to have the power, and discretion to exercise it, so as to protect the subject-matter of litigation from destruction pending the final determination of that right, and in order that, if it be ultimately decided that the judgment appealed from was erroneous, his property may be saved to him. To grant the right of appeal from a judgment denying an injunction which is sought to restrain the destruction of property, and at the same time deny the trial court the right to preserve the property intact pending the appeal, would be a travesty on justice.

While it is true that we are here dealing with the matter of mere abstract power in the superior court, it may be said that while we are satisfied such power exists, its exercise is a matter discretionary with the trial court and to be exercised only under such conditions, imposed upon the party in whose favor the injunction order pending appeal is given, as will fully and fairly protect the adverse party in the fruits or benefits of the judgment in his favor. It would appear that in granting the injunction here in question the trial court endeavored to fully protect the municipality by the conditions imposed on the plaintiffs in granting the injunction and which they accepted. But with that matter we have no present concern. As we said, the question on this application for a writ of prohibition is simply a question of the abstract power, or jurisdiction of the court, to grant the injunction pending appeal which, as we have held, the court clearly has. Did we deem the possession of this power in the court doubtful by virtue of the code provisions to which petitioner refers, we would nevertheless be constrained to hold that the power existed as necessary to the ends of justice, because a decree denying an injunction or dissolving a preliminary injunction is not suspended pending the appeal therefrom, and it is a debatable question whether there is any power in our appellate courts, by original, injunctive order, to maintain the status quo of the litigated subject-matter pending appeal. Hence, unless the superior court possesses the power by provisional injunction to maintain the status quo of the subject-matter of litigation, there is no remedy afforded plaintiffs whereby their property could be saved from destruction while the question of the right of the city to require its removal from its streets was, in good faith, being litigated.

The petition for a writ is denied.

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.

(158 Cal. 1)

In re DUNPHY'S ESTATE. (S. F. 5,344.)

(Supreme Court of California. June 10, 1910.
Rehearing Denied July 7, 1910.)

APPEAL AND ERROR (§ 337*)—APPOINTMENT OF GUARDIAN—APPEAL FROM ORDER—TIME THEREFOR.

Code Civ. Proc. § 1808, provides that any order appointing a guardian must be entered as and become a decree of court, and that the provisions of the Code relative to decedents' estates, as far as they relate to the practice in the superior courts, shall apply to guardianship proceedings. Section 1704 requires orders and decrees in probate proceedings to be entered at length in the minute book. Section 1714 declares as to appeals in such proceedings that the provisions of part 2 of the Code relative to appeals in "civil actions" apply to probate proceedings except in so far as is "inconsistent with the provisions of this title (relating to probate proceedings)." Section 1715 requires an appeal in probate proceedings to be taken within 60 days after the order, decree, or judgment is entered. Section 941a provides that "appeals from all judgments, orders or decrees of any of the superior courts * * * which may, pursuant to law, be reviewed by the Supreme Court, * * * may in addition to other modes prescribed by law be taken pursuant to the provisions of the next section." Section 941b provides for the notice of appeal, its contents, and other matters, and declares "that this notice may be filed at any time after the rendition of the judgment, order or decree. * * *" These last two sections are in part 2, tit. 13, applying generally to appeals in "civil actions." *Held*, that the time for an appeal from an order appointing a guardian for an incompetent was governed by section 1715, and, in view of section 1714, was not enlarged by sections 941a and 941b, subsequently adopted, and the appeal cannot be taken before the order is entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1877, 1878; Dec. Dig. § 337.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

In the matter of the guardianship and estate of James C. Dunphy, an incompetent person. On motion to dismiss an appeal from the order adjudging him incompetent, and appointing a guardian of his person and estate. Appeal dismissed.

Timothy J. Lyons and Bishop, Hoefler, Cook & Harwood (Raymond Benjamin, of counsel), for appellant. J. D. Meredith and Perry Evans, for respondent.

LORIGAN, J. On August 7, 1909, in the above proceeding an order was made and filed in the superior court of the city and county of San Francisco adjudging James C. Dunphy to be an incompetent person and appointing a guardian of his person and estate. On August 9, 1909, a notice of appeal to this court from said order was given. On August 31, 1909, the order made and appealed from was entered at length in the minute books of the superior court. The point made for a dismissal of the appeal is that it was prematurely taken. It is insisted that no appeal can be taken under section 1715 of the Code of Civil Procedure relative to appeals in probate proceedings until after the order appealed from is entered, and that, as this appeal was taken before such entry, it was prematurely taken and must be dismissed. Guardianship proceedings are embraced within the same title as relates to proceedings in estates of decedents, and are a part of what are generally denominated probate proceedings.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is provided by section 1808 of the Code of Civil Procedure that "any order appointing a guardian must be entered as and become a decree of the court," and that the provisions of the Code in the title above referred to relative to estates of decedents, as far as they relate to the practice in the superior courts, shall apply to proceedings in guardianship. Section 1704 of the Code of Civil Procedure requires that orders and decrees of the court in probate proceedings must be entered at length in the minute book of the court. As to appeals—embracing the appeal from the order involved here—it is provided by section 1714 of the same Code that "the provisions of part two of this Code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title"; and by section 1715 following: "The appeal must be taken within sixty days after the order, decree, or judgment is entered."

It is long established by a uniform and unbroken line of authorities in this state that appeals in probate proceedings which, of course, include proceedings in guardianship, are governed exclusively by these sections of the Code, and must be taken under said section 1715; that the right to take an appeal accrues only after the entry of the order, decree, or judgment appealed from; and that, where an appeal is taken before the entry of the judgment or order appealed from, it is prematurely taken, and this court has no jurisdiction to entertain it, and such appeal must be dismissed. Ex parte Miller, 109 Cal. 643–646, 42 Pac. 428; In re Rose, 72 Cal. 577, 14 Pac. 369; In re Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Estate of Devincenzi, 131 Cal. 452, 63 Pac. 723; Estate of More, 143 Cal. 493, 77 Pac. 407, and other cases which might be cited, and which will be found referred to in the above decisions. Under the authorities, as this appeal was taken before the order was entered, the motion now made to dismiss must be granted unless, as contended by counsel for appellant, the time within which an appeal may be taken in probate proceedings has been enlarged by reason of sections 941a and 941b of the Code of Civil Procedure, and that thereunder the appellant is permitted to appeal from an order made in probate proceedings as in other cases as soon as the judgment or order is rendered, and before its entry in the minute book. His contention is in invoking the aid of these sections that, while it is true that before the adoption of said sections 941a and 941b an appeal could not be taken until after the entry of the order appealed from in the minute book, the effect of these sections is to enlarge the right of appeal so as to permit it to be taken as soon as the rendition of the order by the court and before its entry in the minute book. Section 941a provides that "appeals from all judgments, orders or decrees of any of the superior courts * * * which may, pursuant to law, be reviewed by the Supreme Court, * * * may in addition to other modes prescribed by law be taken pursuant to the provisions of the next section." This next section—941b—provides for the notice of appeal, its contents, and other matters, and declares as to the notice of appeal "that this notice may be filed at any time after the rendition of the judgment, order or decree. * * *" These are the sections, and particularly the latter, under which appellant asserts the right to take the appeal under consideration after the rendition of the order and before its entry.

But these sections, while they are general in their language, and, in the absence of any other controlling provision of the Code, would have the effect claimed for them by appellant, still, by virtue of the limitation imposed by section 1714 of the Code of Civil Procedure, they cannot apply to probate proceedings as far at least as the time within which an appeal may be taken from an order or judgment therein is concerned.

The sections invoked are found in part 2, tit. 13, §§ 936–980, Code Civ. Proc., and apply generally to appeals in "civil actions," and declare when they must be taken. Probate proceedings are embraced in part 3 of title 11 of sections 1294 to 1810 of the same Code, and sections 1714 and 1715 thereof deal with the special subject of appeals from orders or judgments rendered therein, and control on that subject. Under section 1714, the general provisions applying to appeals in civil actions which embrace sections 941a and 941b can only apply to appeals in probate proceedings when they are not inconsistent with the provisions of the title applying to appeals in such proceedings. As section 1715 expressly declares that an appeal in such proceedings may be taken only after the entry of the order or judgment appealed from, and as section 941b, invoked by appellant and found in another title containing general provisions as to appeals in civil actions, provides that an appeal from an order or judgment may be taken after rendition and before the entry thereof, it is quite clear that the two sections are inconsistent with each other in point of time, and hence under section 1714 the time within which an appeal may be taken is controlled by section 1715 and cannot be taken until after the entry of the order. Counsel for appellant contends that both sections can be construed so as to be consistently applied; that section 1715 may be construed as a limitation upon the time within which the appeal may be taken—that is, it cannot be taken after the lapse of 60 days after the entry—but that as to when the right to take it shall accrue section 941b fixes it at any time after the rendition of a judgment or order; that, so construing the sections, they harmoniously tend to fix the rendition as the time when the right to take the appeal accrues, and 60 days after entry as the time when the right is lost. There would be no trouble in so holding if the construction of those two sections were alone concerned. No valid reason can be urged why a party should be denied a right to appeal in probate proceedings immediately on the rendition of the judgment or order and before entry, and granted it generally in all civil actions, and a construction could be readily reached which would accord the enlarged right in all actions or proceedings. The insuperable obstacle, however, to a construction of these sections under the harmonious lines suggested by appellant is the language of section 1714. That section makes applicable to appeals in probate proceedings only those general provisions on the subject, found in part two of the Code, which are not inconsistent with provisions in the title embracing probate proceedings and providing for appeals therein, and excludes all other provisons which are inconsistent with the latter. As section 1715 fixes the time when an appeal may be taken in probate proceedings as after the entry of the order or judgment appealed from, and it has uniformly been held by this court that an appeal taken before that entry was made was prematurely taken, it would be a waste of time to attempt to argue that section 941b, permitting appeals to be taken on rendition of the order before its entry, is not inconsistent with the former section, and hence inapplicable under section 1714 to appeals in probate proceedings. There is such a radical inconsistency in point of time as to when the appeal may be taken under the several sections referred to as render them incapable of harmonious construction, and it necessarily follows that section 1715 must exclusively govern the taking of the appeal under consideration.

In the Estate of Brewer, 103 Pac. 486, a converse proposition to the one involved here was considered by this court. There the motion was to dismiss an appeal from a final decree in probate, on the ground that it was taken more than 60 days after the entry of the decree. Appellant contended in support of his appeal that under section 941b he had six months after the entry of the decree within which to appeal, notwithstanding section 1715 required the appeal to be taken within 60 days after its entry. It was held that the time during which the appeal could be taken under section 941b was inconsistent with the limit prescribed by section 1715 governing probate proceedings, and that under section 1714, in view of this inconsistency, section 1715 exclusively applied. The appeal was therefore dismissed.

The legal situation here is practically identical with that presented in the Brewer Case. The same sections of the Code were under consideration and construction. In that case it was held that under section 1714 only those general provisions governing appeals which were not inconsistent with the provisions as to appeals in probate proceedings found in that title were applicable to the latter; that section 941b allowing an appeal within 6 months after entry of the decree was inconsistent in point of time with section 1715, specially applicable to appeals in probate proceedings, and which provided that the appeal should be taken within 60 days, and hence section 1715 controlled. Equally applicable is that conclusion to the matter at bar. Section 941b is inconsistent with section 1715 in point of time as to when the appeal may be taken; the first provides it may be taken before entry, the latter after entry. This inconsistency renders section 1715 alone applicable and as the appeal under consideration was taken before entry of the order appealed from, when section 1715 provides that it must be after its entry, the appeal was prematurely taken and is dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

13 Cal. App. 13

In re RIORDAN'S ESTATE.

REARDON et al. v. FITZGERALD.

(Civ. 754.)

(Court of Appeal, First District, California. April 27, 1910. Rehearing Denied May 25, 1910; Denied by Supreme Court June 25, 1910.)

1. WILLS (§ 38*)—TESTAMENTARY CAPACITY—INSANE DELUSION.

If a person, against all evidence and probability, persistently believes wholly imaginary facts and conducts himself, however logically, on the assumption of their existence, he is, so far as they are concerned, under an insane delusion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78–81; Dec. Dig. § 38.*]

2. WILLS (§ 38*)—TESTAMENTARY INCAPACITY—EFFECT OF INSANE DELUSION.

If a testator at the time of executing his will was under an insane delusion as to his children in persistently believing, against all evidence and probability, wholly imaginary facts, and conducted himself, however logically, on the assumption of their existence, and provisions of his will disinheriting them were caused or affected by such delusion, the instrument is not his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78–81; Dec. Dig. § 38.*]

3. WILLS (§ 55*)—TESTAMENTARY INCAPACITY—EVIDENCE—INSANE DELUSION.

Evidence *held* insufficient to show that the testator was laboring under an insane delusion as to disinherited children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 142; Dec. Dig. § 55.*]

4. WILLS (§ 38*)—WHAT CONSTITUTES INSANITY—INSANE DELUSION.

One may have a bad temper, and under its influence say and do wrong and unnatural things, and still not labor under an insane delusion as to objects of his hostility.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78–81; Dec. Dig. § 38.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

6. WILLS (§ 82*)—UNNATURAL WILL—WHAT CONSTITUTES.

Relatives with whom testator had made his home for many years after separation from his immediate family, and up to the time of his death, were not unnatural objects of his bounty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Application for the probate of the will of Patrick Riordan, deceased, contested by Daniel James Reardon and others. From the judgment rejecting the will, and from an order denying a new trial, the proponent, James D. Fitzgerald, appeals. Reversed.

Frank J. Hennessy and Stafford & Stafford, for appellant. Wm. M. Cannon, for respondents.

KERRIGAN, J. This is an appeal from a judgment denying probate to the will of deceased, and from an order denying appellant's motion for a new trial.

Patrick Riordan was born in Ireland, and came to California in 1849. He married in San Jose, and there settled on a ranch. His first child was born in 1862, and during the succeeding 16 years he became the father of 12 children, 9 of whom are still living. Upon an original investment of $8,000 he had in the year 1885 accumulated property of the value of $45,000. In that year his wife secured a divorce from him on the ground of his extreme cruelty, and at the same time they agreed upon a division of the community property. Of the ranch, consisting of 231 acres she received 151 acres, and he 80 acres, and the cattle thereon were divided equally between them. Thereafter Patrick Riordan moved a barn or granary from another part of the ranch to within about 200 yards of the Riordan family home, and resided in it for more than two years, thereafter making his home in San Jose and San Francisco until the time of his death. He executed his last will on July 6, 1901, and he died in San Francisco on July 6, 1907. By his will he gave to each of his nine children the nominal sum of $1, and in explanation thereof he stated, "I give my children no more because they have lived apart from me and for other sufficient reasons not here given." To each of two nieces residing in Ireland he bequeathed $2,000. He gave to his nephew James D. Fitzgerald, in trust for the latter's minor son, James R. Fitzgerald, a certain piece of improved real property situated in San Francisco. He nominated James D. Fitzgerald executor of his will, and bequeathed to him the residue of his estate. When this will was offered for probate, it was contested by the children of the decedent, who alleged that their father was of unsound mind and under the undue influence of James D. Fitzgerald when he made the same. The jury found on both of these issues in favor of the contestants. Upon the verdict judgment was entered denying probate to the will. A motion for a new trial was duly made, and denied.

The evidence shows that in 1887 decedent sold his share of the ranch and went to live in San Jose. In 1889 he visited Ireland, and some two years later made a second visit to that country. From the year 1887 until his death he engaged in no regular business, although he bought some real property and occasionally loaned money on security, attending personally to all his own affairs. He went when and where and with whom he pleased. He was a man of intelligence, but very set in his views. He always enjoyed good health until in July, 1907, when he was taken ill with pneumonia, and died after an illness of about six days, being at that time 85 years of age. From 1887 until his death—a period of 20 years—he made his home with the family of Dr. James D. Fitzgerald, his nephew. The proponent of the will called 24 witnesses, intimate acquaintances of the deceased, all of whom testified that he was of sound mind.

The contestants admitted that their father was a sober and industrious man; that he provided them with a good home up to the time of the separation from his wife, when they remained with her; that he sent them to school, visited them there, and attended church every Sunday with his family. They also testified that he was a successful and perfectly sane man in every regard, with the single exception that he entertained an insane delusion as to his children. If a person, against all evidence and probability, persistently believes supposed facts which have no existence except in his perverted imagination, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under an insane delusion. Estate of Scott, 128 Cal. 62, 60 Pac. 527; Estate of Kendrick, 130 Cal. 364, 62 Pac. 605; Estate of Redfield, 116 Cal. 652, 48 Pac. 794. If the testator was the victim of a delusion, as thus defined, in respect to his children at the time he executed his will, and the provisions thereof were caused or affected by such delusion, the instrument is not his will. Seven of the contestants testified at the trial that at the time of the separation of their father and mother in 1884 he was of unsound mind as to his children, basing their opinion upon his harsh and cruel treatment of them. He had an ungovernable temper, and would often become enraged at the children, at such times inflicting upon them, or attempting to do so, the harsh and cruel treatment complained of.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Their testimony is substantially as follows: Several times quarrels with one of the children would involve the whole family, and the mother, with the children, would run out of the house, and while they were outside the decedent would walk up and down the floor with a light in one hand and a club, or some similar instrument, in the other, muttering to himself. When he would retire for the night, at about 2 o'clock, they would crawl through the window into one room, and there the boys would sleep on the floor and the mother and the girls on a bed. Sometimes for some reason or other, and again without apparent reason, he would hit or attempt to hit one or other of his children, or he would swear at them, the term generally employed being, "You damn scoundrel." On one occasion his son Thomas, who was helping his father catch some horses, permitted them to get away. This angered the decedent, and he called the boy a "damn scoundrel." Thomas ran away and his father pursued him into a bedroom where Mrs. Riordan was, and, then addressing Mrs. Riordan, he said, "You damn scoundrel, is that what you are doing?" and he attempted to hit her with a blacksnake, but missed her and cut the window curtain. Thereupon the "mother ran out, and all the folks ran into the yard." On another occasion, upon being informed that the children wanted some books, Riordan hit his eldest son over the back with a rope doubled, threw him against the wall, and said, "You damn scoundrel, it's books you want. I will give you books." He also seized a pitchfork and chased his son into the house. One day at the table his daughter Mary asked for sugar, and he became angry, and, when Mrs. Riordan tried to quiet him, he struck her on the temple with a brass candlestick. On another occasion a daughter asked for butter, whereupon he grabbed a plate to throw at her. Mrs. Riordan interfered and he struck her on the nose. It would be tedious to detail further the testimony. However it is proper to state that there were a number of instances somewhat similar to those just detailed. The children also claimed that their father showed them no paternal affection, and that they were afraid of him. After 1884, and while the decedent was living in the barn, on several occasions he pointed his finger at the children and swore at them, and also on other occasions stated that the loss of his eye (which was removed in 1892) was caused by one of his sons. For the purpose of showing that the condition of mind of the testator as disclosed by these incidents continued to exist down to the time the will was executed seventeen years later, the contestants rely on some deeds, transfers of bank accounts and three wills, including the one in question, by which acts the decedent gave all or nearly all of his property to the Fitzgeralds, and thereby showed, as they claim, a persistent and fixed desire to prevent them from receiving any of his estate. Not a witness other than the children testified that the decedent was without testamentary capacity; and ignoring the remoteness of this testimony, and assuming that the condition of mind of the decedent toward his children in 1885 was shown to exist in 1901 when the will was made, still we think the testimony only disclosed that the deceased was harsh and cruel and was afflicted with an ungovernable temper, and that it utterly fails to show that he was laboring under any insane delusion. A person may have a bad temper, and under its influence say and do wrong and unnatural things, and still not be laboring under an insane delusion as to the objects of his hostility.

In the Estate of Kendrick, 130 Cal. 364, 62 Pac. 607, it is said: "Prejudice, dislikes, and antipathies, however ill founded, or however strongly entertained, cannot be classed as insane delusions, nor is every delusion an insane delusion." In the case of In re Spencer, 96 Cal. 452, 31 Pac. 454, it was said: "The likes and dislikes of human beings—their confidences and mistrusts—are often capricious and arbitrary; but they are not evidence of insanity because they cannot be logically defended to the satisfaction of those who think them wrong. In the case at bar there is no warrant for the claim that the testatrix's dislike of her daughter-in-law and her family was an insane delusion. It was simply such a feeling, arising out of the recondite principles of attraction and repulsion, as is quite common among people of undoubted sanity." In the Estate of Carpenter, 94 Cal. 419, 29 Pac. 1105, Judge Temple observes: "People may hate their relations for bad reasons, and yet not be deprived of testamentary power." In Weston v. Hanson, 212 Mo. 248, 111 S. W. 44, although it was claimed that the testator was of unsound mind, the will was upheld. The court in so holding said: "We are not to lose sight of the fact that the testator's brutal treatment of his wife, as shown by the evidence in this case, is not one of the tests of testamentary capacity, for a man may be unkind and brutal in his treatment of his wife, and yet have capacity to make a will." In Conner v. Skaggs, 213 Mo. 334, 111 S. W. 1132, where the will was upheld, the testator disinherited his daughter, because she married against his wishes. We quote from that case: "Many witnesses testified to Mr. Skaggs' exceeding and sore bitterness over this event, and for some time he did not speak of it without falling into a very ecstacy of rage, sometimes accompanied by such physical phenomena as 'foaming at the mouth,' 'pawing the grass,' and cursing and swearing. The record makes it clear that in the height of his bitterness he determined to disinherit his disobedient daughter. He told others he would do so. Accordingly, on the 28th day of February (the month of the marriage), the will in contest was executed, doing that very thing. * * * The resentment of the father was most human and natural, though extravagantly exhibited. That he did not rise to the lofty and divine plane of complete forgiveness when time had healed his wounds is unfortunate, but is still natural and human —not insanity." In Schneider v. Manning, 121 Ill. 381, 12 N. E. 269, the court says: "A man may become prejudiced against some of his children, and that too without proper foundation; and because he may make unjust remarks about them—remarks not warranted by the facts—it does not follow that he has insane delusions, or that he is devoid of testamentary capacity."

Whatever belief or opinion the testator may have entertained against the children when the will was executed, still the record fails to show that there was no reason for such belief or opinion, or that he adhered to it against all evidence and argument. In 1884 he and his wife were separated, and in 1885 they were divorced. The dates of the different acts of cruelty toward the children are not stated, but, basing their opinion upon these acts, those of the children who testified on the subject, gave it as their opinion that the testator was of unsound mind in the years 1884 and 1885. Presumably the trouble between the testator and his wife had much to do with his exhibitions of temper. Riordan doubtless felt compelled to, and indeed did, make a generous division of his property with his wife. In this trouble the children sided with their mother, and, if the decedent had made his will in 1885 disinheriting his children, it certainly could not be said that such act was without reason; much less could it be said of such a will made 16 years later, the children in the meantime having reached adult age, and their path in life having made them and their father strangers. Indeed, conceding the right of testamentary disposition, it is difficult to understand how the children could have expected their father to make any testamentary disposition in their favor. After the year 1884 none of them ever called upon him or wrote to him. They ignored him then, and they continued to ignore him for 22 years and down to the time of his death. When any of them met him on the street, they crossed to the other side or passed him by without speaking. Doubtless some of his children would have been unable to recognize him if brought face to face, or he to recognize some of them. They did not inform him of the death of their mother, which occurred in 1905. Their conduct showed clearly that they did not care for their father; and while, in disinheriting them, he may not, as counsel says, have set an example of Christian charity, still so far from such course being the result of insanity it strikes us as a very natural thing to do. "Where it appears that testator's belief is not so fixed that he could not be reasoned out of it, it will not be held to be a delusion." Skinner's Will, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

Little need be said on the question of undue influence. The decedent had shown for years a desire to leave the principal part of his estate to the Fitzgeralds. As before remarked, Riordan was a man of considerable intelligence with very fixed opinions, and no doubt it would have been difficult, if not impossible, to persuade him how to dispose of his property. He made three wills, and in each of them he practically disinherited his children. His last will was not a deathbed will made by a feeble old man, but it was made six years before his death and when he was in robust health. It was made without suggestion from any one; in brief, it was made free from any suspicious circumstances. Finally, we think nothing was more natural than that the decedent should have bequeathed his estate, as he did, to the Fitzgeralds, with whom he had made his home for many years. They were the natural objects of his bounty.

For these reasons, we think the verdict is not supported by the evidence. The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

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13 Cal. App. 305

MORRELL v. SAN TOMAS DRYING & PACKING CO. et al. (Civ. 720.)

(Court of Appeal, First District, California. April 26, 1910. Rehearing Denied by Supreme Court June 23, 1910.)

1. Sales (§ 334*)—Construction of Contract—Time for Delivery.

Where a contract for the sale of prunes provided for delivery to be made as directed, final delivery before November 30th, and the buyers extended the time for performance by the seller to May 1st following, the buyers could control the time of delivery till November 30th, but the extension was for the benefit of the seller and the buyers were bound to accept performance when he offered it, so that a resale by him on April 15th after their refusal to accept was not premature.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 334.*]

2. Sales (§ 339*)—Remedies of Seller—Action for Breach of Contract—Pleading.

Where a contract for the sale of prunes stated a basis price, and provided that a certain amount should be added to the price or deducted therefrom for such prunes as were above or below standard size, the complaint in an action for the buyers' breach of contract alleging that on resale by the seller after refusal of the buyers to accept a certain sum was received leaving a certain sum as deficiency, without stating the sizes of the prunes resold nor showing what was the standard size, was subject to demurrer for indefiniteness, under Civ. Code § 3311, fixing the damages for a buyer's breach of contract where the property is resold at the excess of the amount due from the buyer over the proceeds of the resale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 926; Dec. Dig. § 339.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. Sales (§ 339*)—Remedies of Seller—Action for Breach of Contract—Sufficiency of Evidence.

In an action for buyers' breach of a contract to purchase prunes at a certain basis price, with increase or deduction where the prunes were above or below standard size, where the evidence failed to show the size of prunes which the buyer refused to accept and which were resold, it was insufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 339.*]

4. Evidence (§ 455*)—Parol Evidence—Construction of Contract—Identification of Subject-Matter.

In an action for breach of a contract for the sale of prunes grown and dried on the M. ranch, oral testimony that the term "M. ranch" meant three ranches leased and worked by the seller was admissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 455.*]

5. Appeal and Error (§ 1003*)—Review—Questions of Fact.

An appellate court will not disturb the verdict of the jury though it appears to be against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. § 1003.*]

6. Sales (§ 85*)—Performances of Contract—Substantial Performance.

Where a contract provided for the sale of prunes grown and dried on the M. ranch, the fact that a portion of the prunes were dried on a neighboring place is not a material variation from the requirements of the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 85.*]

7. Witnesses (§ 239*)—Cross-Examination—Scope and Extent.

In an action for buyers' breach of contract to purchase prunes, where a witness testifies on direct examination that on a resale of the prunes they were purchased by a party after examination and acceptance by it, cross-examination as to whether the prunes could be used in the process employed by the second buyer that would not be suitable for shipping in boxes should be permitted, the direct testimony being for the purpose of showing that the prunes were merchantable.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949–954; Dec. Dig. § 269.*]

8. Damages (§ 68*)—Elements—Interest.

Under Civ. Code, § 3311, fixing damages after breach of contract to purchase at the difference between the contract price and the net proceeds of resale, and section 3357, in the same chapter, providing that the damages prescribed by the chapter are exclusive of exemplary damages and interest except where those are expressly mentioned, interest is improperly allowed in such a case, notwithstanding section 3287, in another chapter, authorizing interest on damages from the day the right thereto vests.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141–143; Dec. Dig. § 68.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by J. B. Morrell against the San Tomas Drying & Packing Company and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed, with directions.

Will M. Beggs and R. C. McComish, for appellants. W. A. Bowden, for respondent.

HALL, J. This is an appeal from a judgment, and also from the order denying defendants' motion for a new trial. The defendants demurred to the complaint both generally and specially, and the first point to be considered concerns the action of the court in overruling this demurrer.

Plaintiff and defendants entered into a contract June 12, 1907, for the sale by plaintiff to defendants of a crop of prunes grown in 1907. The contract is in writing, and the facts pertinent to this discussion as set out in the complaint are as follows: "Moulton's Switch, Santa Clara Co., Cal. 6/12, 1907. Received from the San Tomas Drying & Packing Co. the sum of one dollar ($1.00) as part of purchase money for the following described fruit, viz.: The entire crop of dried Fr. prunes, season 1907, and estimated at 100 tons, and grown and dried on the orchard known as Morrell Ranch-Wrights, f. o. b. cars Wrights, tested at Wrights. Prunes to be on the five point, with one dollar per ton to be added to basis price for each and every point that the prunes average larger than the five point, and one dollar per ton to be deducted from basis price for each and every point that the prunes average smaller than the five point. (It is understood by the five point that prunes must run 35—45—55—65—75—85—95—105—115 per pound.) All fruit to be sound and merchantable and well dried, free from slab, of choice quality and delivered f. o. b. packing house, situated on the Infirmary Road, Santa Clara Co., California, packed in sacks furnished by buyer, original condition as taken from the drying yard. * * * San Tomas Drying and Packing Company agrees to pay balance of purchase money as soon as the delivery is completed and sizes determined. Delivery to be made as directed, final delivery before Nov. 30, 1907. * * * Buyers, San Tomas Drying and Packing Co. For account of Balfour, Guthrie & Co., per H. Booksin, Jr. Seller, J. B. Morrell."

It is alleged that defendants subsequently in writing extended the time for performance by plaintiff to the 1st day of May, 1908; that the entire crop of dried prunes referred to in the contract amounted to 172,698 pounds, and that under the contract defendants agreed to pay therefor the sum of $6,004.37; that plaintiff delivered to defendants, and defendants accepted and received, 134,132 pounds of said prunes and no more; "that on the 15th day of April, 1908, the said plaintiff offered and tendered to said defendants the remainder of said prunes, viz., 38,566 pounds thereof, and then and there offered to deliver the same to the defendants according to the terms of said contract"; that defendants refused, and ever since have refused, to accept the same or any thereof; "that on Saturday, April 25, 1908, having first given the defendants reasonable notice of the time and place of resale, the plaintiff resold the said 38,566 pounds of prunes at public auction for and on account of said defendants for the sum of $1,285.45, leaving a deficiency of $870.89, no part of which has been paid"; "that the expenses attendant upon such resale amount to the sum of $309.39, no part of which has been paid."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is first urged that the general demurrer should have been sustained because the contract provided for delivery to be made as directed, and that the resale took place before the expiration of the time of performance given by the extension pleaded. We do not think this point well taken. The time of performance under the original contract expired November 30, 1907. Until this time arrived defendants could control the time of delivery. The extension pleaded was an extension of time for plaintiff to perform, and, when plaintiff within that time offered to perform, defendants were bound to accept if in other respects the offer was in accordance with the contract. Upon defendants' refusal to accept the tendered fruit, plaintiffs were justified in reselling the same. It is also urged that it cannot be ascertained how the deficiency of $870.80 was determined. For this reason it is separately alleged in the demurrer that the complaint is uncertain and ambiguous.

Nowhere in the complaint is there any statement as to what was the agreed price under the contract between plaintiff and defendants of the rejected 38,566 pounds of prunes. What amount defendants under the contract were obligated to pay for such rejected prunes is nowhere stated. Neither is there any general statement of damages to plaintiff in any given sum resulting from defendants' breach of contract. While it appears from the contract set out in the complaint that defendants agreed to pay a basis price of "4¾," it also appears that the actual price to be paid varied at the rate of $1 per ton below or above such price as the prunes should vary in size below or above the size understood as the standard for the basis price. Nowhere does it even appear what size of prunes is taken as the standard for the basis price. And no attempt is made to state what sizes of prunes were tendered and rejected. So even if we assume that the words "price 4¾ basis" means 4¾ cents per pound, this only informs us that such is the price of prunes that are of the size taken as the standard for the basis price. But it also appears that this price is to be varied with the varying sizes of the prunes delivered. It is thus impossible to determine what was the amount to be paid under the contract for the 38,566 pounds of rejected prunes. The amount to be paid for the rejected prunes is not stated in a lump sum nor at all, nor is any data given from which the amount may be ascertained by calculation.

While it is stated in the complaint that the rejected prunes were resold for $1,285.45, "*leaving a deficiency of $870.80*," it is not stated that this is the deficiency or difference between the contract price and the proceeds of the resale, nor is any data given from which it can be determined that it is. "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: (1) If the property has been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale." Civ. Code § 3311. The pleader probably intended to bring himself within this section, but has failed to show with sufficient certainty or at all that the *deficiency* referred to is the difference between the contract price of the rejected prunes and the amount for which they were resold. The court therefore erred in overruling the demurrer.

The jury returned a verdict for $1,172.29 in favor of plaintiff, which was reduced by the court to $1,080.19. The sufficiency of the evidence to support the verdict is attacked upon the ground, among others, that there is no evidence to show what was the amount due from defendants to plaintiff for the 38,566 pounds of rejected prunes. The plaintiff in his proof seems to have been consistent with his pleading; for while he nowhere in his pleading showed what was the amount that should have been paid by defendants for the 38,566 pounds of prunes, so in his evidence he made no proof thereof. There is no evidence in the record as to what should have been paid under the contract for the 38,566 pounds of prunes. While it is admitted by the pleadings that the basis price was 4¾ cents (?) per pound, neither the pleadings nor the evidence shows what size of prunes was taken as the standard for the basis price, and neither the pleadings nor the evidence shows what were the sizes of the prunes rejected.

As before stated, the price to be actually paid for the prunes varied from the basis price as the prunes varied in size from the standard size taken for the basis price. Nowhere in the evidence does any one attempt in general terms even to state what was due under the contract for the rejected prunes, and no data is given from which the amount may be determined by calculation. Where, as here, the plaintiff seeks to recover the difference between the contract price and the amount realized on a resale of personal property it is essential to prove what was due under the contract of sale as well as what was realized on the resale, in order to determine what was such difference. It is true that the record does show that the bulk of the rejected prunes were resold at a basis of 2½ cents per pound, which is 2¼ cents less than the contract basis. But this data is not sufficient, for we are still in the dark as to what were the sizes of the rejected prunes and what was the actual contract price therefor. For these reasons we think that the evidence does not sustain the verdict.

As a matter of fact the complaint in express terms alleges that the amount agreed to be paid by defendants for the entire crop sold under the contract was the sum of $6,004.37, and the evidence shows without dispute that defendants in fact paid for the prunes accepted $6,455.71. If the allegation is correct that the contract price of the entire crop amounted to but $6,004.37, then the proof shows without dispute that the plaintiff has been paid more than was due him for the entire crop. The plaintiff while on the stand as a witness suggested that the allegation in the complaint was probably a mistake, but no effort was made to amend or correct the allegation.

The contract calls for prunes grown and dried on the Morrell ranch. The plaintiff was in fact working under leases three ranches, to wit, the Morrell home place, the Norton ranch and the Rhodes ranch, and the prunes in question were grown on the three places. It is claimed that the court erred in permitting the plaintiff to show by oral testimony that the term "Morrell ranch" in the contract meant the places then leased and worked by Morrell, the plaintiff. We think, however, that the court did not err in so doing. The three places were leased and in the possession of Morrell the plaintiff. The contract estimated the entire crop of dried prunes at 100 tons. The crop in fact produced on the three ranches did not amount to that quantity. There was such an ambiguity in the contract as to authorize oral evidence to identify the subject of the contract. The evidence objected to simply proved that by the term "Morrell ranch" the parties meant the orchards leased and worked by Morrell.

Much evidence was given to the effect that the rejected prunes did not meet the requirements of the contract as to quality, but upon this point there is a conflict in the evidence. The preponderance of the evidence upon this point seems to be against the plaintiff, but this court cannot disturb the verdict of the jury for this reason.

The fact that a portion of the prunes grown on the Norton place were dried on a neighboring place does not seem to be a material variation from the requirements of the contract.

After permitting the plaintiff to prove that the rejected prunes were finally bought for the Presto Fruit Company after examination and acceptance by them, the court sustained objections to questions on cross-examination put by defendants as to what was done with the prunes, and whether or not prunes could be used in the process employed by the Presto Company that would not be suitable for shipping in boxes. In this we think the court unduly restricted the right of cross-examination. The evidence in chief was manifestly offered to support the proposition that the prunes were merchantable and complied with the contract. The weight of this evidence might have been materially affected if on cross-examination it should have been shown that the prunes in question were used in a process not requiring choice fruit.

The court erroneously instructed the jury that they might allow interest upon any amount that they might find to be due plaintiff from the date of the rejection of the prunes, if they found the rejection to have been unjustifiable.

The rule for fixing damages in such a case as this is laid down in sections 3311 and 3357 of the Civil Code. The first of those sections fixes the damages at the difference between the contract price and the net proceeds of the resale, where, as in this case, a resale is made pursuant to section 3049 of the Civil Code, and makes no provision for interest. The second section (3357) provides that "the damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned." The two sections are in the same chapter and must be read together, and so read, clearly exclude the allowance of interest. The rule given in the instruction of the court accords with section 3287 of the Civil Code, but this section is in a different chapter from that containing sections 3311 and 3357, which are specially applicable to this case and must govern. Hewes v. German Fruit Co., 106 Cal. 441, 39 Pac. 853.

The judgment and order are reversed, and the court below is directed to sustain the demurrer, with leave to plaintiff to amend if so advised.

We concur: COOPER, P. J.; KERRIGAN, J.

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13 Cal. App. 344

MERRYMAN et ux. v. KIRBY et al.

(Civ. 620.)

(Court of Appeal, Third District, California. April 29, 1910.)

1. EJECTMENT (§ 65*)—ACTIONS—ALLEGATIONS OF COMPLAINT—OWNERSHIP OF PROPERTY.

The complaint in ejectment alleged that "plaintiffs now are and during all times herein mentioned were, either the owners of, or their immediate grantors were the owners of, the land described," and that "said plaintiffs or their said grantors were the owners in fee of those certain lots, and are such owners now and during all of the times herein mentioned, and in possession thereof," and that while so possessed defendants entered, etc. *Held*, that the complaint sufficiently alleged plaintiffs were the owners of the property sought to be recovered when the action was begun.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 165–174; Dec. Dig. § 65.*]

2. PLEADING (§ 403*) — DECLARATION — DEFECTS—CURE BY ANSWER.

Even if the complaint was defective in not sufficiently alleging plaintiffs' ownership, allegations of the answer denying "that the plaintiffs now are or during all the times hereinafter mentioned, or at any other time, or at all were, either or any of them, the owners of the lands" described, cured the defect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344, 1345; Dec. Dig. § 403.*]

3. EJECTMENT (§ 63*) — ACTIONS — ALLEGATIONS OF COMPLAINT.

Plaintiffs in ejectment need only allege ownership and possession at defendants' entry, ownership at the commencement of the action, and defendants' unlawful entry and withholding possession of the premises.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 154–157; Dec. Dig. § 63.*]

4. EJECTMENT (§ 64*) — ACTIONS — ALLEGATIONS OF COMPLAINT — DESCRIPTION OF PROPERTY.

The complaint in ejectment described the property to be recovered as that part of lot No. 4 of section 31 in township 8 N., range 1 E., H. B. & M., "described as follows, to wit: Commencing at the southwest corner of the southeast quarter of said section 31, and running thence north two chains to a stake, thence west to where said line would intersect the westerly line of said lot four, thence southerly along the westerly line of said lot four to the southwest corner of said lot four, thence east to the place of beginning." *Held*, that the land was sufficiently described in the complaint so that the officer executing the possessory writ would know the land to which plaintiff would be entitled if he recovers.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 158–164; Dec. Dig. § 64.*]

5. BOUNDARIES (§ 54*)—PRESUMPTIONS—OFFICIAL ACTS—GOVERNMENT SURVEY.

It is presumed that a government survey was properly made and the corners thereof regularly established, so that in the absence of contrary evidence it must be presumed that the corners of a government survey were marked so as to be easily identified.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 474; Dec. Dig. § 54.*]

6. APPEAL AND ERROR (§ 907*) — PRESUMPTIONS—PRESUMPTIONS TO SUPPORT JUDGMENT.

A judgment for plaintiff in ejectment must be affirmed on appeal notwithstanding any insufficiency in the allegations of the complaint as to the description of the property where the evidence was not brought up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by H. B. Merryman and wife against George Kirby and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

H. L. Ford, Adam Thompson, and R. T. Devlin, for appellants. E. M. Frost and A. J. Monroe, for respondents.

BURNETT, J. The action is in ejectment, and the appeal is upon the judgment roll alone from the judgment in favor of plaintiffs. No demurrer to the complaint was interposed, but the appellants now contend that the complaint states no cause of action. In this connection it is asserted that there is no allegation as to ownership of the property at the time of the commencement of the action. Citation is made of authorities to the effect that "plaintiffs must show that at the time of the commencement of the action they have the proper title or interest to support the action of ejectment" (Moore v. Tice, 22 Cal. 513), and "he must also have the right to the possession of the land disputed" (Hawxhurst v. Lander, 28 Cal. 331).

But there are at least two sufficient answers to the contention of appellants. The first one is that the complaint does allege that plaintiffs are the owners of said property, and, secondly, if this were not so, the averments of the answer would cure the defect. The allegation is "that the plaintiffs now *are*, and during all the times herein mentioned were, either the owners of, or their immediate grantors were the owners of, the land and premises hereinafter described," etc. The term "owners" is clearly inplied after the word "are," and it is safe to say that no one could misunderstand such to be the meaning of the pleader. Again, it is alleged "that said plaintiffs or their said grantors were the owners in fee of those certain lots, * * * and are such owners now and during all of the times hereinafter mentioned and in the possession thereof, that while so possessed defendants on or about the ——— day of May, 1907, without right or title so to do, entered that portion of said lot number 4 of said section described as follows, to wit." We have, therefore, the allegation of ownership and possession by plaintiffs at the time of the entry of defendants, the allegation of ownership at the time of the commencement of the action, and that defendants unlawfully entered the premises and still withhold the possession thereof from plaintiffs. These are all the averments required in an action of this character. Payne v. Treadwell, 16 Cal. 243; Keller v. Ruiz De Ocana, 48 Cal. 638; Johnson v. Vance, 86 Cal. 128, 24 Pac. 863. Again, the defendants in their answer "deny that the plaintiffs *now are*, or during all the times hereinafter mentioned or at any other time or at all were, or either or any of them were the owners of * * * the lands and premises," etc.

In Vance v. Anderson, 113 Cal. 536, 45 Pac. 817, it is said: "We shall, however, assume that it was the duty of the plaintiff to tender to the defendants an issue as to her seisin or ownership at the date of the bringing of the suit. But the defendants did not wait, as they might well have done, for such tender, for in their answer they not only denied the seisin and right to possession of the plaintiff on the 1st of May, 1894, but added 'or at any other time, or at all, or is now seised in fee,' etc., as above quoted. When defendants thus tendered an issue as to the seisin of plaintiff up to the time the action was brought, and that issue was tried and determined against the defendants, it was too late to raise the objection here."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellants are equally at fault in the claim that the land is insufficiently described. "In ejectment, the land should be so defined that in the event of a recovery, the officer executing the writ of possession will know to what land plaintiff is entitled, and thus be enabled to effect the purpose of the action." Bay State M. & T. Co. v. Jackson, 27 Colo. 139, 60 Pac. 573. But it must be manifest that the description here does not appear on its face to be insufficient to identify the property so that it can be located upon the ground. The description is "That portion of said lot number four of said section (section 31 in township 8 N., R. 1 E., H. B. & M.) described as follows, to wit: Commencing at the southwest corner of the southeast quarter of said section 31, and running thence north two chains to a stake, thence west to where said line would intersect the westerly line of said lot four, thence southerly along the westerly line of said lot four to the southwest corner of said lot four, thence east to the place of beginning."

We must assume, in the absence of evidence to the contrary, that the corners referred to in the description are marked so as to be easily identified. To hold with appellants would be in the face of the presumption that the government survey was properly made and the corners regularly established. It has been held that the premises may be sufficiently described by a particular name by which they are known, by their boundaries, by number, by lot and concession, or by section and township. Or it may be sufficient to describe the land as a part of a section of a certain survey. Cyc., vol. 15, pp. 93, 94; Pellier v. Gillespie, 67 Cal. 583, 8 Pac. 185. But even if the pleadings left the matter in doubt the judgment would have to be affirmed, since the evidence has not been brought up. In Thompson v. Connolly, 42 Cal. 315, it was contended that the verdict in describing and locating the division line between the two parcels of land was too vague and uncertain to support the judgment, but the court said: "In support of this proposition, it is said that the line of the Hill tract is a mere imaginary line, and that the map furnishes no data for its correct location, nor for ascertaining the quantity of land awarded to the parties severally, or the precise location of either parcel. But we cannot assume that the line of the Hill tract is a purely ideal line, having no visible existence on the ground. For aught that appears, it may be defined by visible monuments, and its exact location may be a matter of notoriety in the vicinity. All the intendments are in support of the judgment, and there is nothing in the record to raise a reasonable doubt that the land awarded to the plaintiff and defendant can be located with entire precision."

The cases cited by appellants are not opposed to respondents' contention herein, and need not be specifically noticed.

We can see no merit in the appeal, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 348

PEOPLE v. WEBSTER (Cr. 215.)

(Court of Appeal, First District, California. April 29, 1910.)

1. Homicide (§ 244*)—Unlawful Killing—Evidence.

Where accused and decedent quarreled in a saloon, and then separately left the place, accused going away and arming himself, and they met there again in half an hour, accused of his own volition returning to the saloon where decedent was, and accused then shot and killed decedent, the jury could find that the killing was unlawful and not in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 507–509; Dec. Dig. § 244.*]

2. Homicide (§ 332*) — Appeal — Self-Defense—Question for Jury.

Whether a homicide was committed in self-defense is for the jury, and their verdict is conclusive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699–704; Dec. Dig. § 332.*]

3. Criminal Law (§ 823*)—Instructions—Sufficiency.

Where the court correctly charged on the presumption of innocence and on the right of accused to have his guilt established beyond a reasonable doubt, a charge that if, after a consideration of the evidence, the jury were not "fully satisfied" that accused was guilty, they should acquit him, was not prejudicial because of the use of the quoted words instead of the usual expression, "satisfied to a moral certainty and beyond a reasonable doubt."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995; Dec. Dig. § 823.*]

4. Criminal Law (§ 778*)—Instructions—Presumptions.

Under Code Civ. Proc. §§ 1961, 1963, providing that the jury are bound to find according to a disputable presumption, not contradicted, and declaring that the presumptions that an unlawful act was done with an unlawful intent, and that a person intends the ordinary consequences of his voluntary act, are disputable, an instruction that a person must be presumed to intend to do that which he voluntarily does do, and must be presumed to intend the natural and probable consequences of his acts, and in the absence of evidence to the contrary this presumption must prevail, is not erroneous because of the use of the word "must," for it states that one must be presumed to intend the natural consequences of his acts unless there is evidence direct or indirect to controvert the presumption.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846, 1847, 1850; Dec. Dig. § 778.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Criminal Law (§ 823*)—Instructions.

Where the court charged that accused had a right to act on appearances, an instruction that to justify homicide on the ground of self-defense it must appear that the danger was so urgent that the killing of the assailant was absolutely necessary, etc., though not in conformity with Pen. Code, § 197, subd. 3, providing that a homicide is justifiable when committed in lawful defense when there is reasonable ground to apprehend a design to do some great bodily injury, and there is imminent danger of the design being accomplished, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995; Dec. Dig. § 823.*]

6. Homicide (§ 300*) — Self-Defense — Instructions.

Under Pen. Code, § 197, subd. 3, providing that homicide is justifiable when committed by one in the lawful defense of his person when there is reasonable ground to apprehend a design to do some great bodily injury, and imminent danger of the design being accomplished, a charge that to justify homicide on the ground of self-defense it must appear that the danger was so urgent that the killing of the assailant was absolutely necessary, etc., was not an accurate statement of the law.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614–632; Dec. Dig. § 300.*]

7. Homicide (§ 116*)—Self-Defense—"Attack Warranting One in Killing Assailant."

An unlawful attack warranting one in killing his assailant is such an attack as puts him, as a reasonable person, in fear of being killed or of receiving great bodily harm, and one cannot deliberately proceed in the immediate exercise of a mere technical right when he has reason to know that by so doing he will be placed under the necessity of killing another in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158–163; Dec. Dig. § 116.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

George Webster was convicted of manslaughter, and he appeals. Affirmed.

T. D. Ingersoll, L. J. Schino, and B. F. Foller, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. Defendant was informed against by the district attorney of the county of Fresno for the crime of murder. He was tried and found guilty of manslaughter. He moved for a new trial, which motion was denied, and he was thereupon sentenced to imprisonment in the state prison for the period of 10 years. This is an appeal from the judgment, and from an order denying defendant's motion for a new trial.

The defendant and the deceased on July 18, 1909, quarreled in a saloon in Coalinga, Fresno county. Separately they left the saloon, and within half an hour met again in the same place. They engaged in a second quarrel, as the result of which the defendant (who in the interval between the two quarrels had armed himself with a pistol) shot and killed the deceased. The defendant claims that the evidence is insufficient to support the verdict of the jury.

The evidence shows that the defendant fired three shots at and into the body of deceased, and that deceased was unarmed at the time. While the defendant and deceased had been engaged in a quarrel a short time before, the facts that defendant went away, armed himself, and of his own volition returned to the saloon where the deceased was, and then and there shot and killed deceased, were sufficient to justify the jury in the inference that the killing was unlawful, and not in necessary self-defense as claimed by defendant. Whether the killing of deceased was done in self-defense was a question peculiarly for the jury, and it is not our province to interfere with their verdict. Under such circumstances the verdict of the jury is final and conclusive. People v. Emerson, 130 Cal. 562, 62 Pac. 1069; People v. Stokes, 11 Cal. App. 759, 106 Pac. 251.

The court instructed the jury that: "Laws are made and juries called to investigate cases just as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you are not fully satisfied that the defendant is guilty, you must say so by your verdict. By so doing the object of the law will be as fully attained as if you were to find a verdict of guilty." Defendant complains of this instruction because the words "fully satisfied" were used, and not the more usual expression "satisfied to a moral certainty and beyond a reasonable doubt." It would be difficult to conceive of a case in which a jury could be "fully satisfied" and at the same time not be satisfied "to a moral certainty and beyond a reasonable doubt." Passing the point that on the whole this instruction is favorable to the defendant, we think the part complained of could not have injured him, for the defendant's right to be presumed innocent and to have his guilt established beyond a reasonable doubt was so often and clearly stated to the jury that they must have understood his right in that behalf. In the case of People v. Flynn, 73 Cal. 511, 514, 15 Pac. 102, 103, the trial court had employed the word "satisfied" instead of the words "satisfied beyond a reasonable doubt," and it was claimed that the instruction was erroneous. The court said: "Looking at the whole charge, it will be found that the words 'beyond a reasonable doubt' are repeated fifteen times. * * * Taking, then, the whole charge, and reading, as we must, the different parts of it together, it appears that the jury were clearly told that they could not find the defendant guilty of burglary of the first degree, or at all, unless they were satisfied of his guilt beyond a reasonable doubt. We are unable, therefore, to see how the defend-

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ant could have been prejudiced by the part of the charge objected to."

The court also instructed the jury as follows: "A person must be presumed and is presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts, and therefore, if one person assails another violently with a dangerous weapon likely to kill, and which does in fact destroy the life of the person assailed, the natural presumption is that such assailant intended death, or other great bodily harm. In the absence of evidence to the contrary this presumption must prevail."

Section 1963 of the Code of Civil Procedure enumerates certain disputable presumptions, and in part provides:

"Subd. 2. That an unlawful act was done with an unlawful intent.

"Subd. 3. That a person intends the ordinary consequences of his voluntary act."

Defendant claims that this instruction was at variance with the statute, and in using the word "must" that it in effect deprived the defendant of the benefit of the presumption of innocence. We perceive no sound basis for an objection to this instruction. While the instruction states that a person must be presumed to intend the ordinary consequences of his voluntary act, it also, in compliance with section 1961, Code Civ. Proc., states that said presumption applies in the absence of evidence to the contrary; that is to say, the defendant must be presumed to intend the natural and usual consequences of his act, unless there is evidence, direct or indirect, to controvert this presumption.

The most serious question in the case arises as to the instruction given by the court at the request of the people upon the subject of what constitutes justifiable homicide. The instruction is as follows: "To justify homicide on the ground of self-defense, it must appear that the danger was so urgent and pressing that, in order to save the life of the slayer, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further struggle before the fatal shooting."

Subdivision 3 of section 197 of the Penal Code provides that homicide is justifiable when committed by a person "in the lawful defense of such person when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished." Defendant contends that the court, by the use of the words "absolutely necessary," incorporated into the instruction an element not warranted by the statute; that the jury were told that a defendant in a criminal case is justified in killing his assailant when the facts and circumstances make it absolutely necessary, or, in other words, that he had no right to act upon apparent necessity. To support his position he cites People v. Flahave, 58 Cal. 249, which, it must be conceded, is squarely in point and upholds defendant's position. But the case has not been followed. People v. Bruggy, 93 Cal. 476, 29 Pac. 26; People v. Westlake, 62 Cal. 303. In People v. Cord, 108 Pac. 511, the instruction is upheld. But we are able in this case, as was the Supreme Court in the case of People v. Morine, 61 Cal. 369, where the same instruction was considered, to say that other instructions given qualify and explain the objectionable instruction, and that the charge read as a whole correctly presents the law on the subject. In that case there were three instructions which explained the one questioned. Here there are at least seven, and they were so full and clear that the jury must have understood that the defendant had a right to act upon appearances. In conclusion, we feel constrained to say that the instruction is not an accurate statement of the law and should not have been given.

The court refused to give the following instruction: "In this case the defendant had a right to go back to the saloon for the purpose of procuring a drink or for any lawful purpose, even if he expected to be attacked by the deceased on the way, or after he had entered the place, and if he was for that purpose in this saloon he had a right to be there, and his going did not of itself take away from him the right of self-defense if unlawfully attacked."

The right of self-defense is too broadly stated in this instruction. The unlawful attack which would warrant a defendant in killing his assailant is such an attack as would put him, as a reasonable person, in fear of being killed or of receiving great bodily harm; and any unlawful attack falling short of this would be unavailable as a defense in a charge of homicide. A simple assault would be an unlawful attack, yet it would not justify homicide.

There was one other instruction similar to the one just discussed proffered by the defendant and refused by the court, but it also stated the rights of the defendant too broadly. We do not believe, as was assumed in the instruction, that a person can deliberately persist in the immediate exercise of a mere technical right when he has reason to know that by so doing he will be placed under the necessity of killing a human being in self-defense.

We have examined the other instructions complained of, but find them without error.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

13 Cal. App. 327

PEOPLE v. REESE. (Cr. 129.)

(Court of Appeal, Third District, California. April 27, 1910.)

1. Criminal Law (§ 1081*)—Appeal—Notice.

In a criminal case in which judgment was rendered prior to the going into effect of Pen. Code, § 1239 (St. 1909, c. 711), providing that defendant may appeal from a judgment in a criminal case by announcing in open court, "at the time judgment is rendered," that he appeals from the same, defendant to have taken an appeal must have served and filed a written notice of the same, as prescribed by section 1240, as it read before the change in the method of taking appeals in such cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722–2724; Dec. Dig. § 1081.*]

2. Criminal Law (§ 1130*)—Appeal—Dismissed—Failure to File Brief.

Under Supreme Court Rule 5 (78 Pac. viii) failure of appellant in a criminal case to file a brief or points and authorities justifies dismissal of the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2965; Dec. Dig. § 1130.*]

Appeal from Superior Court, Siskiyou County; J. F. Lodge, Judge.

John Reese was convicted of manslaughter, and attempted to appeal. Record ordered to be stricken.

B. K. Collier and Beard & Beard, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant was convicted of the crime of manslaughter under an information charging him with the crime of murder. The transcript does not show that an appeal has been taken from either the judgment or the order denying defendant's motion for a new trial.

A certificate of the clerk of the trial court on file in this court discloses "that there never has been, nor is there now, any written notice of appeal in said case of the People of the State of California vs. John Reese, Defendant, entered in the clerk's register in my office, and that no notice of appeal of any kind whatever is to be found in any of the records or papers in said case of the People of the State of California vs. John Reese, Defendant, in my office." Judgment in this case was pronounced on May 12, 1909, and as section 1239 of the Penal Code (St. 1909, p. 1086), which provides that an appeal from a judgment in a criminal case may be taken by the defendant "by announcing personally or through his attorney in open court at the time the judgment is rendered that he appeals from the same," did not go into effect until June 21, 1909, it is very plain that the defendant, in order to have succeeded in taking an appeal, should have served and filed a written notice of the same, as prescribed by section 1240 of the Penal Code, as that section read prior to the change in the method of taking appeals in criminal cases. Having failed to pursue the course prescribed for appealing from the judgment at the time judgment was rendered against him, this court is without jurisdiction to review the record filed here.

There is in fact no appeal here in any sense of the proposition, for there is not any evidence of even an attempt to take an appeal, while, on the contrary, the certificate of the clerk of the court below shows, as we have seen, that there is nothing in the records of the cause disclosing that any attempt was made to take any appeal whatsoever. The appellant has not filed a brief, or points and authorities, and this omission would alone be sufficient to justify the dismissal of an appeal, if one had been taken. Rule 5, Supreme Court (78 Pac. viii).

From the foregoing, it is clear that there is nothing left for this court to do but to order the transcript or record herein stricken from the files of this court, and such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

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13 Cal. App. 234

LOS ANGELES COUNTY v. WINANS et al. (Civ. 693.)

(Court of Appeal, Second District, California. April 15, 1910. Rehearing Denied by Supreme Court June 13, 1910.)

1. Deeds (§ 128*)—Estates and Interests Created—Remainders.

Civ. Code, § 779, provides that when a remainder is limited to the heirs of the body of a life tenant, the persons who, on termination of such estate, are heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of such owner. *Held*, under such section, that the remainder in a deed to one for life, with remainder to the heirs of her body, was an interest which the remaindermen took by purchase, and not by inheritance.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 128.*]

2. Deeds (§ 133*)—Estates and Interests Created—Remainders.

In view of Civ. Code, § 695, declaring a future interest contingent, while the person or event on which it is limited to take effect remains uncertain, the interest of remaindermen in a deed to one for life, remainder to the heirs of her body, was a contingent interest, since it was future in character, and the person in whom and the time of the happening of the event on which it was limited to take effect were both uncertain at the time of its creation, and it could not become vested till death of the life tenant, since she could have no "heirs" till her decease.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*]

3. Remainders (§ 4*)—Validity—Contingent Remainder.

In view of Civ. Code, § 697, declaring that a future interest is not void merely because of the improbability of the contingency on which it is limited to take effect, the interests of grandchildren of one given an estate for life, with remainder to the heirs of her body, are not void because of improbability of the contingency on which they are limited to take effect.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 2; Dec. Dig. § 4.*]

4. Deeds (§ 133*)—Estates and Interests Created—Remainders.

The interests of grandchildren of one given an estate for life, with remainder to the heirs of her body, should not be regarded as mere possibilities, such as the expectancy of an heir apparent, which by Civ. Code, § 700, are not to be deemed interests of any kind.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 133.*]

5. Deeds (§ 133*)—Estates and Interests Created—Remainders.

Civ. Code, § 694, declaring a future estate to be vested when there is a person in being who would have a right, feasible or indefeasible, to immediate possession, on the ceasing of the intermediate or precedent interest, does not apply so as to vest the remainder at once in children of a grantee for life with remainder to the heirs of her body.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 133.*]

6. Deeds (§ 133*)—Estates and Interests Created — Remainders — "Alternative Contingent Remainder."

The remainder created by deed to one for life, remainder to the heirs of her body, is a future interest which will vest in grandchildren whose father or mother, the child of such tenant, fails to survive her, and is an alternative contingent remainder under Civ. Code, § 696, providing that two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 133.*]

7. Deeds (§ 133*)—Estates and Interests Created—Remainders.

In case of a deed to one for life, remainder to the heirs of her body, the remainders to children and to children of deceased children, are not remainders expectant, the one to take effect after the other, but are contemporary.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*]

8. Judgment (§ 681*) — Conclusiveness — Persons Represented by Parties.

That interests in remainder of grandchildren of a life tenant in a deed to one for life, remainder to the heirs of her body, were and are contingent instead of vested, does not preclude application to them of the principle of virtual representation in judicial proceedings affecting their interests, when they were unborn at the time of the adjudication, if the proceedings were such as to otherwise justify it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. § 681.*]

9. Judgment (§ 677*) — Conclusiveness — Persons Represented by Parties.

The protection of one whose property is brought into court by representation, is to be found in his right to attack the decree on the ground of fraud or collusion in its procurement, and in the absence of such attack, the decree is final and conclusive as to the status of the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1193; Dec. Dig. § 677.*]

10. Judgment (§ 677*) — Conclusiveness — Persons Represented by Parties.

The principal of virtual representation as to persons not parties can be relied on in support of a judgment only as a matter of necessity, and never as a matter of convenience, and the form of the action is not controlling, though it is to be considered in connection with the circumstances of the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1193; Dec. Dig. § 677.*]

11. Judgment (§ 681*)—Conclusiveness — Persons Represented by Parties—Persons Unborn.

In a case where property is necessary for a public use, and the court can by decree protect interests of persons unborn, the necessity of relying on the principle of representation to acquire jurisdiction of such interests, is apparent.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. § 681.*]

12. Judgment (§ 681*) — Conclusiveness — Persons Represented by Party.

The rule as to the representation by a party of persons unborn in respect to their interests in property in litigation does not apply, unless the interests of representative and represented are so identical that the motive to protect and preserve may be assumed to be the same in each.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. § 681.*]

13. Municipal Corporations (§ 519*)—Lien for Street Improvement—Foreclosure—Title Affected.

The proceedings under the street improvement act of 1885 (St. 1885, c. 153) were intended to subject to the lien created by the law the entire title of the property affected thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 519.*]

14. Judgment (§ 677*) — Conclusiveness— Persons Represented by Parties—"Owner."

St. 1885, c. 153, § 16, relating to foreclosure of liens for street improvements, making the executor, administrator, or guardian of the "owner" and persons in possession under claim or exercising acts of ownership over the same, also "owners" for the purposes of the law, recognizes constructive or virtual representation as sufficient to give jurisdiction of the property in the equitable action to be brought against the "owner," pursuant to section 12, though the proceeding be held not to be one in rem because the res is not made defendant.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 677.*

For other definitions, see Words and Phrases, vol. 6, pp. 5134–5151; vol. 8, p. 7744.]

15. Liens (§ 22*)—Foreclosure—Decree.

It is not necessary that a suit in equity to foreclose a lien be strictly in rem to subject the entire property to payment of the debt, but all interests are constructively before the court where service is made in accordance with the statute, whether on the person or the thing, and a decree may be made effective as to all persons interested in the property to the value thereof in the same manner that the law makes a judgment against an estate, a judgment in personam against the administrator, which is enforceable only to the extent or value of the estate held by him.

[Ed. Note.—For other cases, see Liens, Dec. Dig. § 22.*]

16. Liens (§ 22*)—Foreclosure—Decree.

Decrees foreclosing liens effective as to all persons interested in the property to its extent or value as effectually binds the property as if it were attached or seized or made defendant in the action.

[Ed. Note.—For other cases, see Liens, Dec. Dig. § 22.*]

17. MUNICIPAL CORPORATIONS (§ 579*)—LIEN FOR STREET IMPROVEMENTS—FORECLOSURE SALE—TITLE AND RIGHTS OF PURCHASERS.

Acquiring in foreclosure of liens for street improvements jurisdiction of the interests of unborn grandchildren of a life tenant, afterwards entitled as remaindermen, did not effectually vest such interests in purchasers at the sales under the foreclosure decrees, because of their agreements with the life tenant and with each other and which became merged in and were succeeded by a declaration of trust by their successor in title for the benefit of the life tenant and the heirs of her body.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 579.*]

18. MUNICIPAL CORPORATIONS (§ 579*)—LIEN FOR STREET IMPROVEMENTS—FORECLOSURE—SALE—TITLE AND RIGHTS OF PURCHASERS.

A purchaser at a foreclosure sale, who agreed to hold only the legal title in trust with the equitable rights of remaindermen fully acknowledged, was bound to know he was dealing with the life tenant, who might be protecting her own holding at the expense of remaindermen, and yet whose efforts to protect the property and all agreements made by her having this effect must redound to the advantage of the remaindermen.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 579.*]

19. JUDGMENT (§ 681*)—CONCLUSIVENESS—PERSONS REPRESENTED BY PARTIES.

Where property held under a deed to one for life, remainder to the "heirs of her body," was conveyed by the life tenant and her daughter, their interests became hostile to that of other "heirs of her body" and the legal obligation to protect the title of their grantee rendered them incompetent to represent other contingent remaindermen, and their appearance no longer operated to give jurisdiction of the others in suits affecting title, and the doctrine of virtual representation could not apply to the vendee of the life tenant and her daughter in an action to quiet title against the other remaindermen.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 681.*]

20. JUDGMENT (§ 677*)—CONCLUSIVENESS—PERSONS NOT PARTIES—ACTION TO QUIET TITLE.

Code Civ. Proc. § 738, providing for action by any person "against another" who claims an estate or interest in real property adverse to him, to determine such adverse claim, etc., does not authorize adjudication of the right, claim, interest, or title of any one not before the court.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 677.*]

21. JUDGMENT (§ 668*)—CONCLUSIVENESS—PERSONS BOUND BY DECREE—PERSONAL OR CONSTRUCTIVE SERVICE.

Where a service of summons is made constructively the proceeding becomes, to a certain extent, one in rem, but the decree in such a case cannot adjudge the rights of any person not included in the service, and in case of either personal or constructive service, only the interests of persons served and of those whom they expressly or virtually represent are affected by the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1183; Dec. Dig. § 668.*]

22. LIFE ESTATES (§ 18*)—DUTY TO PAY TAXES AND STREET ASSESSMENTS.

The duty to pay taxes and street assessments rests primarily on the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 39, 51; Dec. Dig. § 18.*]

23. LIFE ESTATES (§ 25*)—AUTHORITY TO LEASE PROPERTY.

Subject only to the limitations of the life estate, a life tenant is entitled to the possession and may lease the property for any term.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 47; Dec. Dig. § 25.*]

24. GUARDIAN AND WARD (§ 116*)—CHILDREN UNDER GUARDIANSHIP—AUTHORITY TO SUE THEREFOR.

A mother is not authorized to sue for her children for whom her husband is the regularly appointed guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 116.*]

25. GUARDIAN AND WARD (§ 81*)—LEASE OF PROPERTY—APPLICATION THEREFOR—CONSENT OF COURT.

If authority or consent of any court were necessary to lease his wards' property, a guardian should apply to the probate court to which he owes his appointment, and he could not go into a court of equity to procure the authority.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 81.*]

26. GUARDIAN AND WARD (§ 41*)—MAINTENANCE AND SUPPORT OF WARD—INVESTMENT IN REAL ESTATE—CHANGE OF FORM.

In view of Code Civ. Proc. §§ 1768, 1770, 1792, providing for orders of court in such cases, a guardian cannot without an order subject an interest in real estate of his ward to his maintenance or support, nor change the form of an investment therein.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 41.*]

27. GUARDIAN AND WARD (§ 45*)—CONTRACTS—AUTHORITY OF GUARDIAN TO CONTRACT.

A guardian cannot bind his ward's property by contract without an order of court, and his attempt to do so cannot result in giving to the party, with whom he contracted, right to a lien for labor done or materials furnished under the contract.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 45.*]

28. GUARDIAN AND WARD (§ 41*)—LIEN ON WARD'S PROPERTY—POSSESSION OF GUARDIAN.

A guardian, who could not by direct act dispose of the property of his ward, could not do so indirectly.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 41.*]

29. MECHANICS' LIENS (§ 291*)—FORECLOSURE—JUDGMENT—COLLATERAL ATTACK—PRESUMPTIONS.

In a collateral attack on a judgment foreclosing a mechanic's lien, it must be presumed in support of the judgment that a finding of knowledge and consent as to the material furnished and labor performed was such knowledge and consent as would sustain the decree.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 291.*]

30. JUDGMENT (§ 681*)—CONCLUSIVENESS—PERSONS REPRESENTED BY PARTIES.

On the foreclosure of a mechanic's lien on property conveying to one for life, with remainder to the heirs of her body, minor children of the life tenant could not, by their consent to the judgment against them, bind her grandchildren.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 681.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

31. MECHANICS' LIENS (§ 263*)—FORECLOSURE —NECESSARY PARTIES—OWNERS OF PROPERTY.

While a proceeding to foreclose a mechanic's lien is "in its essential nature" in rem, it is not a proceeding whereby property alone is made defendant in the action to foreclose, and the owner must be made a party if his property is to be charged with the claim for which the lien is given.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 471–481; Dec. Dig. § 263.*]

32. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTION OF FACT.

A finding on question of fact below is conclusive on appeal, where there is evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Condemnation proceedings by the County of Los Angeles against E. H. Winans and others. From judgments in favor of plaintiff and from orders denying a motion to set aside findings and for a new trial, Winans and other defendants separately appeal. Affirmed.

See, also, 109 Pac. 650.

Waldo M. York (John M. York, of counsel), for appellant Winans. Waldo M. York and Haas, Garrett & Dunnigan, for appellant Cole. Haas, Garrett & Dunnigan, for appellant Anderson. Bernard Potter, for appellant T. F. Joyce. Smith & Smith, for appellant S. A. Joyce. Valentine & Newby, for respondents Means and Hendricks. Davis & Rush, for respondents Wannop & Forbush. Mott & Dillon, for respondent Henry J. Pauly & Co. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for other respondents.

TAGGART, J. This is a proceeding in eminent domain brought by the county of Los Angeles to acquire lands upon which to construct a hall of records. Interlocutory decree and final order or judgment of condemnation were entered in favor of plaintiff. By the former the court, besides finding the value of the premises condemned, ascertained and adjudged the rights of the respective defendants in the property and apportioned among them the sum decreed to represent the value of the property condemned.

Separate appeals were taken by each of the appellants Winans, Cole, Anderson, and Joyce from the final judgment, from the interlocutory judgment, and from the orders denying their respective motions to vacate and set aside certain findings, and their motions for a new trial. No objection is made to the value of the property fixed by the court, but its apportionment among the various defendants is questioned.

On June 27, 1881, J. E. Hollenbeck, who was the owner in fee simple of all the lands affected by this proceeding, executed a deed conveying said lands to Mrs. Emma Means "for and during the term of her natural life and upon her death to the heirs of her body"; the habendum clause of said deed reading: "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, for life, remainder to the heirs of her body." J. E. Hollenbeck died in the year 1885, leaving, as the sole executrix of his will and residuary devisee of his estate, his wife, Elizabeth Hollenbeck, who, after the regular distribution to her of said premises, and on the 28th day of June, 1887, made a deed of all her interest in said lands to said Emma Means. At the time of the making and delivery of the former deed there were living three children, heirs of the body of said Emma Means, to wit: Elfie O. Means, Claude E. Means, and J. Worthington Means; two other children have since been born to her, as follows: Fairy A. Means (now Blee), about three years thereafter, and Juliet E. Means, born in the year 1890. The defendants Chester Kenneth Hendricks, Elizabeth Rosine Hendricks, James Bryan Hendricks, Merle Raymond Hendricks, Esther Georgia Hendricks, and Clarence Donald Hendricks are grandchildren of said Emma Means and children of the defendant Elfie O. Hendricks (formerly Means); and the defendants Claude Edward Means and Dorothy Matele Means are also grandchildren of said Emma Means, being children of said defendant Claude E. Means.

The defendants who are appellants here claim to have succeeded to the title to various portions of said premises together, including the entire property, by sales thereof made in various proceedings to foreclose street assessments, mechanics' liens, etc., had in the superior court of Los Angeles county, and by virtue of certain decrees quieting their titles so acquired, made by the same court. The portions claimed by the appellants are respectively designated as follows: That of Winans as lot 4; that of Cole as lot 5; and that of Joyce as lot 6, all of the "Court House Block" in the city of Los Angeles. Lot 4 comprises the east half of the condemned lands; lot 5 the southwest quarter, and lot 6 the northwest quarter thereof.

The trial court found, in effect, as to each of the said appellants Winans, Cole, and T. F. Joyce that he had acquired all the right, estate, and interest of Emma Means as life tenant and as successor to the estate of J. E. Hollenbeck, deceased, and of her children as remaindermen in and to the portion of the condemned property claimed by said appellant, but that he did not acquire the rights, interest, or estate of the grandchildren of Emma Means in said premises. The finding in this respect as to the Hendricks grandchildren and lot 4 being as follows: "The defendants Hendricks, children of defendant Elfie O. Hendricks, have an interest in said lot four (4) contingent upon the death of their mother, Elfie O. Hendricks, during the lifetime of the said Mrs. Emma Means, and also contingent upon their surviving said Mrs. Emma Means; and upon the happening of said contingencies they, or the survivor or survivors of them, will be the owners of an interest and estate in fee in said lot four by virtue of said deed of J. E. Hollenbeck as heirs of the body of said Mrs. Emma Means, the extent of which cannot now be determined." Similar findings were made as to the other lots, and also as to all the lots, in favor of the other grandchildren, Claude Edward Means and Dorothy Matele Means, children of Claude E. Means. The appellant Anderson's interest is found to be that of mortgagee of the interest of appellant Cole in lot 5.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appellants attack these findings (other than the last) and the conclusions of law drawn therefrom and the directions of the court as to the disposition of the funds in accordance therewith, and contend: (1) That the remainder created by the deed of J. E. Hollenbeck vested at once in the children of Emma Means, under the provisions of section 694 of the Civil Code; (2) that whether such remainder be regarded as vested or contingent, service of process upon and the appearance in the various proceedings by Mrs. Means, her children with the guardian of the latter, by application of the principle of virtual representation, operated to bind the interests of the grandchildren yet unborn; and (3) that certain of the proceedings were in rem and jurisdiction of the interests of the grandchildren was obtained by following the statutory method of bringing the property into court.

The proceedings in which it is claimed jurisdiction of the interests of the unborn grandchildren was thus acquired so as to estop or bar them from now claiming any interest in the sum found to be the value of the property are as follows: In support of the titles of Cole and Winans (which may be considered together), the following judgment rolls: (a) The rolls in actions Nos. 14,109 and 10,983 to foreclose street-assessment liens against certain portions of said property, brought against Mrs. Emma R. Means, her husband, J. W. Means, the defendants named herein who are children of Emma R. Means, and W. E. Rogers, who is the lessee of Mrs. Means, and also of the children under a proceeding in equity (No. 8,616) by their mother and guardian to obtain consent to the execution of a lease in their name; (b) that in an action to quiet title, No. 18,501, by Abbott, the successor in title of the purchasers at the sales made pursuant to the decrees in the above-mentioned foreclosure proceedings, against Mrs. Means, her husband and children; (c) that in an action (No. 21,002) brought by Winans against Abbott, trustee, etc., Mrs. Means, husband and children, to foreclose a mortgage on the portions of the premises now claimed by Winans and Cole; (d) that in an action to quiet title to the same premises, No. 24,146, by Gosch, the successor in title to the purchaser (McCollum) at the commissioner's sale made in execution of the decree in action No. 21,002, against four of the Means children, J. Worthington Means, Claude E. Means, Fairy A. Means, and Juliet E. Means, minors; (e) and that in an action by the same plaintiff to quiet title (No. 28,196) against Mrs. Means, her husband and five children. Incidental to and explanatory of these proceedings, it is also necessary to consider the effect of the proceeding No. 8,616 above referred to, and of probate proceeding No. 5,874; of the lease of Mrs. Means and children to W. E. Rogers, and the deeds, mortgages, and other instruments through which the parties to these respective actions and proceedings acquired the rights upon which such actions were based. These are as follows: Sheriff's deed in No. 14,109 to A. J. Mead, and deed of latter to R. W. Abbott; sheriff's deed in No. 10,983 to Stella M. Johnson; her deed to Charles A. Cole and the deed of the latter to R. W. Abbott; a declaration of trust by R. W. Abbott for the benefit of Emma Means and the heirs of her body; mortgage of Abbott, trustee, to Winans; a deed by Mrs. Means to Charles A. Cole; deed by Mrs. Means and her daughter Elfie O. to M. McCollum; deed by McCollum et ux., to C. H. Gosch, and the deed of Emma R. Means, Elfie O. Means, and J. W. Means to C. H. Gosch.

In support of the contention of appellants Joyce (T. F. and S. A.) that the interests of the grandchildren in lot 6 were acquired by them, the following additional proceedings and matters are relied upon: The judgment rolls in: (f) a consolidated action to foreclose certain mechanics' liens on the building constructed by Rogers, lessee, under the lease above mentioned (No. 12,444) against Rogers, Mrs. Means, her husband and children; and (g) in an action to quiet title, No. 19,205, brought by Horace Hiller, who purchased the property at the sale under the decree foreclosing the mechanics' liens, against Mrs. Means, her husband individually and as guardian of the children, the five children and others whose names are not material here.

Under the Code of this state the remainder granted to the heirs of the body of Emma Means by the deed of J. E. Hollenbeck was an interest which the remaindermen took by purchase, and not by inheritance. Civ. Code, § 779. It was a contingent interest, since it was future in character, and the person in whom, and the time of, the happening of the event upon which it was limited to take effect, were both uncertain at the time of its creation. These uncertainties both continued to exist until after the various proceedings were had upon which appellants base their respective titles. Section 695. It did not and could not become vested until the death of the life tenant, since she could have no "heirs" until her decease. In the interval all of her children might die, leaving the entire estate to the second generation, or the grandchildren. The interests of the latter are not void because of the improbability of the contingency on which they are limited to take effect. Section 697. Neither can their interests be regarded as mere possibilities, such as the expectancy of an heir apparent (section 700), as they do not depend upon the law of succession to determine whether or not they will take effect, and they cannot be defeated by the testamentary or other act of the ancestor. It is also apparent that section 694 has no application here. That section is, in effect, the enactment into a statute of the rule laid down in Fearne on Contingent Remainders and Executory Devises: "The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." Butler's (6th Ed.) p. 216. This declaration should be read in connection with the language of Fearne which immediately follows it, to wit: "In short, upon a careful attention to this subject we shall find, that wherever the preceding estate is limited, so as to determine on an event which must certainly happen; and the remainder is so limited to a person in esse, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate is limited so as to determine only on an event which is uncertain, and may never happen, or wherever the remainder is limited to a person not in esse or not ascertained, or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent." Page 217.

In Williamson v. Williamson, 57 Ky. 329, 368, it was said of the rule distinguishing a contingent from a vested remainder, first above quoted from Fearne: "This principle, however general and universal it may be, has no application in a case like this, where the event which renders the possession vacant also resolves the contingency upon which the limitation depends, and makes that certain which was before uncertain. The possession becomes vacant by the death of the ancestor, and by the same event the persons who properly sustain the character of 'heirs' are ascertained and rendered certain. This rule, therefore, cannot operate as a test in a case like this, where the estate in remainder is given to the heirs of the same person who is devisee for life."

The remainder which we are considering is a future interest which will vest in those grandchildren of Mrs. Means whose father or mother, child of Mrs. Means, fails to survive the grandmother, and is an alternative, contingent remainder under section 696 of the Civil Code. In some of its characteristics it resembles the "contingent remainder, or alternative remainder in fee, with a double aspect," of the common law. Such estates usually arose where a remainder was limited to the issue of some person named, and, upon failure of such issue before the death of the life tenant, to some other person in the alternative. Of the estates so created it is said they are both contingent fees limited merely as substitutes or alternatives one for the other, and not to interfere, but so that only one shall take effect; for instance, the fee of the grandchild in the case at bar being substituted in place of the fee of its father or mother if the latter should fail of effect by the grandmother surviving such father or mother. Pingrey on Real Property, § 1008. The one remainder is a substitute for, and not subsequent to, the other. Neither is, by its terms, to wait until the other shall have once taken effect and afterwards been determined. Washburn on Real Property (6th Ed.) § 1575; Tiedeman on Real Property, § 415; Fearne on Contingent Remainders, 373; Waddell v. Rattew, 5 Rawle (Pa.) 234. They are not remainders expectant, the one to take effect after the other, but are contemporary. Luddington v. Kime, 1 Ld. Raym. 203; 91 English Reports, King's Bench (Reprint) p. 1035. The taking by the unborn remainderman is not a contingency dependent upon a contingency, but the same contingency which may happen several ways. Plunket v. Holmes, 83 English Reports, p. 17.

The conclusion that the interests in remainder of the defendant grandchildren were and are contingent instead of vested does not preclude the application to them of the principle of virtual representation, if the proceedings in which such representation was exercised were such as to otherwise justify it. The rule as to virtual representation is stated broadly by the Supreme Court of the United States in Miller v. Texas & Pacific R. Co., 132 U. S. 672, 10 Sup. Ct. 209 (33 L. Ed. 487), by recognizing the holding of Lord Redesdale in Giffard v. Hort, 1 Schoale & Lef. 386, as follows: "Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court *before he has issue*, the contingent remaindermen are barred. Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." So, also, the New York court in Kent v. Church of St. Michael, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693, uses the following language: "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons." The rule is declared in Story's Equity Pleadings, § 144, and its limitations considered in the sections following. See, also, Finch v. Finch, 2 Ves. Sr. 491, 28 Eng. Rep. p. 316; Reynoldson v. Perkins, Amb. 564, 27 Eng. Rep. p. 362; Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Eng. Rep. p. 1007; Harrison v. Wallton, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 867, 20 L. R. A. 247; McCampbell v. Mason, 151 Ill. 500, 38 N. E. 675; Miller v. Foster, 76 Tex. 479, 13 S. W. 531; Hermann v. Parsons, 117 Ky. 239, 78 S. W. 125; Dunham v. Doremus, 55 N. J. Eq. 511, 37 Atl. 62; Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652, 40 L. R. A. 127, 64 Am. St. Rep. 301.

The rule and its reason are declared in Sweet v. Parker, 22 N. J. Eq. 455, as follows: "Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit. The reason or principle of such exceptions is stated as follows in Calvert on Parties, § 2, p. 20: 'If they are required to be parties merely as the owners and protectors of a certain *interest*, then the proceedings may take place with an equal prospect of justice if that interest receives an effective protection from others. It is the *interest* which the court is considering, and the owner merely as the guardian of that interest; if, then, some other persons are present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required, and the court may, without putting any right in jeopardy, take its usual course and make a complete decree.'" The rule is made applicable to representation of persons living, as well as those unborn, as in the case of an association whose members are numerous. Cockburn v. Thompson, 16 Ves. Jr. 321, p. 326; 33 Full Reprint, Eng. Rep., p. 1007. This principle is carried into our statutes by the provisions of section 388 of the Code of Civil Procedure, where the joint property of all may be bound by serving the summons upon one or more of a larger number of associates. Other statutory proceedings based thereon might be named. The doctrine is said by some of the cases to be applied only where the law regards the interest of the representative so identical with that of the person represented that motives of self-interest will induce the person acting as the representative to defend the property as his own. Other cases following the suggestion in Calvert on Parties urge in support of the rule the motives of affection where the representative of the unborn child is its parent; all, however, holding that all persons in being capable of appearing who are interested must be brought into court. The protection of a person whose property is brought into court by such representation is to be found in his right to attack the decree on the ground of fraud or collusion in its procurement. In the absence of such attack, the decree is final and conclusive as to the status of the property. Baylor v. Dejarnette, 13 Grat. (Va.) 152; Faulkner v. Davis, 18 Grat. (Va.) 651, 690, 98 Am. Dec. 698. These two cases have been more recently approved in the case of Harrison v. Wallton, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830. See, also, Ruggles v. Tyson, 104 Wis. 500, 79 N. W. 766, 81 N. W. 367, 48 L. R. A. 809; Mayall v. Mayall, 63 Minn. 511, 65 N. W. 942; Mathews v. Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558; Gray v. Smith (C. C.) 76 Fed. 525, 532; Arndt v. Griggs, 134 U. S. 321, 10 Sup. Ct. 557, 33 L. Ed. 918.

The application of the principle as here contended for is not a common one, and no decision by a court of this state so applying it has been called to our attention. The convenient use, which it served in extricating involved real estate titles at common law and in common-law jurisdiction, does not appeal with equal force to conditions existing under the Code, although it is true, as said by some of the cases, that it is in accord with the trend of modern law toward making real property as readily transferable as is consistent with fair dealing and protection against fraud. That it tends to furnish some certain and convenient method of determining all unsettled questions respecting such titles, and that the well-being of every community requires the latter. Arndt v. Griggs, 134 U. S. 321, 10 Sup. Ct. 557, 33 L. Ed. 918, is not alone sufficient to justify its indiscriminate adoption. So well have these matters been covered by statute that its application has become not only unusual but generally unnecessary.

The better reasoned of the later cases hold that it can be relied upon in support of a judgment only as a matter of necessity, and never merely as a matter of convenience. The form of the action is not controlling, but is, of course, to be considered in connection with the circumstances of the case. The necessity for relying upon some such principle to acquire jurisdiction of the interest in real property of persons unborn is apparent, "where the estate is sold under a regular and valid judgment, and the proceeds of sale take its place and are secured in some way for such persons" (Kent v. Church, supra), since this includes the caring for and preserving of the rights of the persons so represented; it is also readily apparent where the purpose of the suit in which such persons are said to be so represented is for the administration of a trust estate by a court of equity so as to protect the interests of the unborn, as well as those who are in being, against the danger of destruction by tax and other liens which affect the entire title (Ruggles v. Tyson, supra); or in a case such as the one at bar where the property is necessary for a public use and the court can by decree protect the interests of the party said to be so represented. So where a trust is created without a power of sale and it is necessary for the preservation of the trust estate that it be sold, this principle is properly invoked to acquire jurisdiction of the persons not in being (Mayall v. Mayall, supra). It is more difficult, however, to follow the reasoning underlying these decisions into those cases in which it has been held that where a mortgagor after making the mortgage conveys the mortgaged property upon such conditions as to create an interest therein in unborn persons, a foreclosure suit brought by the mortgagee against all interested persons living, or all the parties that could be brought before the court, enables a court of equity to enter a decree barring the equity of redemption of the persons not in esse. Sweet v. Parker, supra; Nodine v. Greenfield, 7 Paige (N. Y.) 544, 34 Am. Dec. 363. In these cases, however, the interest of the unborn person, who is so represented, is such only as his grantor had in the property at the time the deed was made, that is, whatever would be left after the debt secured by the mortgage had been paid. So, also, in cases in which the judgment has been adverse, thus absorbing the entire estate of both the living and those not in esse, it is not easy, at first sight, to see how it can be said that anything is being done to preserve or protect the interest of the unborn. In such cases, as in those first mentioned, the living remainderman is called upon to protect such an estate as he and the other party has, and if the result of the decree of the court be to declare there is no estate, or that such as there is should be applied to the payment of the liens which exist against it, the representative has done all that the represented could have done, had he been present. If the sole purpose of the appearance of a living remainderman in an action were to secure some advantage to himself, or merely to serve the convenience of the party whose title was being quieted against the unborn remaindermen, virtual representation could not be presumed to exist, and any judgment obtained by virtue of such pretended representation could be set aside on the ground of fraud or collusion when the unborn remainderman became capable of suing in his own right. Where, however, he has the same interests to preserve in the property that the unborn person would have if he were present, and his acts in connnection therewith are such that, from the advantage to the person not in esse, it can be assumed the latter will adopt them, the acts of the living remainderman in protecting the property against attack may be said to come within the reason of the rule. The interests of representative and represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each.

Considering the effect of this doctrine upon the various judgment rolls and documents hereinabove mentioned, we are of opinion that the proceedings under the street improvement act of 1885 (St. 1885, c. 153), as the statute read at the time when the foreclosures in actions Nos. 10,983 and 14,109 were decreed, were intended to subject to the lien created by the law the entire title of the property affected thereby. As was said in Gillis v. Cleveland, 87 Cal. 217, 25 Pac. 352: "Thus it appears that the expense of the improvement is a charge upon the property benefited, and not a charge against the owner personally. In furtherance of this end, the identity of the lot assessed, and not the person who may be the owner, is made the essential requirement of the statute; the first must be specifically described, while the latter may be designated as 'unknown,' as in the present case. Nowhere in the statute does any intention appear to charge the owner personally." But section 12 of the act also provides that the contractor may sue "the owner of the land, lots or portions of lots"; that the suit must be brought in the superior court within whose jurisdiction the work was done, service in such actions to be had in such manner as is prescribed in the codes and laws of this state; and that "the court in which said suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts." St. 1889, p. 168. It was also said in Page v. Chase, 145 Cal. 578, page 583, 79 Pac. 278, page 279: "In this state the Legislature has authorized its enforcement by means of a suit in equity against the 'owner' of the land; and in section 16 of the street improvement act (St. 1885, p. 159), the 'owner' is defined to be, for the purposes of that act, 'the person owning the fee, or in whom appears the legal title to the land by deeds duly recorded in the county recorder's office of the county.' There is no provision that the land shall be made the defendant in such action, or that service of process shall be made upon it. * * * It would not be contended that (because the assessment was made to an unknown owner) the contractor could select any person he might choose as the defendant in his action and bind the land by the judgment therein, as against its actual owner, as defined in section 16." The quotation from section 16 by the court in this opinion was no doubt sufficient for the purposes of that case, but it omits a portion of the definition important here, that is, the provision which makes the executor administrator or guardian of the owner," and persons in possession under claim, or exercising acts of ownership over the same also "owners" for the purpose of the law. The statute itself thus recognizes a constructive or virtual representation as sufficient to give the court jurisdiction of the property in the equitable action to foreclose the lien provided for, even though the proceeding be held not to be one in rem, for the reason that the res is not made a defendant.

If the view expressed in Page v. Chase, supra, that a judgment for the sale of the property in such a proceeding will not bind the entire world, or affect the interests in the property of any owner not made a party defendant to the action, be accepted, this does not prevent the application of the rule of virtual representation. If the proceeding were strictly in rem, there would be no necessity to invoke any principle of representation except the one that the property in court represents all its owners and claimants. It is not necessary that a suit in equity be strictly in rem to subject the entire property to the payment of the debt. All interests in the property are constructively or virtually before the court when the service is made in accordance with the statute, whether this be upon the person or the thing. A decree in equity may be made effective as to all persons interested in the property to the value thereof in the same manner that the law makes a judgment against an estate a judgment in personam against the administrator, which is enforceable only to the extent or value of the estate held by him. Decrees in equity are frequently made effective in this way and the property is as effectually bound as if it were attached or seized or made the defendant in the action. Richards v. Blaisdell, 106 Pac. 732; Stacy v. Thrasher, 6 How. 44, page 61, 12 L. Ed. 337; Heidritter v. Oil Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729.

The acquiring of jurisdiction of the interests of the grandchildren by these proceedings did not effectually vest these interests in the purchasers at the sales made under the respective decrees, because of the respective agreements made by them with Mrs. Means and with each other, and which became merged in and were succeeded by the declaration of trust by R. W. Abbott for the benefit of Emma R. Means and the heirs of her body. None of the subsequent proceedings or steps taken released the successors in title of Abbott from the trust obligation to hold for the benefit of the unborn remaindermen. The action to quiet title by Abbott (No. 18,501) resulted in the making of the declaration of trust by him for the benefit of Mrs. Means and "the heirs of her body." The mortgage of Abbott to Winans was executed by the former under and by virtue of a contract with Mrs. Means and was to secure obligations primarily imposed upon her as life tenant of the property. The most favorable view for appellants that can be taken of this transaction is that the amount named in the mortgage was the sum found necessary to prevent the sale of the entire property under the street foreclosure proceedings, and, the transaction being for the preservation of their estate, the interests of the unborn remaindermen were bound by the decree in the action (No. 21,002) to foreclose the mortgage. While of opinion that the case before us is to be distinguished from those cited by appellants in this connection (Sweet v. Parker, 22 N. J. Eq. 455; Nodine v. Greenfield, 7 Paige [N. Y.] 544, 34 Am. Dec. 363, and English cases), we regard this as unnecessary, because, as in the case of the street assessments, the purchaser at the sale (M. McCollum) entered into an agreement whereby he became only the legal holder of the title with the equitable rights of the remaindermen in the property fully acknowledged. He, like the previous purchasers of the property, was bound to know that he was dealing with the life tenant, who might be protecting her own holding at the expense of the remaindermen, and yet whose efforts to protect the property, and all agreements made by her having this effect, must redound to the advantage of the remaindermen.

In the first action to quiet title by Gosch (No. 24,146) Mrs. Means and her daughter, Elfie O. Means, were not made parties defendant, they having prior to that time conveyed the property to McCollum by a grant deed, and Gosch having succeeded to McCollum's interests therein. So, also, as above stated, subsequent to the conveyance by McCollum to Gosch and prior to the commencement of the second action to quiet title (No. 28,196) Mrs. Means, her husband, and her daughter made a quitclaim deed of said premises to Gosch. By the making of the grant deed the interests of Mrs. Means and her daughter Elfie became hostile to that of the other "heirs of her body." Their legal obligation to protect the title of their grantee rendered them incompetent to represent the others in the manner in which they had theretofore done. It could no longer be said that there was an identity of interest and motive between them and the other contingent remaindermen. Their appearance no longer operated to give jurisdiction of the others to the court. The plaintiff had succeeded to the interests of Mrs. Means and her daughter in the property, and being himself hostile he could not appear for the contingent remaindermen, although he had acquired the interests of one of them. The first action being by the vendee of the life tenant for the purpose of destroying the remainder, and the second by the successor of the life tenant and one of the contingent remaindermen for the same purpose, the doctrine of virtual representation could not be applied. It is apparent, then, that in neither of these actions was jurisdiction of the grandchildren acquired upon this theory. The special reasons stated distinguish this case from those cited, bearing upon the application of the doctrine to actions to quiet title.

Without applying the principle of virtual representation, we know of no theory upon which the court can be said to have acquired jurisdiction of the interests of the grandchildren, who were not parties thereto, in these actions to quiet title. The proceeding authorized by section 738 of the Code of Civil Procedure may be broader in some respects than the suit in equity called by the same name, but it does not authorize the adjudication of the right, claim, interest, or title of any one not before the court. In terms it says: "An action may be brought by any person *against another* who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim," etc. Where the service of summons is made constructively under the Code, the proceeding becomes to a certain extent one in rem, but the decree entered in such a case cannot adjudge the rights of any person not included in the constructive service, any more than it can do so where the persons named in the summons have been personally served within the state. In case of either personal or constructive service, only the interests of the persons served and of those whom they expressly or virtually represent are affected by the decree. The only proceeding purely in rem given by the statutes of this state for the determination of the rights in real property of persons whose interests are unknown, to which our attention has been called, is that provided by sections 749, 750, and 751 of the Code of Civil Procedure.

An examination of proceeding No. 8,616, relied upon by appellant Joyce, is important on this appeal only for the purpose of determining whether the interests of the unborn contingent remaindermen were so connected with the lease of Rogers as to be affected by the judgment foreclosing the mechanic's lien in suit No. 12,444. The duty of paying the taxes and street assessments (actions Nos. 10,983 and 14,109 above), by reason of the nonpayment of which the property was about to be lost, rested primarily upon the life tenant, Mrs. Means. She was entitled to the possession and might lease the property at her pleasure for any term, subject only to the limitations of her own estate, but there were no grounds upon which she could ask a court of equity to preserve her estate at the expense of that of the remaindermen. So far as she was concerned, this was the only purpose served by proceeding No. 8,616. As the application of Mrs. Emma Means, life tenant, it failed to set forth any cause for relief, and in her capacity of mother Mrs. Means was not authorized to sue, as her husband, J. W. Means, was the regularly appointed general guardian of the children who were living. The husband was the appointee of the probate court (No. 5,874), and if the authority or consent of any court were necessary in order that he might make a lease of his wards' property, application should have been made to the court to which he owed his appointment. He could not go into a court of equity and procure this authority. No power is given to the guardian to subject an interest in the real estate of his ward to the maintenance or support of the latter (sections 1768, 1770, Code Civ. Proc.), or to change the form of such an investment (section 1792) without an order of court. There was no special procedure for this purpose provided by the Code at the time application No. 8,616 was made to the superior court; nevertheless, we are of opinion that proceeding No. 8,616 did not affect the interests of the minors because not addressed to the probate side of the court in No. 5,874. That the guardian cannot bind the property of his ward by a contract without an order of court is well settled in this state. Guy v. Dü Uprey, 16 Cal. 195, 76 Am. Dec. 518; Morse v. Hinckley, 124 Cal. 154, 56 Pac. 896. As he cannot make such a contract, so an attempt on his part to do this cannot result in giving to the party with whom he has contracted the right to a lien for labor done or materials furnished under the contract. Fish v. McCarthy, 96 Cal. 484, 31 Pac. 529, 31 Am. St. Rep. 237; San Francisco Paving Co. v. Fairfield, 134 Cal. 220, 224, 66 Pac. 255. If the guardian could not by his direct act impose a lien upon the interests of his ward, it could not be done indirectly by the lessee of the life tenant. If the question whether the minor children of Mrs. Means were required to give the notice provided by section 1192, or have the lien foreclosed in action No. 12,444 imposed upon their interests in the property had to be here decided, we should be inclined to accept the view that they were not. James on Mechanics' Liens, § 105, p. 114. The attack upon the sufficiency of the judgment in that action, however, is a collateral one, and it appears from the findings therein that the court found that these minors were the owners of the property and "that all of the material furnished and labor performed by any or all of the plaintiffs was furnished and performed with the knowledge and consent of the owners of the real estate described in the complaints." The guardianship of the father is also found, and in support of the judgment we are bound to presume this finding of knowledge and consent meant such consent as would sustain the decree. The complaint sufficiently alleges such ownership and consent, and the authority of the guardian to consent to sustain the findings mentioned. Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327.

The language of the judgment, however, does not comprehend by name or description among those whose claims to the property and equity of redemption are barred and foreclosed any of the grandchildren contingent remaindermen. Neither do we think, under the principle of virtual representation hereinabove applied in the proceedings to foreclose street assessment liens, they were brought within the jurisdiction of the court in proceeding No. 12,444. It does not appear upon the face of the judgment roll in that action that the interests of the persons appearing and contesting the lien were identical with that of the unborn remaindermen. Indeed, it appears from the findings in the case, including those last above considered, that the liens foreclosed were created by the act of the lessee of the life tenant under a contract with her, and that her interest alone was chargeable. The minors who were before the court were not held bound because they were owners who failed to give the notice under section 1192, but because of their consent to the judgment against them. They could not bind the grandchildren in this way. Accepting the rule laid down in the decision of Justice Matthews of the United States Supreme Court in Heidritter v. Oil Cloth Co., 112 U. S. 294, page 301, 5 Sup. Ct. 135, 138 (28 L. Ed. 729) that the proceeding to foreclose a mechanic's lien is "in its essential nature" in rem, we find nothing therein to warrant us in holding that any transfer of the title of the unborn remaindermen was made to Hiller by virtue of the deed to him as purchaser at the sale made in execution of the judgment. This was not a proceeding whereby the property alone is made defendant in the action and the world foreclosed. The owner must be made a party to such an action if his property is to be made chargeable with the claim for which the lien is given.

When action No. 19,205 to quiet title was brought by Hiller against Mrs. Means, her husband, and children, and others, he had already acquired the interests of Mrs. Means and her children in the property the title of which he sought to quiet, and these persons could not be brought into court solely to represent the interests of the grandchildren. The issue raised by the answer of the children who appeared in the action related to a charge of fraud upon the part of their father and mother in consenting to the former judgment (No. 12,444) on their behalf, but upon this issue the court found against them. This was not an issue affecting the interests of the grandchildren, and it cannot be said that the living remaindermen represented the interests of the unborn in presenting the matter.

The claim of title of S. A. Joyce to lot 6, the same property claimed by T. F. Joyce, is based upon a sale pursuant to the foreclosure of a street sewer assessment and a deed to her from the board of public works of the city of Los Angeles, dated July 1, 1908. This sale the court found to be a collusive effort of T. F. Joyce to cure the defect in his title by refusing to meet his obligations as successor of the life tenant and as a co-remainderman, and to thus initiate an adverse holding in the lot by causing the same to be bought in by his wife S. A. Joyce. The question here was one of fact, and we are of opinion that there is evidence to sustain the finding of the court.

We do not think it necessary to consider the question of which appeal properly presents the matter to the court. Suffice it that the cause is before us on its merits in either view.

The findings of the court holding that the contingent interests of the grandchildren of Mrs. Means acquired by the Hollenbeck deed did not pass to appellants find support in the evidence, and the disposition of the proceeds of the judgment made in accordance therewith properly applies the law, and therefore the judgment and orders appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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13 Cal. App. 257

LOS ANGELES COUNTY v. WINANS et al.

(Civ. 697.)

(Court of Appeal, Second District, California. April 15, 1910. Rehearing Denied by Supreme Court June 13, 1910.)

1. DEEDS (§ 132*)—ESTATES AND INTERESTS CREATED—REMAINDERS—"MERE POSSIBILITY."

The rights of living remaindermen, children of the life tenant, in a deed to one for life with remainder to the "heirs of her body," are not "mere possibilities" within Civ. Code, § 700, declaring that a mere possibility, such as the expectancy of an heir apparent, is not an interest of any kind, but they are estates in fee to vest in the future in such of them as survive their mother.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 369, 370; Dec. Dig. § 132.*

For other definitions, see Words and Phrases, vol. 5, p. 4491.]

2. DEEDS (§ 123*)—ESTATES AND INTERESTS CREATED — REMAINDERS — "HEIRS OF HER BODY."

Civ. Code, § 779, provides that when a remainder is limited to the heirs of the body of a person to whom a life estate in the same property is given, the persons, who on termination thereof, are heirs of the body of the life tenant will take as remaindermen, and not as mere successors of such owner. *Held*, under this section, that the words "heirs of her body," in a deed to one for life, with remainder to the "heirs of her body," will be considered as words of description and identity, and not of capacity.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 420, 421; Dec. Dig. § 123.*

For other definitions, see Words and Phrases, vol. 4, pp. 3267-3271.]

3. MUNICIPAL CORPORATIONS (§ 558*)—STREET IMPROVEMENTS—FORECLOSURE OF LIENS—NATURE OF PROCEEDINGS.

Proceedings to foreclose street assessment liens, while not in rem in the sense that the res is brought into court as a defendant, are substantially such, since, by the "suit in equity" against persons whom the statute designates the "owners," the entire property becomes subject to sale to pay such liens.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1240, 1265; Dec. Dig. § 558.*]

4. JUDGMENT (§ 747*)—CONCLUSIVENESS—COLLATERAL ATTACK.

The findings and judgment in a suit to quiet title adverse to defendants therein are conclusive as to them, in a collateral action as to their rights, title, or interests in the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1284-1296; Dec. Dig. § 747.*]

5. LIMITATION OF ACTIONS (§ 60*)—ACCRUAL OF CAUSE OF ACTION—CLAIM TO TRUST PROPERTY.

Where a trust arises by operation of the law, the beneficiaries may proceed to enforce their claim to the trust property as soon as the title vests in the involuntary or constructive trustee, so that the statute begins to run against them from that date.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 172; Dec. Dig. § 60;* Trusts, Cent. Dig. § 570.]

6. TRUSTS (§ 249*)—RIGHT TO SUE—TRUST RELATION AS DEFENSE.

The holder of the legal title is not precluded from suing defendants because of an alleged trust relation to them; the equitable character of defendants' claim not preventing the entry of a valid decree declaring the legal and equitable interests of the respective parties in the premises.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 355-360; Dec. Dig. § 249.*]

7. REMAINDERS (§ 17*)—RIGHT TO SUE REMAINDERMEN.

Suit may be maintained by the holder of the legal title against contingent remaindermen, whose remainder is a mere expectancy.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. § 17.*]

8. JUDGMENT (§ 747*)—EFFECT AS ESTOPPEL.

A judgment in a suit to quiet title, finding against defendants on issues raised by their answer setting up all the equities claimed by them, estops them from claiming an award on condemnation of the property, title to which was in issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1289; Dec. Dig. § 747.*]

9. TRIAL (§ 398*)—INCONSISTENCY OF FINDINGS—"VESTED."

The use of the word "vested" in a finding that a party was the owner of an estate in remainder in a lot that was vested in children of a life tenant by virtue of a certain deed which was to one for life, remainder to the heirs of her body, and "will upon the death of said E. M. (the life tenant) take the interest and estate in fee in said lot 4 that would, under said deed * * * go to those of the above-named children of Mrs. E. M. who shall survive her," was not a holding that the interest in remainder of such children was a vested one, so as to be inconsistent with the view that the remainder is contingent, implied from the language of another finding; the context making it apparent that the words "vested in" are not used in the comparative sense as distinguishing a vested from a contingent estate, but rather as the equivalent of "acquired by."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 946; Dec. Dig. § 398.*

For other definitions, see Words and Phrases, vol. 8, p. 7302.]

10. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

A party is not prejudiced by the admission of evidence to prove a fact otherwise established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

11. APPEAL AND ERROR (§ 854*)—REVIEW—REASONS FOR DECISION.

An appellate court is not bound by the reasons given by the trial court for its decisions, and if its judicial action be correct, its judicial reason is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. § 854.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Condemnation proceedings by the County of Los Angeles against E. H. Winans and others. From a judgment directing payment of the amount awarded, and from an order denying a new trial, defendants Mrs. Emma Means and others appeal. Affirmed.

Valentine & Newby, for appellants Means, Hendricks, and Blee. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for plaintiff and respondent. Davis & Rush, for respondents Wannop & Forbush. Mott & Dillon, for respondents Henry J. Pauly and Henry J. Pauly & Co. Smith & Smith, for respondent S. A. Joyce. Bernard Potter, for respondent T. F. Joyce. Haas, Garrett & Dunnigan, for respondent Margaret M. B. Anderson. Waldo M. York and Haas, Garrett & Dunnigan, for respondent Charles A. Cole. Waldo M. York (J. M. York, of counsel), for respondent E. H. Winans.

TAGGART, J. This is an appeal by the defendants Emma R. Means and her five children from the judgment of the superior court directing the payment to the defendants Winans, Cole, and Joyce of the amounts awarded the latter as successors in title to the interests of said appellants in the condemned property mentioned in the companion appeal to this (No. 693, 109 Pac. 640), the opinion in which is filed herewith, and which opinion is referred to for a statement of the facts of the case. An appeal is also taken from an order denying their motion for a new trial.

It is urged in support of these appeals that the series of transactions, proceedings, and actions enumerated in the opinion in No. 693 failed to transfer the interests of Mrs. Means and her five children to the other defendants above named, or to any of them. The insufficiency of the evidence to justify the various findings upon which the portions of the decree so adjudicating is rested is specified as error, in support of the motion for a new trial. It is also contended that neither the conclusions of law nor the interlocutory decree is sustained by the findings, that the findings are contradictory, and that the court erred in admitting in evidence the several judgment rolls and documents upon which the claims of defendants Winans, Cole, and Joyce are based.

Appellants sustain their main contention on this appeal upon the view that the children of Mrs. Means take the interests acquired by them through the Hollenbeck deed as purchasers (section 779, Civ. Code); but when the right of transfer of their interests is presented section 700 of the same Code is invoked and various cases cited in which the expectancy of an "heir apparent" is considered. These two positions are inconsistent. The rights of the remaindermen under the Hollenbeck deed, who are living, and are children of Mrs. Emma Means, are not mere possibilities, such as are covered by the provisions of section 700, but estates in fee to vest in the future in such of them as survive their mother. Future interests pass by succession, will, and transfer in the same manner as present interests (section 699), and they are not rendered void merely because of the improbability of the contingency upon which they are limited to take effect. Section 697. To construe the words "heirs of her body" to mean "in the capacity of heirs" would be to restore the rule in Shelley's Case and repeal by construction the express provisions of section 779. For all purposes connected with the transactions herein reviewed, these words will be considered as words of description and identity, and not of capacity, such being the effect of the section last named (779).

As said in the opinion in No. 693, the proceedings to foreclose the street assessment liens (Nos. 14,109 and 10,983), while not in rem in the sense that the res is brought into court as a defendant, are, nevertheless, substantially such, since by the "suit in equity" against the persons whom the statute designates the "owners," the entire property becomes subject to sale to pay such liens. Page v. Chase, 145 Cal. 582, 79 Pac. 278. If it be assumed, however, that jurisdiction of appellants was acquired by the court in these cases, so that the decree was effective, the agreements made with the purchasers at the respective sales by Mrs. Means served to continue their equitable interests in the premises which was admitted in the Abbott declaration of trust in their behalf. Again, if we regard the foreclosure of the Abbott mortgage as not barring the equity of redemption of appellants, and the agreement of Mrs. Means with McCollum, although made in her own name, as having been made for the benefit of her children, the actions to quiet title, particularly by No. 28,196, were sufficient to conclude all the appellants.

The claim now made by Mrs. Means and her daughter Elfie O. Hendricks (then Means), that their deeds to McCollum and Gosch, respectively, were intended as mortgages, was submitted to the court as an issue by the pleadings in action No. 28,196, and they are concluded by the finding of the court made thereon against them. So, also, upon collateral attack the finding made by the court in the same action that "neither of these defendants (Emma R. Means, J. W. Means, her husband, and Elfie O. Means, Claude E. Means, J. Worthington Means, Fairy A. Means, and Juliet E. Means) have now any right, title, or interest in or to any of the property described in the plaintiff's complaint," is conclusive against all the appellants. Appellants' view that the attitude of plaintiff in the action (Gosch) is not adverse to appellants cannot be sustained. The trust relation between the latter and Gosch, if there was such a relation, was not created by writing and there was no showing of an express trust. Where the trust arises by operation of law it is said the beneficiaries have a right to proceed to enforce their claim to the trust property immediately, that the title to the trust property vests in the involuntary or constructive trustee, and that the statute of limitations begins to run against their cause of action from that date. Norton v. Bassett, 154 Cal. 411, at page 419, 97 Pac. 894. While the statute of limitations would not be operative as to minor defendants, the principle announced by the case declares the adverse character of the holding.

Gosch was not precluded from bringing an action to quiet title against the appellant because of the alleged trust relation. He was the holder of the legal title, and the equitable character of the claim of the defendants in the action did not prevent the court from entering up a valid decree declaring the interests of the respective parties, legal and equitable, in the premises. There was no place for the application of the rule that the holder of an equitable title cannot enforce his equities against the holder of the legal title. So the contention of appellants that the action cannot be maintained against the children because their contingent remainder is a mere expectancy finds full answer in Barnett v. Barnett, 104 Cal. 298, at page 301, 37 Pac. 1049. See, also, Civ. Code, § 699; In re Walkerly, 108 Cal. 627, at page 648, 41 Pac. 772, 49 Am. St. Rep. 97. We find nothing in the record in the case (to which alone we must look) to sustain the point made by appellants that the judgment in action No. 28,196 was entered by consent without authority. The complaint was in the ordinary form used in such actions; service of summons was regularly made upon the minor defendants by serving them and their father personally. All the defendants appeared, a guardian ad litem being appointed for the minors, a general denial was entered and the special interests of the defendants pleaded, showing their equitable rights and the existence of the agreement with McCollum. On these issues the court found in favor of plaintiff, and the defendants are concluded by the findings so made.

With respect to the title of T. F. Joyce, if the finding in No. 12,444, that the material for which the lien was claimed was furnished with the knowledge and consent of the owners of the real estate, was not sufficient to conclude appellants upon a collateral attack, they are, nevertheless, estopped by the judgment in No. 19,205. In this action the complaint to quiet title was in the usual form and the answer of defendants (appellants here) set up all the equities claimed by them in their brief upon this appeal, and in the case of the children alleged collusion between plaintiff (Hiller) and their mother, Emma R. Means, in the procurement of the judgment in the foreclosure of the liens of the materialmen and mechanics in action No. 12,444. On all of these issues the trial court found in favor of plaintiff. While Hiller was acting as trustee for the materialmen and mechanics who were plaintiffs in No. 12,444, there is no evidence of any express trust relation between him and appellants and no bar on this ground to his bringing the action to quiet his title.

The conveyance of Gosch and wife to Winans and Cole, respectively, conveyed to them the interests acquired by Gosch in lots 4 and 5; and that of Hiller to Joyce the interest Hiller acquired in lot 6.

In all that has been heretofore said, both in this opinion and that filed in appeal No. 693, it has been assumed that no question of description was involved, and that the respective holdings of defendants Winans, Cole, and T. F. Joyce, to wit: Lots 4, 5, and 6 of the courthouse block in the city of Los Angeles, taken together, covered the entire Means property. Appellants, however, contend that such is not the case and that the findings of the court in this regard are not sustained by the evidence in the case. It is claimed that it appears from the evidence of the witness Rowan, and the diagram introduced in connection therewith, that there remains a triangular piece of land 33.71 feet wide on the northerly boundary of the property and running to a point at the southerly boundary which is not affected by the various proceedings, conveyances, etc., which are hereinabove considered, the title to which remains in the defendants Means, Blee, and Hendricks. The deduction of the surveyor witness that there is such a "gore" remaining is made upon the assumption that the descriptions in all these various instruments call for lines running parallel to New High and Broadway (Fort) streets, instead of at right angles to the side lines running from one of these streets to the other. As the fact is not as assumed, it is not necessary to enter into a calculation to determine the exact effect of the calls as made; the number of square feet one way or the other being so small and of so little value.

Other alleged errors presented relate to matters specified as "decisions against law," and "errors of law occurring at the trial." Under the first it is urged that findings three and four are not consistent in this, that it is found by the court in finding three that respondent Winans has acquired and owns the interest of the life tenant, the reversionary interest of the grantor, and the interests of the five children (naming them) in lot 4; and "that the persons who will take said property at the termination of said life estate and the proportions in which they will take the same cannot now be ascertained"; while finding four is, that Winans is the owner of the estate in remainder in lot 4 "that was *vested* in" the five children by virtue of the Hollenbeck deed, and "will upon the death of said Emma Means, take the interest and estate in fee in said lot 4 that would under said deed of J. E. Hollenbeck go to those of the above-named children of Mrs. Emma Means who shall survive her." It is contended that the use of the word "vested" in the last-mentioned finding is a holding that the interest in remainder of the Means children is a "vested" one, which is inconsistent with the view that such remainder is contingent implied by the language quoted from finding number three. It is apparent from the context that the words "vested in" are not used in the finding in a comparative sense as distinguishing a vested from a contingent estate, but rather as the equivalent of the words "acquired by." This is apparent from that part of the finding which is above quoted. That is to say, the fourth finding means only that Winans is the owner of the estate in remainder "acquired by" the five children of Mrs. Means by virtue of the Hollenbeck deed. So read it is consistent with the other findings, and tends to support the conclusions of law drawn from those findings by the trial court. The same errors are alleged with respect to the findings relating to the titles of Cole and Joyce and these objections may be answered in the same way.

The errors of law specified relate to the admission of the various judgment rolls and documents, the effect of which has been hereinabove considered. For the reasons assigned the papers in the proceeding No. 8,616, and the lease to Rogers made pursuant thereto, do not directly support the title of Winans and Cole, but it is apparent that their admission in evidence could not have prejudiced the rights of the appellants Means, Hendricks, and Blee. The proceeding mentioned was begun to procure the consent of a court of equity upon behalf of the Means children to the making of the lease to Rogers, but was not effective for that purpose. The court, however, found in action No. 12,444 that the consent of these minors was given and the judgment roll in No. 12,444 established this fact conclusively against collateral attack. The effect of No. 8,616, therefore, as evidence supporting the Joyce title need not be considered, as this title is established without it. An appellate court is not bound by the reasons given by the trial court for its decision. It is the judicial action of the trial court, as distinguished from its judicial reason, which appellate courts are called upon to review, and if the former be correct the appellate court will not concern itself about the latter. It is not material for the purpose of this appeal, then, whether the trial court relied upon the proceeding No. 12,444 or No. 19,205 in sustaining the Joyce title.

The judgment roll in the latter action was properly admitted. The objection to its admissibility on the ground that the interests of the children, as heirs at law, were not litigated or decided therein, cannot be sustained. Their interests as heirs at law were not involved. Their rights in the property were those of purchasers and their respective interests personal and not representative. The term, "heirs of the body" of Emma Means, did not make her "heirs at law" in that capacity parties to the title, but the persons who were described by the words "heirs of her body" acquired an interest as individuals.

There was no finding of adverse possession, and the judgment was sufficiently sustained by the other findings; hence, it follows that if the evidence of the payment of taxes and holding of possession of Winans, Cole, and Joyce was immaterial so far as the children were concerned, the latter were not prejudiced by its admission, even though it were error to admit it.

Objections were made to the introduction in evidence of the various judgment rolls which have been mentioned, but these objections are not specifically urged, except as they are presented by the arguments which have hereinabove been considered in connection with the effect of such rolls upon the titles of the children of Mrs. Means.

In accordance with the foregoing views, the interlocutory decree and orders appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(158 Cal. 54)

RAUTH v. SOUTHWEST WAREHOUSE CO. (L. A. 2,473.)

(Supreme Court of California. June 17, 1910.)

1. APPEAL AND ERROR (§ 595*)—RECORD—SEPARATE APPEALS—SINGLE TRANSCRIPT.

Supreme Court Rule 2 (78 Pac. vii) authorizes an appeal from a judgment and from an order denying a new trial to be heard on the same transcript though the appeals were taken at widely different times independent of a stipulation or order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2623; Dec. Dig. § 595.*]

2. SALES (§ 266*) — WARRANTY—DESCRIPTION OF CHATTEL.

Where an article sold is described as of a certain kind or description, a warranty that it is of that kind or description is implied.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 758; Dec. Dig. § 266.*]

3. SALES (§ 266*)—NATURE AND CHARACTER OF CHATTEL — DESCRIPTION — WARRANTY OF KIND.

Where a buyer in terms asks for a particular kind of article, and the seller purports to comply with the request, he will generally be held to warrant the article as being of that kind, though he may not have made any declaration in words to that effect, but in order to create an implied warranty from the description of an article, the circumstances must be such as to amount to a representation of fact on the part of the seller that the article is of the particular kind or description.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 758; Dec. Dig. § 266.*]

4. SALES (§ 441*)—IMPLIED WARRANTY—SEED BARLEY—KIND—EVIDENCE.

Evidence *held* insufficient to warrant a finding that seed barley sold to plaintiff and his assignors was described or represented to be bearded barley, so as to raise an implied warranty that it was of that description.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1278; Dec. Dig. § 441.*]

5. CUSTOMS AND USAGES (§ 19*)—EVIDENCE.

Evidence *held* insufficient to show a custom among farmers and dealers in seed grain in the community that the word "barley," when used without qualification, meant bearded barley only, and did not include the beardless variety.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 41–46; Dec. Dig. § 19.*]

6. SALES (§ 266*)—WARRANTY—STATUTES.

Where neither a seller of seed barley nor any of his agents had reason to believe that the fact that barley sold to plaintiff and his assignors was of the beardless variety, if known to any of them, would have influenced them against its purchase, a failure to disclose the fact that it was of the beardless variety did not create a cause of action under Civ. Code § 1767, providing that one who agrees to sell personal property, knowing that the buyer relies on his advice and judgment, thereby warrants to the buyer that neither the seller nor any agent employed in the transaction knows the existence of any fact concerning the thing sold which would to the seller's knowledge destroy the buyer's inducement to buy.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 742; Dec. Dig. § 266.*]

Department 1. Appeal from Superior Court, Orange County; F. E. Densmore, Judge.

Action by C. A. Rauth against the Southwest Warehouse Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Percy R. Wilson and W. W. Middlecoff, for appellant. H. C. Head, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANGELLOTTI, J. This is an appeal from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, in an action brought by plaintiff to recover damages on account of breach of alleged warranty, fraudulent representations, and fraudulent concealment, in the sale to plaintiff and four other persons, who have assigned their claims to plaintiff, of certain seed barley for the season of 1906–7. The trial resulted in a verdict and judgment for plaintiff in the sum of $12,155.21.

There is but one transcript in the matter of these appeals, and there is no stipulation or order that both appeals may be presented upon the same transcript. The appeals were taken at widely different times. The record shows that notice of intention to move for a new trial was regularly given before the appeal from the judgment was taken. Plaintiff suggests that, in view of the fact that the appeals were taken at different times, they cannot be presented upon the same transcript in the absence of stipulation or order, and that they must therefore be dismissed. A complete answer to this claim is to be found in rule 2 of this court.

Aside from the amount of seed barley purchased and the amount of damage, the cause of action stated on behalf of Rauth and that on behalf of each of his assignors, B. F. Nimmo, M. Wooley, Thomas Jessup, and M. Erreca, were exactly the same. As to each it was substantially alleged as follows: He was farming for the season of 1906–7, a portion of the land of the Irvine Company known as the "San Joaquin Rancho" in Orange county, under a lease from the owner. Defendant offered to sell him seed barley for planting thereon, showed him a sample thereof and represented that the same was good, clean seed barley, such as is usually sown and raised in Orange county and in the locality where his land is situated. By said representations it induced him to believe that the same was "the variety known as bearded barley." It further represented that it had bought the same for seeding purposes to sell to the farmers of Orange county and of the locality where his land was situated, that it was well threshed, that the beards were all broken off, and that it was fit and proper for the purpose of growing grain in said locality. An inspection of the barley did not show that it was not bearded barley. He believed all said representations, and relying thereon bought and planted such seed. Defendant at the time of such sale well knew that such barley was not the common or bearded barley, but was the variety known as "beardless barley," and was not the kind or variety usually called "barley" in southern California and in Orange county, and knew that he believed he was purchasing the variety called "bearded barley," and purposely concealed the fact that it was beardless barley from him, well knowing that he relied on its representations and advice and judgment regarding the quality and fitness, and that he was purchasing the same for seed in a locality where bearded barley is usually sown, and that he would not purchase the same if he knew it to be beardless barley. His land was suitable for the growing of such barley as is usually grown in Orange county, but the beardless barley was not suited to the climate or soil of such land or any land in that locality. The consequence was that it produced a very poor crop, much less in quantity than common or bearded barley would have produced. Defendant, admitting the sales of the seed barley, denied all the other allegations of the complaint.

The main contention of defendant upon this appeal is that the evidence is insufficient to warrant a conclusion of any breach of warranty, fraudulent representation, or fraudulent concealment on its part in the matter of the sales of this seed barley. Admittedly the seed barley was what is styled "beardless" or "bald barley" as distinguished from the ordinary "bearded barley," owing to the absence of the long awn or bristle which extends from each seed. We will assume, as is probably true, that the evidence as to the crops realized on the San Joaquin Rancho during that season from this and other seed barley was sufficient to support a conclusion that this particular seed barley was not as well adapted to the particular soil in which it was planted and the climate of that locality as would have been seed barley grown in that locality. The evidence did show, however, that some of it planted at Santa Monica that season produced 30 sacks of grain to the acre. This barley was what is called in Orange county "Northern barley," having been grown in the Tehachapi valley in Kern county which is many miles north of Orange county, and which has a much greater altitude, all of which was made clear to each of the buyers. But there was absolutely nothing in the evidence to indicate that the difference in yield was not due solely to the fact that this seed barley was grown in a different locality and at a greater altitude rather than to the fact that it was "beardless" barley instead of barley of the bearded variety. The evidence of two witnesses elicited for the purpose of showing that prior experiments with that kind of barley had shown it to be unfitted for that locality was entirely insufficient to support any conclusion to that effect. One of these witnesses testified that some 18 or 20 years before seed of that kind had been used in that locality for a couple of years, but that its use was then abandoned. The other witness testified that in about the year 1876 he saw a little beardless barley growing in that locality. Neither testified as to where the seed came from nor as to whether it produced as well as the bearded kind, nor as to the reason for its use not being continued. There is nothing to indicate that any of the parties to the transaction here involved ever heard of any use of beardless barley seed in this locality. There is no pretense that the beardless barley is in any degree inferior to or different from bearded barley either in quality or productiveness. So far as appears the only difference is in the fact that the bearded barley has the long awn or bristle extending from each grain, while the beardless barley has only short bristles.

The evidence was entirely without conflict as to certain facts. Defendant established its grain and warehouse business in Orange county in 1906. Its manager, C. J. Haines, saw the crop from which this seed barley came growing in the Tehachapi valley. He observed that it was beardless. The evidence shows that this does not mean that the grains are entirely without awns, but that such awns are very short. It appealed to him as being very clean and fine, and he thought it would be excellent for seed in the southern part of the state. He therefore bought the crop as it stood, and the threshed barley was shipped to Orange and Los Angeles counties. Three car loads of this were sent to Irvine in Orange county and there sold in small lots. It had threshed very clean and fine, and was an attractive seed in every way. Among the purchasers were Rauth and his four assignors. As to each of these the evidence showed without conflict, and the jury found in response to special interrogatories that the selling agent told the buyer that the barley was Northern barley raised at Tehachapi, but did not tell him that it was bearded barley; that the buyer said he desired to buy seed barley but did not state that he desired bearded barley; that the buyer examined the barley before purchasing it, and that the seed barley which defendant sold was of good quality, and germinated and came up after being planted. There is nothing to indicate that the agents of defendant did not act in the best of faith throughout this matter, unless that is shown by their failure to explain to the purchasers that the seed barley was of the beardless type as distinguished from the bearded type. Nor was there any breach of warranty unless the fact that the barley sold was of the beardless kind instead of the bearded shows such a breach.

The evidence of the buyers as to the transactions between themselves and defendant is very brief.

As to Rauth, Haines told him that he had some good barley that he had seen growing at Tehachapi, and it looked so nice that he had bought the whole field. He showed him a sample, and Rauth examined it. Rauth told Haines that they had done a good job of bearding up in that county, and Haines said it was threshed with a combined harvester. Erreca dealt solely with Spencer, a foreman at the warehouse. His transaction was late in the season, after the sales to the others on the San Joaquin Rancho. Spencer said: "I have good barley seed. All San Joaquin farmers use same barley, and he gave me eight or nine or ten names buying his barley seed." Erreca looked at the barley. "I told Spencer, 'This barley has not much beard. It looks like this barley was raised in some dry country.' 'Yes,' he says, 'this was raised in a dry country. Not much beards.'" Wooley dealt with Haines. Haines told Wooley that he had some good Northern barley grown at Tehachapi; that he thought it would be good seed barley and good for Wooley to plant. He showed him a sample, and it appeared to Wooley to be good. Before buying Wooley and Mr. Krauss, the manager of the Irvine Company, went together to look at it, and Krauss said that he thought that it would be a good investment, and that it would make a better crop to get new barley like this.

Nimmo dealt with Spencer. He called at defendant's warehouse to see about seed barley, and Spencer showed it to him. He spoke to Spencer about its being bearded closely and of some of the kernels being cracked, and asked if it would affect the sprouting, and Spencer said that he did not think so. Krauss had told him that defendant had some northern seed, and that if any of the tenants wished to change seed they could find some at defendant's warehouse. Nimmo did wish to get seed produced in some locality other than Orange county.

Jessup dealt with Haines. The barley was shown to him, and Haines said it was from Tehachapi, that he had it shipped for seed, and thought it would be a good thing for Orange county, a good change of seed. Jessup spoke of it as being so dry, white, bright and bearded closely, and Haines said that it was raised in a dry climate, and he supposed that was the reason it was bearded so much closer.

It is doubtless true that if this barley was sold by defendant as being of the ordinary bearded kind, instead of the beardless, and that the partial failure of the crops of plaintiff and his assignors was due to the fact that it was of the beardless rather than the bearded kind, of which, as we have said, there is no sufficient evidence, defendant would be liable as for a breach of warranty. It is a generally accepted rule that on the sale of a chattel as being of a particular kind or description, stated as a fact, a contract is implied that the article sold is of that kind or description. Substantially, the description is warranted. This was the rule applied in Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438, and 38 N. J. Law, 496, 20 Am. Rep. 425, where the buyer expressly asked for early strap leaf red top turnip seed, and the seller declared the seed to be such, and it proved to be an entirely different and inferior kind; in White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13, on a sale of large Bristol cabbage seed; and in Moody

v. Peirano, 4 Cal. App. 411, 88 Pac. 380, on a sale of White Australian wheat. To make this rule applicable, the circumstances must be such as to amount to a representation of fact on the part of the vendor that the article is of the particular kind or description. If the buyer in terms asks for the particular kind, and the seller purports to comply with his request, he would probably be held to warrant the article as being of that kind, although he may not have made any declaration in words to that effect. In other words, the circumstances may be such as to make the acts of the vendor constitute such a representation. But in this case, as we have seen, there was no demand, in terms, for bearded barley. The demand of the buyers was simply for seed barley, and they were given good seed barley of a kind not shown to be in any way different in quality from the common bearded variety theretofore grown in that locality. There is nothing in the evidence heretofore referred to upon which to found the conclusion of a representation or warranty that the barley was of the bearded kind, unless we can hold that the jury was warranted in concluding that there was a custom or usage in Orange county known to defendant or so notorious that one engaged in the grain business must be presumed to know it (2 Paige on Contracts, § 604), to the effect that where the word "barley" was used without qualification it meant only bearded barley and did not include beardless barley. An attempt was made to show such a custom or usage, but in addition to the fact that the evidence was directed to the existence of such a custom only at the time of the trial, which was nearly two years after the transactions, such evidence, in our judgment, fell far short of the degree of clearness and certainty essential to show a custom or usage so notorious that defendant must be presumed to have known it, for actual knowledge was not shown, to the effect that the term "barley" did not include barley exactly like the common bearded variety ordinarily grown in Orange county, except that it grew without the long bristles found on such barley. As the bearded type had been the kind almost exclusively grown in that county, of course when the word "barley" was used therein it ordinarily referred to bearded barley, and ordinarily when one ordered "barley" he received barley of the bearded kind. Common bearded barley was spoken of and quoted in market reports simply as "barley." This was practically the sum and substance of the evidence, though some of the witnesses in response to the questions of counsel for plaintiff to that effect dignified the thing by calling it a custom or usage. The one witness as to market quotations did not pretend to testify that beardless barley was ever quoted other than as simply "barley." "Barley" and "Chevalier barley" were the only two kinds he testified to as being separately quoted. Chevalier barley, as we know, is a different quality of grain, and, as the witness testified, is probably quoted at a different price.

Learned counsel for plaintiff relies on section 1767, Civ. Code, which provides that "one who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy." The answer to this is that the evidence is entirely destitute of any sufficient support for the conclusion that defendant or either of its agents, Haines and Spencer, had any knowledge or reason to suspect that the fact that this barley was of the beardless kind, if known to any of the buyers, would operate as an influence against its purchase. What we have said negatives the idea of any fraudulent concealment or fraud of any kind on the part of defendant.

We perceive no ground in the evidence for holding defendant legally responsible for the partial failure in the crops of plaintiff and his assignors. In view of our conclusion in this regard, it will be unnecessary to consider any of the other points made for reversal.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

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13 Cal. App. 368

MAY v. CRAIG et al., Board of Public Works of City of Long Beach. (Civ. 844.)

(Court of Appeal, Second District, California. May 7, 1910.)

1. MUNICIPAL CORPORATIONS (§ 601*)—MUNICIPAL AFFAIR — IMPROVEMENT OF PRIVATE PROPERTY.

The construction of improvements on private property within a city is not a municipal affair, the city having no interest therein or control thereof, except such as is necessary for the protection of public welfare under the police power delegated by the Constitution to such cities, the exercise of which is subordinate to the general law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1333; Dec. Dig. § 601.*]

2. EVIDENCE (§ 32*)—JUDICIAL NOTICE—CITY ORDINANCES.

The appellate court cannot take judicial notice of a city ordinance not presented by the record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32;* Appeal and Error, Cent. Dig. § 2959.]

3. MUNICIPAL CORPORATIONS (§ 592*) — CITY ORDINANCE—GENERAL LAW.

Where a city ordinance regulating private improvements merely exacts requirements additional to those prescribed by the general law, such provisions will be sustained, but, if the additional provisions are in conflict with the general law, the general law will prevail.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311, 1312; Dec. Dig. § 592.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Application for a writ of mandamus by N. Emmet May against F. S. Craig and others, Commissioners of the Board of Public Works of the City of Long Beach. Judgment for defendants, and petitioner appeals. Affirmed.

Chas. Cassat Davis, for appellant. Stephen G. Long and Percy Hight, for respondents.

ALLEN, P. J. Plaintiff by his complaint sought a writ of mandate to compel the board of public works of Long Beach, a charter city, to issue to him a permit for the construction of a certain building by him proposed to be erected within such city. This permit, it is alleged, the board refused to issue, assigning as the sole reason that the plans and specifications intended to control in the erection and construction of such building did not conform to and comply with the requirements of the act of April 16, 1909. Laws 1909, p. 948. It is further alleged that the plans and specifications which were presented did conform in every respect to the ordinances of the city regularly enacted with reference to the construction of buildings within such city. It is admitted in the complaint that such plans did not comply with all of the requirements of the general law. A demurrer was interposed to the complaint, which was sustained without leave to amend, and judgment went for defendants, from which judgment this appeal is taken.

It is appellant's contention that all matters with reference to the size and character of buildings constructed or to be constructed within the limits of a charter city, and all regulations relating thereto, are municipal affairs, and under the Constitution of this state such charter provisions are superior to the provisions of a general law relating to the same subject. With this contention we do not agree. In our opinion, the construction of improvements upon private property within a city is not a municipal affair. The city has no interest therein or control thereof, except such control is made necessary for the protection of the public welfare, and the only power which the city can exercise in relation to such private structures must come from the police power delegated by the Constitution to such charter cities; and this police power is expressly made subordinate to the general law. The complaint as filed and presented by the record does not contain a copy of the ordinance enacted by the city, and we cannot take judicial notice thereof. It may be that the ordinance simply exacts requirements additional to those of the general law, which, if true, would not be in conflict therewith. In re Hoffman, 155 Cal. 117, 99 Pac. 517. Upon the other hand, such ordinance may undertake to make lawful that which by the state law is declared unlawful. In that event a conflict would arise, and the ordinance must yield to the general law. That a duty to issue a permit should arise, it must be made to appear that no such conflict exists; otherwise, the determination of the board must be sustained.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

13 Cal. App. 360

WINSOR POTTERY WORKS v. SUPERIOR COURT. (Civ. 807.)

(Court of Appeal, First District, California. May 5, 1910.)

1. Appeal and Error (§ 465*)—Bond to Stay Proceedings — Fixing of the Amount — Duty of Court.

Under Code Civ. Proc. § 939, subd. 3, and section 943, providing that on appeal from the appointment of a receiver a bond must be given if there is to be a stay of proceedings, the amount of which shall be fixed by the judge, it is his duty in such a case to fix the amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2239, 2240; Dec. Dig. § 465.*]

2. Mandamus (§ 57*)—Appeal—Bond to Stay Proceedings — Fixing of Amount by Court.

Where it was the duty of a judge to fix the amount of the bond to stay proceedings on an appeal from the appointment of a receiver, a writ of mandate would lie on his refusal to do so.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 116; Dec. Dig. § 57.*]

3. Appeal and Error (§ 151*)—Right of Review—Persons Aggrieved.

In an action by a stockholder of a dissolved corporation to cancel deeds made by the trustees to defendant, and for a receiver for the dissolved corporation with power to sue to recover its assets, the defendant, claiming to be the owner and being in the possession of the property, is aggrieved by the appointment of the receiver so as to entitle it to appeal therefrom, though the receiver was not directed to take possession of any of defendant's property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947, 951, 952; Dec. Dig. § 151.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Petition for writ of mandate by the Winsor Pottery Works against the Superior Court of Alameda County, to compel the fixing of the amount of an undertaking to stay proceedings pending appeal from an order appointing a receiver. Writ granted.

Costello & Costello, for petitioner. Lloyd S. Ackerman, for respondent.

COOPER, P. J. This is an application for a writ of mandate to compel the Hon. Frank B. Ogden, one of the judges of the superior court of Alameda county, to fix the amount of an undertaking for the purpose of staying proceedings on appeal from an order made by the said court and the judge thereof, appointing a receiver in a certain proceeding pending in said court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There is no dispute as to the facts, and in brief they are as follows: In December, 1909, one Brinkmeyer, claiming to be the owner of certain capital stock of Winsor's California Pottery & Terra Cotta Works, a dissolved corporation, commenced an action in the said superior court against the Winsor Pottery Works, a corporation (the petitioner herein) and a number of other defendants. The object of the said action was, among other things, to have certain deeds of conveyance made by the trustees of Winsor's California Pottery & Terra Cotta Works, a dissolved corporation, to the said Winsor Pottery Works, conveying certain real estate, set aside and canceled, and to have a receiver appointed to take charge of all the property of said dissolved corporation, with power in said receiver to commence actions to set aside the said conveyances, and to recover the said real estate from the possession of the said Winsor Pottery Works, and to have its deeds to said property delivered up and canceled.

After the commencement of the said action, without notice to petitioner, but by the consent of the other defendants in said action, and at the request of the plaintiff therein, the court made an order appointing one Samuels receiver in said action, which order, among other things, directed and authorized the said receiver "to institute such actions as may be proper to recover for the benefit of the stockholders or members of said dissolved corporation all property and effects which are due and owing to the Winsor's California Pottery & Terra Cotta Works, a dissolved corporation, or to the stockholders or members thereof, by said Winsor's Pottery Works, or any other persons or at all, under and by virtue of two conveyances or indentures of date August 7, 1908, from Winsor's California Pottery & Terra Cotta Works to Winsor Pottery Works, a corporation, and the other of date August 30, 1909, from Serrill Winsor, S. W. Winsor, Mary B. Winsor, and Lydia C. Winsor to Winsor Pottery Works, a corporation, or under and by virtue of any other transaction."

On the 21st day of February, 1910, petitioner duly perfected an appeal from the order so appointing said receiver. After said appeal had been so perfected the petitioner applied to the Hon. Frank B. Ogden, the said judge of the superior court, for permission to file an undertaking to stay proceedings upon said appeal, and asked the said judge to fix the amount of said undertaking to stay proceedings upon and pending appeal from said order so appointing a receiver in said cause; but the said judge refused to fix the amount of the said bond or to permit of said bond or undertaking being filed upon said appeal.

The Code provides that an appeal may be taken from an order appointing a receiver. Code Civ. Proc. § 939, subd. 3. It is further provided (Code Civ. Proc. § 943): "If the judgment or order appealed from appoint a receiver the execution of the judgment or order cannot be stayed by appeal unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed, or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking."

It is the duty of the judge under the said section to fix the amount of the undertaking in order to stay the proceedings pending an appeal, and in case of his refusal the writ of mandate will lie to compel such action. Green v. Hebbard, 95 Cal. 39, 30 Pac. 202.

It is said that the petitioner was not aggrieved or injured by the order appointing the receiver, for the reason that the receiver was not directed to take charge of any property belonging to petitioner. It is sufficient to say that in the action brought by Brinkmeyer it was deemed necessary to make the petitioner a party defendant. One of the main objects of the action was to recover real estate held by petitioner, and to have petitioner's deeds thereto delivered up and canceled. The first step towards the accomplishment of the objects so sought by Brinkmeyer was to have a receiver appointed to take charge of all the property of the dissolved corporation, and, among other things to take or recover and take charge of the real estate held by petitioner under said deeds. The petitioner claims to be the owner of such real estate, and an order authorizing a receiver to bring an action on behalf of a dissolved corporation to recover such property is such an order as would show the petitioner to be aggrieved by it. The petitioner being a defendant in the suit instituted by Brinkmeyer, and being in possession of the real estate sought to be recovered through the medium of a receiver, certainly had the right to appeal from the order appointing a receiver, and to question the right of the court to make such appointment upon the facts stated in the complaint. Having the right to appeal, it had the right to give an undertaking to stay proceedings under the express provisions of the Code.

Let the writ be made peremptory.

We concur: KERRIGAN, J.; HALL, J.

158 Cal. 39

WILLIAMS v. LANE. (L. A. 2,251.)

(Supreme Court of California. June 13, 1910.)

1. Appeal and Error (§ 553*)—Substitute for Bill of Exceptions—Phonographic Report of Trial—Allowance by Court.

Under Code Civ. Proc. § 953a, providing for authentication of a transcript in lieu of the bill of exceptions, the phonographic report of the trial must be settled and allowed by the judge and certified by him as correct, before it can take the place of a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2465; Dec. Dig. § 553.*]

2. Bankruptcy (§ 391*) — Statutes — Proceedings in State Court—Suspension.

Bankruptcy Law July 1, 1898, c. 541, § 11, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), declaring that a suit pending on a claim from which a discharge in bankruptcy would be a release at the time of filing a bankruptcy petition shall be stayed until after an adjudication or a dismissal of the petition does not oust the state court of jurisdiction to try such a suit begun before the filing of the petition, but at best suspends it for the period specified, after which the bankruptcy court may order the trustee to appear and defend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637–655; Dec. Dig. § 391.*]

3. Bankruptcy (§ 156*) — Pending Suit — Intervention of Trustee.

After the appointment of a trustee for a bankrupt, he may intervene in pending suits with the authority of the bankruptcy court, and sue or defend in the name of the bankrupt without substitution of his own name as trustee as a party to the record.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 241; Dec. Dig. § 156.*]

4. Pleading (§ 34*)—Demurrer—Presumptions.

Under Code Civ. Proc. § 456, declaring that in pleading a judgment it may be stated to have been "duly given or made," and if such allegation is controverted, the party pleading must establish on the trial the facts conferring jurisdiction, where a state court judgment directing a partnership accounting as against a bankrupt copartner was so pleaded, it would be presumed that an order of the bankruptcy court permitting the bankrupt's trustee to defend the action was duly made, if such order was essential to confer jurisdiction on the state court to pronounce the judgment as against a demurrer to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 69; Dec. Dig. § 34.*]

5. Bankruptcy (§ 149*)—Partnership—Individual Partner.

Under Bankr. Act July 1, 1898, c. 541, § 5, subd. h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), providing that if one or more but not all of the partners of a firm are adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by the consent of the partner or partners not adjudged bankrupt, where only one of the members of the firm was bankrupt, the partnership estate should be administered by the solvent partner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

6. Bankruptcy (§ 149*)—Partnership—Jurisdiction—Accounting.

Under Bankr. Act July 1, 1898, c. 541, § 5, subd. h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), providing that where one or more of the partners of a firm shall not be adjudged bankrupt, the partnership assets shall be administered by the solvent partner, bankruptcy courts under such circumstances have no jurisdiction over the solvent partner, and though he is accountable to the trustee of the bankrupt partner, he is only bound to pay over such property as may represent the share of the insolvent, after administration of the partnership assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

7. Bankruptcy (§ 295*)—Action—Trustee—Jurisdiction.

Under Bankr. Act July 1, 1898, c. 541, § 5, subd. h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), providing for the administration of the affairs of the solvent firm by the solvent partner, notwithstanding the bankruptcy of an insolvent partner, suit by such solvent partner against the bankrupt trustee for an accounting may be properly brought in the state courts of equity jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 414, 417; Dec. Dig. § 295.*]

8. Judgment (§ 499*) — Conclusiveness — Collateral Attack.

Where, in a suit for a partnership accounting, there was nothing in the judgments to indicate that there were any proceedings in bankruptcy pending against one of the partners when the judgments were entered, they were not subject to collateral attack, on the ground that the court had no jurisdiction, because of the pendency of bankruptcy proceedings against the insolvent partner before judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 940; Dec. Dig. § 499.*]

9. Partnership (§ 347*) — Decree on Accounting—Conclusiveness.

A prior judgment settling the accounts of a partnership between the parties up to May 1, 1905, was conclusive, and could not thereafter be re-examined with reference to matters adjudicated.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 821; Dec. Dig. § 347.*]

10. Appeal and Error (§ 1040*)—Sustaining Demurrer—Prejudice.

Defendant was not harmed by the sustaining of a demurrer to his cross-complaint, where he availed himself of the same matter by answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4092; Dec. Dig. § 1040.*]

In Bank. Appeal from Superior Court, Santa Barbara County; Walter Bordwell, Judge.

Action by A. C. Williams against H. P. Lane, trustee of the bankrupt estate of Addie L. Allen. Judgment for plaintiff, and defendant appeals. Affirmed.

Ralph W. Schoonover, for appellant. Day & Day, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

LORIGAN, J. This action was for an accounting brought by a solvent partner against the trustee in bankruptcy of his insolvent partner.

From a judgment settling the account the defendant appeals, and accompanies his appeal with what purports to be a transcript of the testimony and proceedings in the case, prepared under section 953a of the Code of Civil Procedure, in lieu of a bill of exceptions under which he attacks the sufficiency of the evidence to sustain the findings.

Objection to a consideration of this transcript is made by respondent on the ground that it is not properly settled, allowed, and certified. The only thing which purports to be a certification of the transcript is the certificate of the official stenographer of the court, who states that it is a correct transcript of the "hearing had in the above-entitled action and reported by me on the 4th and 5th days of December, 1907." This is not the method provided for in section 953a for the authentication of a transcript to be used in lieu of a bill of exceptions. The phonographic report of the trial provided for in that section must, after due proceedings pointed out in the section, be settled and allowed by the judge and certified to by him as correct, so as to constitute a record available on appeal in lieu of a bill of exceptions. None of the requisite steps were taken, and hence, there being no proper authentication of the transcript in question, the objection to its consideration must be sustained.

This leaves only for examination the points made by appellant on the judgment roll, which are that the trial court erred in overruling his demurrer to the complaint, and sustaining the respondent's demurrer to his cross-complaint. As to the demurrer to the complaint. The complaint sets forth that on May 9, 1905, plaintiff and one Addie L. Allen were partners, doing business under the firm name of A. C. Williams & Company; that on said last date, by a judgment of the superior court of Santa Barbara county "duly given or made," said partnership was dissolved, and subsequently, on the 12th day of May, 1905, a judgment was "duly given or made" settling all the accounts of said partnership, and between said partners; that prior to said dissolution of partnership said Addie L. Allen had filed her petition in bankruptcy in the district court of the United States for the southern district of California, praying that each of the copartners, and the said firm of A. C. Williams & Company be adjudged bankrupt; that on April 29, 1905, and prior to said judgment of dissolution a receiver was appointed by said district court, who took possession of all the property and accounts of said firm and retained them until the 17th of August, 1906, when said district court ordered them returned to plaintiff as solvent partner, for administration; that said Addie L. Allen was adjudged bankrupt by said district court on December 5, 1905, and said H. P. Lane was, on March 13, 1906, duly appointed her trustee, and that plaintiff has endeavored to account with defendant, who refuses to make any settlement or accounting. The complaint then sets forth that assets to the amount of $1,145.13 had been returned to plaintiff by said receiver, exhibits an account showing the disposition of said fund in settlement of the obligations of the partnership, and prays for a settlement of the account.

The demurrer of defendant to this complaint questioned, first, the validity of the judgments for a dissolution and accounting of the partnership referred to in the complaint, and, secondly, the jurisdiction of the superior court to proceed at all in the immediate action at bar. Both of these propositions, in a general way, may be considered together.

The point of appellant, as far as the original judgments for an accounting and dissolution are concerned, is that, notwithstanding this action had been commenced and was being prosecuted at the time Addie L. Allen filed her petition in bankruptcy, the effect of filing such petition was to oust the state court of jurisdiction to proceed further in the matter, and that the judgments rendered thereafter were void. In this connection, while it is not definitely alleged in the complaint that the action for a dissolution and accounting which eventuated in the judgments therefor was brought by Addie L. Allen against her partner, Williams, the briefs on both sides treat this as the fact. It must of course be conceded that when the action for an accounting and dissolution was commenced, the court had complete jurisdiction of the subject-matter and the parties, and unless the effect of a filing of the petition in bankruptcy by one of the partners was, as asserted by appellant, to deprive the state court of jurisdiction, that court could have proceeded to render a valid judgment in the matter. The particular provision of the bankruptcy act (sec. 11 [U. S. Comp. St. 1901, p. 3426]) relied on by appellant, declares that "a suit which is pending on a claim from which a discharge in bankruptcy would be a release, and which is pending against a person at the time of filing a petition against him, shall be stayed until after an adjudication or the dismissal of his petition." It is asserted by respondent that the action which was pending in the state court for an accounting and dissolution of partnership was not a suit on a claim from which a discharge in bankruptcy would have relieved the insolvent partner. We perceive no reason, however, for discussing this proposition, because it is apparent to us that the provision of the bankruptcy act referred to does not pretend to oust the state court of jurisdiction. At best, it but suspends it during a specified period. And this is not an absolute suspension even during such period, because this same section provides (subds. b and c) that the bankruptcy court may order the trustee to enter an appearance and defend any pending suit against the bankrupt, or, with the approval of the bankruptcy court, the trustee may be permitted to prosecute as a trustee any suit commenced by the bankrupt, with like force and effect as if it had been commenced by him. There is nothing in the statute which requires that the trustee should be substituted for the bankrupt in name. He may prosecute or defend a pending action upon the order or approval of the court without doing so. He may continue it in the name of the party whom he represents as trustee, without actually becoming a party to the record.

Now, while the complaint pleaded the judgments as "duly given or made" during a period intermediate the filing of the petition of the bankrupt and her adjudication as such, it is not disclosed by the complaint whether any order of the bankrupt court authorizing the trustee to further prosecute the suit brought by the bankrupt was or was not made. But, as far as the demurrer to the complaint is concerned, it is immaterial whether it did or not. The judgments were pleaded as the Code provides they may be, as being "duly given or made" at a certain date. Code Civ. Proc. § 456. So, conceding without deciding, that our state court had no jurisdiction to proceed further with the trial of the then pending cause, to which the bankrupt was a party, unless on approval of the bankrupt court, still when a judgment is pleaded under the Code provision as "duly given or made" such a pleading, as the Code section declares, imports the existence of all facts necessary to confer jurisdiction upon the court to pronounce it, and if one of the facts relative to jurisdiction to pronounce the judgment in question here was the order or approval of the bankruptcy court permitting the trustee to so further prosecute, it is under such a pleading imported that such order was duly made or approval given by the bankruptcy court. Hence the demurrer to the complaint was properly overruled.

On the point that the superior court had no jurisdiction to proceed in the immediate action at bar, the claim of appellant is that the bankruptcy court has exclusive jurisdiction of the property of the bankrupt, and that such court is the only forum in which the administration of his estate can be had. As a general proposition this is true. It is to be observed, however, as is quite apparent from the allegations of the complaint, that neither Williams, the plaintiff partner, seeking the accounting in the case at bar, nor the firm of Williams & Company, of which Addie L. Allen was a partner, was declared bankrupt by the bankruptcy court. Addie L. Allen was alone so declared. It is to be noted also that the bankruptcy law makes special provision as to the administration of partnership property, where it is declared by section 5, subdivision h, of the bankruptcy act that "in the event of one or more, but not all, of the partners of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; that such partner or partners not adjudged bankrupt shall settle the partnership as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." Under this provision the partnership estate is to be administered by the solvent partner. In the matter of such settlement the bankruptcy courts have no jurisdiction over the solvent partner. While he is accountable to the trustee of the bankrupt partner, it is only for such property as may be the share of the insolvent after there has been an administration by him of the partnership property. We are pointed to no provision of the bankruptcy act which requires an action against the trustee in bankruptcy for an accounting as to the partnership property to be brought in the bankruptcy courts. In fact, counsel for appellant admits that there is no direct provision on the subject, but claims that as the estate of the bankrupt must be administered by the bankruptcy court, that court necessarily has jurisdiction. But, as the partnership property is by express provision of the bankruptcy act not to be administered in the bankruptcy courts, but by the solvent partner, the act would seem to remit the solvent partner to such state tribunal as would have jurisdiction in those matters. The trustee in bankruptcy by section 23 of the act is limited in bringing or prosecuting suits to those courts where the bankrupt whose estate is being administered might have brought them, if the proceeding in bankruptcy had not been instituted against him. There is no limitation in the act as to where the solvent partner shall bring his action for an accounting against the trustee. The solvent partner and the trustee might, without the aid of any court, have agreed to an accounting between them. The solvent partner having endeavored to effect this, and being unable to do so, was necessarily required to resort to some court to accomplish it, and in the absence of any requirement to proceed in the bankruptcy court, had a right to invoke the aid of the state court as the tribunal having jurisdiction in such matters, and to which the insolvent partner would have had to resort for an accounting had he not been declared bankrupt. As the bankruptcy act declares that the partnership property shall not be administered in bankruptcy, but leaves the settlement of the partnership business to the solvent partner, and as this may necessarily require an action for an accounting, in the absence of anything in the act to the contrary, such action is properly brought in the state courts having equitable cognizance of such matters. The superior court had therefore jurisdiction of the action at bar, and the demurrer challenging that jurisdiction was properly overruled.

Appellant complains of the action of the court in sustaining a demurrer to his cross-complaint. By this pleading the defendant attempted to attack the validity of the judgments for dissolution of partnership and an accounting rendered on the 9th and 12th of May, 1905, which have heretofore been discussed; to have them declared void and for an accounting between the partners from the very formation of the partnership, notwithstanding the making of a judgment settling their account up to May 1, 1905. The basis for the attack on the validity of the judgments is the same heretofore considered—the pendency of the bankrupt proceedings against the insolvent partner had before judgment—with the further allegation that the fact of the pendency of such proceedings was suggested to the trial court before judgment was entered, with a demand for a stay of proceedings which was refused. In this connection, however, the cross-complaint sets up the judgments, from which it appears on the face thereof that they are rendered by a court having jurisdiction of the subject-matter and the parties, and were rendered by consent of the parties. There is nothing in the judgments to indicate that there were any proceedings in bankruptcy pending when they were entered. They are regular on their face, and, under these circumstances, are conclusive and not subject to a collateral attack, which is really all that appellant undertakes to do by the particular allegations against their validity to which we have just referred.

So, too, the judgment of May 12, 1905, in as far as it settled the accounts of the partnership between the partners up to May 1, 1905, is conclusive on the subject, and appellant was not entitled to go back of it and have re-examined the matters involved therein which had been adjudicated.

The only issue tendered by the allegation of the cross-complaint, aside from the attack on the judgments, was solely whether the solvent partner had accounted for all the partnership property. But as this issue was also made under the answer, appellant was not injured by the sustaining of the demurrer to the cross-complaint. He had the benefit in his answer of all that was contained in the cross-complaint on this material issue.

The entire matter of this partnership might have been settled in the original action had not the petition in bankruptcy filed by Addie L. Allen, one of the partners, prayed for an adjudication of bankruptcy not only against herself, but also against her partner, the plaintiff, and the firm of Williams & Company. On the filing of that petition the trustee in bankruptcy took possession of all the assets of the firm. The bankruptcy court subsequently decreed that neither Williams, nor the firm was bankrupt, but that Addie L. Allen alone was, and ordered the partnership property restored to Williams as solvent partner to settle the partnership business. It was only upon receipt of the partnership property and its conversion into money that the business of the partnership could be settled by the solvent partner, and which settlement consisted only, in this instance, of the payment of the partnership creditors. This being done, it was necessary, in the absence of any agreed settlement with the trustee, to have the account settled by a court in order that any interest of the bankrupt in the partnership property might be turned over to his trustee in bankruptcy, as the bankrupt law required.

Some other points are made by appellant, but they cannot be considered as they are based on the transcript accompanying the judgment in the case at bar, which, not being properly authenticated, is no part of the record.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

158 Cal. 21

GAY v. ENGEBRETSEN. (L. A. 2,455.)

(Supreme Court of California. June 13, 1910.)

1. MUNICIPAL CORPORATIONS (§ 400*)—IMPROVEMENTS—LIABILITY OF CONTRACTOR FOR NEGLIGENCE.

One contracting with a city to make certain street improvements is liable for injuries to others resulting from his own negligence in doing the work without any express provision in the contract imposing such liability.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 400.*]

2. MUNICIPAL CORPORATIONS (§ 400*)—STREET IMPROVEMENTS—CONTRACTS—ORDINANCE IMPOSING LIABILITY ON CONTRACTOR—VALIDITY.

A city ordinance relating to street improvements and providing that all damage arising from the nature of the work during its progress and before its acceptance, or from any act or omission on the part of the contractor or his servants not authorized by the specifications, shall be borne by the contractor, required the assumption by the contractor of such liability only as would accrue from his failure to exercise proper care in the doing of the work, and was not invalid as seeking to compel him to assume damages arising after the completion of the work, which obligation rested on the city, thereby tending to increase the cost of the work to the property owner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 962-964; Dec. Dig. § 400.*]

3. STATUTES (§ 255*)—TIME OF TAKING EFFECT.

The ordinary rule is that legislative enactments become operative on their passage, unless there is some express provision of law to the contrary.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 336; Dec. Dig. § 255.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. MUNICIPAL CORPORATIONS (§ 294*)—STREET IMPROVEMENTS—BIDS—PUBLICATION OF NOTICE.

Vrooman Act (St. 1885, c. 153) § 3, as amended by St. 1905, c. 67, § 1, relating to street improvements, provides that 20 days after the publication by the street superintendent, and at the expiration of 25 days after the advertising and posting of any resolution of intention, the city council shall have jurisdiction to order the work to be done, etc., which order shall be published for 2 days, the same as provided for the publication of intention. Section 5 provides that before the awarding of any contract the city council shall cause notices for bids to be posted for 5 days and to be published for 2 days in a newspaper designated by the council. *Held* that, while the passage of the resolution ordering the work done is a necessary preliminary to the right to award a contract, the statute does not require the publication of the resolution ordering the work done to be fully made in advance of the call for bids.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776–788; Dec. Dig. § 294.*]

Department 1. Appeal from Superior Court, San Diego County; R. W. Guy, Judge.

Action by John H. Gay against John Engebretsen. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 109 Pac. 880.

L. L. Boone, for appellant. Haines & Haines, for respondent.

SLOSS, J. Action for the cancellation of an assessment for street improvements and to enjoin the contractor from claiming any interest thereunder in the lands assessed. The defendant's demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was entered in favor of the defendant. The plaintiff appeals.

The appellant makes two points against the validity of the assessment.

The work consisted of street grading in the city of San Diego. The resolution of intention referred to specifications contained in ordinance 2,061 of said city, entitled: "An ordinance providing specifications for the grading of streets in the city of San Diego, California." Section 19 of this ordinance reads as follows: "All loss or damage arising from the nature of the work to be done under these specifications, during the progress of the work, and before the acceptance thereof, or from any act or omission on the part of the contractor, or any agent or person employed by him, occurring in the course of the work not authorized by these specifications, shall be sustained and borne by the contractor. The contractor shall keep good and sufficient guards around said improvement, by fence or otherwise, to prevent accident, and shall hang thereon lights to burn from dusk to daylight, and the contractor shall hold the city harmless from any and all suits for damages arising from or out of and during the performance of the work, or any portion thereof, and before the same has been accepted."

The position of the appellant is that this clause is obnoxious to the rule declared in a line of cases commencing with Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Van Loenen v. Gillespie, 152 Cal. 222, 96 Pac. 87; Hatch v. Nevills, 152 Cal. xvi, 95 Pac. 43; Stansbury v. Poindexter, 99 Pac. 182. We are satisfied that there is a clear distinction between section 19 above quoted and the provision of the specifications construed in Blochman v. Spreckels, which may be taken as a type of the cases dealing with this subject. The ordinance there construed contained the following provision: "The contractor shall keep good and sufficient guards around said improvements by fence or otherwise, to prevent accidents, and shall hang thereon lights to burn from dusk to daylight; and the contractor shall hold the city harmless from any and all suits for damages arising out of the construction of said improvements. The contractor shall when required to do so by the superintendent of streets remove from the work any overseer, laborer or other person, who shall refuse or neglect to obey the said superintendent in anything relating to the work, or who shall perform his work in a manner contrary to these specifications or be found incompetent or unfaithful. All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor."

It was the last sentence of this clause that was regarded by the court as fatal to the validity of the specifications. This sentence, says the opinion, "looked to damage which might arise out of and subsequent to the completed work—practically any damage for which the city would be liable which might originate in the nature of the work to be done." The decision was that such a provision was unauthorized, in that it sought to compel the contractor to assume an obligation properly resting upon the city, and thereby tended to increase the cost of the work and the consequent burden to the property owner. The court was distinguishing between two kinds of damage which might result from the doing of street work: First, such as might result from the making of the improvement, however carefully and properly the actual work of construction were done; and, second, the damage which might accrue through negligence, or the failure to take proper precautions during the period of construction. The first is a damage to property resulting from the exercise of the governmental function of ordering the improvement. For it the person whose property has been injured may seek redress from the governmental agency which caused the work to be done. The second gives rise to the liability resting upon any one who negligently performs a lawful act in such a manner as to injure another. There can be no impropriety in making the contractor liable for the consequences of his own negligence. Indeed, he would be so liable without any express provision in the contract. James v. San Francisco, 6 Cal. 528, 65 Am. Dec. 526; Barton v. McDonald, 81 Cal. 265, 22 Pac. 855. In all probability, paragraph 19 of the specifications in the case at bar was designedly framed to avoid the vice of the clause condemned in Blochman v. Spreckels, and similar cases. It was, we think, intended to require the assumption by the contractor of such liability only as would accrue from his failure to exercise proper care in the doing of the work while the same was under his exclusive control and management. This is the meaning naturally derived from the limitations expressed in the clause itself. The loss or damage to be sustained and borne by the contractor is only such as arose from the nature of the work to be done "during the progress of the work." His obligation to hold the city harmless from any and all suits for damages is limited to such suits as may arise from or out of and during the performance of the work, and before the same has been accepted. The damage which will accrue to property from the proper carrying out of a public improvement scheme is, ordinarily, permanent in character. Its effects, while having their inception during the progress of the work, continue thereafter. The limiting words placed in paragraph 19 of these specifications may well be construed as excluding this very element of damage. Indeed, such construction is necessary in order to give any substantial meaning to the restrictive language differentiating these specifications from those found in the Blochman Case. A contrary ruling would require us to say that the clause was intended to impose upon the contractor a liability limited in time for a loss or damage which would in most cases be permanent and indivisible.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The rule of Blochman v. Spreckels has been considered a harsh one when applied to specifications identical with those there involved. Even in cases where the decision was clearly in point, this court has manifested reluctance in following it (see Woollacott v. Meekin, supra), and has, in adhering to the doctrine, based its action in large part upon the principle of stare decisis. We are certainly not disposed to extend the application of the decision in question to facts which may so readily be distinguished from those which were thought to require a holding adverse to the validity of the assessment.

The second point relates to the publication of the resolution ordering the work done, and of the notice inviting proposals. The resolution was passed by the common council on the 6th day of November, 1905. It designated the San Diego Union and Daily Bee as the newspaper in which the resolution itself and the notice inviting sealed proposals for doing the work should be published. The resolution was published in said paper on the 13th and 14th days of November, 1905, and the notices inviting proposals were published therein on the same days, i. e., the 13th and 14th days of November. The contention is that, until publication of the resolution had been completed, there was no jurisdiction to call for bids, and, in addition, that, inasmuch as the only designation of a paper in which the notices should be published was in the resolution ordering the work done, there was, at the time the notices were published, no valid designation of a paper in which said publication of notices should be made.

The argument necessarily underlying these claims is that a resolution ordering work done is not effective as a basis for further proceedings, or otherwise, until it has been published as required by law. Section 3 of the Vrooman act (St. 1885, p. 148, as amended by St. 1905, p. 63) provides that at the expiration of 20 days after the expiration of the time of publication by the street superintendent, and "at the expiration of twenty-five days after the advertising and posting, as aforesaid, of any resolution of intention (in the absence of objection by property owners), the city council shall be deemed to have acquired jurisdiction to order any of the work to be done, or improvement to be made, which is authorized by this act; which order, when made, shall be published for two days the same as provided for the publication of intention." Section 5 provides that, before the awarding of any contract, the city council shall cause notices inviting sealed proposals or bids to be posted for five days and to be published for two days in a newspaper designated by the council for that purpose. It will be observed that, while section 3 expressly makes the publication of the resolution of intention a condition precedent to the jurisdiction of the council to order the work done, the act contains no declaration that the publication of the resolution ordering the work done shall be made before any further steps can be taken. It is merely provided that the resolution shall be published for two days. We see no good reason for holding that the resolution ordering work done is ineffectual for any purpose until the completion of the publication. The ordinary rule is that legislative enactments become operative upon their passage, unless there is some express provision of law to the contrary. People v. Clark, 1 Cal. 406; Davis v. Whidden, 117 Cal. 618, 49 Pac. 766. This court has held that, under a city charter providing that a board of trustees should publish all ordinances for 10 days, but containing no provision that an ordinance should not take effect until after its publication, an ordinance regulating liquor licenses took effect on its passage. City of Sacramento v. Dillman, 102 Cal. 107, 36 Pac. 385. The principle of this decision is applicable here. The appellant cites several cases in which the completion of publication was held to be essential to the effectiveness of an ordinance; but an examination of these cases shows that in each instance the charter or law authorizing the adoption of the ordinance expressly provided that the enactment should not be effective until published. Some of the authorities cited deal with proceedings under the street law. In each of them (Porphyry Paving Co. v. Ancker, 104 Cal. 340, 37 Pac. 1050; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; California Improvement Co. v. Reynolds, 123 Cal. 88, 90, 55 Pac. 802; Greenwood v. Hassett, 128 Cal. xviii, 61 Pac. 173) the question was concerning the necessity of publishing the resolution of intention. It was held, following the plain language of section 3, a part of which we have quoted, that the publication of this resolution is by the statute made a prerequisite to the power of the council to order the work done, or of the street superintendent to post notices of street work. As we have seen, there is no such provision regarding the publication of the resolution ordering the work done. We hold, accordingly, that that ordinance became effective upon its passage, for the purpose of designating the newspaper in which it and the notice calling for bids should be published, as well as for the further purpose of authorizing the posting and publication of such notices. The passage of the resolution ordering the work done is, no doubt, a necessary preliminary to the right to award a contract, as is the posting and publishing of the notices inviting bids; but we fail to find in the statute any provision requiring the publication of the resolution ordering the work done to be fully made in advance of the call for bids.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

158 Cal. 775

ENGEBRETSEN v. GAY et al. (L. A. 2,483.)

(Supreme Court of California. June 13, 1910.)

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by John H. Engebretsen against John H. Gay and others. From the judgment, defendants appeal. Affirmed.

L. L. Boone, for appellants. Haines & Haines, for respondent.

PER CURIAM. Appeal from a judgment foreclosing the lien of a street assessment. The questions involved are the same as those disposed of in Gay v. Engebretsen (L. A. No. 2,455) 109 Pac. 876, and the authority of that case requires an affirmance of the judgment.

Judgment affirmed.

158 Cal. 775

ENGEBRETSEN v. GAY et al. (L. A. 2,484.)

(Supreme Court of California. June 13, 1910.)

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by John H. Engebretsen against John H. Gay and others. From the judgment, defendants appeal. Affirmed.

L. L. Boone, for appellants. Haines & Haines, for respondent.

PER CURIAM. Appeal from a judgment foreclosing the lien of a street assessment. The questions involved are the same as those disposed of in Gay v. Engebretsen (L. A. No. 2,455) 109 Pac. 876, and the authority of that case requires an affirmance of the judgment.

Judgment affirmed.

158 Cal. 27

ENGEBRETSEN v. GAY et al. (L. A. 2,478.)

(Supreme Court of California. June 13, 1910.)

1. MUNICIPAL CORPORATIONS (§ 400*)—STREET IMPROVEMENTS—DAMAGES—LIABILITY.

Liability for damages to abutting property resulting from raising the grade of a street rests on the city by virtue of the constitutional prohibition against the taking or damaging of private property for public use without compensation and cannot be imposed on the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 962–964; Dec. Dig. § 400.*]

2. PLEADING (§ 148*)—CROSS-COMPLAINT—SUBJECTS.

Under Code Civ. Proc. § 442, providing that a cross-complaint may be filed where defendant seeks affirmative relief relating to or depending on the contract or transaction on which the action is brought, or affecting the property to which the action relates, defendant in an action to foreclose a street assessment lien may not by cross-complaint interpose a claim against plaintiff, the contractor, for trespass in piling dirt on defendant's property while doing the work.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 299; Dec. Dig. § 148.*]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by John Engebretsen against John H. Gay and others. From the judgment, defendants appeal. Affirmed.

L. L. Boone (Stearns & Sweet and Ward, Wells & Ward, amici curiæ), for appellants. Haines & Haines, for respondent.

SLOSS, J. Appeal by defendant Gay from a judgment foreclosing the lien of a street assessment. Two points made by appellant against the validity of the assessment were fully considered in Gay v. Engebretsen (L. A. No. 2,455) 109 Pac. 876, where we held that neither afforded sufficient ground for defeating the lien. An additional question is presented in this case.

The work consisted in part of the grading of India street in the city of San Diego. The defendant Gay filed a cross-complaint alleging that the plaintiff, acting under the contract for the grading of said street, had raised the level thereof about 20 feet along the frontage of Gay's lot, and had piled dirt on a part of said lot, thereby destroying said defendant's use of the street for ingress to and egress from said property, and damaging him in the sum of $500. Plaintiff's demurrer to the cross-complaint was sustained.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant sets up in his cross-complaint the provision of the specifications whereby the contractor was required to agree that loss or damage arising from the nature of the work to be done under the contract during the progress of the work and before acceptance thereof should be sustained and borne by the said contractor. A reference to our opinion in L. A. No. 2,455 will be a sufficient guide to our reasons for holding that this clause has no reference to the part of the damage resulting from raising the grade of the street. Liability for such damage rests upon the city by virtue of the constitutional provision prohibiting the taking or damaging of private property for public use without compensation. Blochman v. Spreckels, 135 Cal. 622, 67 Pac. 1061, 57 L. R. A. 213, and the cases following it, went upon the theory that this liability could not properly be imposed upon, or assumed by, the contractor under a street improvement contract. If the contractor cannot make a valid agreement to bear this liability, it would seem to follow, a fortiori, that he is not subject to it, where, as in this case, he has not agreed to assume the responsibility. In Eachus v. Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147, it is said, in discussing the liability of the city for damage caused to an abutting owner by altering the grade of a street, that "the remedy is not against the contractor unless he departs from the line of the official grade. The city, in the establishment of the official grade of a public street and in excavating and grading the street to the official grade, acts through its legally elected and qualified officers. When it lets a contract for the grading of the streets, which it had the authority and power to let, it assumes the responsibility of paying all damages necessarily caused to private property by such grading." See, also, De Baker v. Railway Co., 106 Cal. 257, 286, 39 Pac. 610, 46 Am. St. Rep. 237.

The appellant, however, urges that, independently of the raising of the street level, he has a cause of action against the contractor for the trespass alleged to have been committed in piling dirt upon the abutting property. As to this, there is the objection that the cause of action is not a proper subject of cross-complaint in an action to foreclose the assessment. That such demand cannot be asserted by way of counterclaim has been expressly decided here. In Himmelmann v. Spanagel, 39 Cal. 389, the court said that "the assessment is the 'transaction' within the meaning of section 47 of the practice act, out of which the cause of action must arise, which the defendants are authorized to set up as a counterclaim. It is apparent that the alleged demand did not arise out of the assessment, nor, indeed, out of the proceedings upon which it is based, and, therefore, is not available as a counterclaim." See, also, Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303; Duncan v. Ramish, 142 Cal. 693, 76 Pac. 661.

While the case cited deals with the propriety of a counterclaim, the reasoning is such as to exclude equally a cross-complaint. Under section 438 of the Code of Civil Procedure (which is similar to section 47 of the old practice act), a counterclaim may be filed on a cause of action "arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." A cross-complaint may be filed where the defendant seeks affirmative relief "relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates." Code Civ. Proc. § 442. With reference to the point under discussion there is no such difference between sections 438 and 442 as to justify the holding that a cross-complaint for the cause of action here asserted is permissible, any more than a counterclaim would be.

The demurrer was therefore properly sustained.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI J.

158 Cal. 30

ENGEBRETSEN v. GAY et al. (L. A. 2,501.)

(Supreme Court of California. June 13, 1910.)

1. Constitutional Law (§ 248*)—Attorney's Fees—Right to Impose—Classification.

Attorney's fees may be by statute allowed a successful plaintiff in certain classes of cases, though no such allowance be made defendant in case he prevails, provided the classification is based on some difference bearing a reasonable and just relation to the act respecting which the classification is attempted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 248.*]

2. Municipal Corporations (§ 526*)—Special Assessments—Foreclosure of Lien—Attorney's Fees — Statutes — Constitutionality.

Act March 18, 1885 (St. 1885, c. 153), relating to street improvements, and providing, in section 12, as amended by St. 1889, c. 151, § 8, that on foreclosure of a street assessment lien plaintiff shall recover in addition to the taxable costs $15 as attorney's fees, is constitutional; the assessment being laid under the state's power to tax, and the state having power to provide a penalty for nonpayment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 526.*]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by John Engebretsen against John H. Gay and others. From part of the judgment, plaintiff appeals. Reversed, with directions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Haines & Haines, for appellant. L. L. Boone, for respondents.

ANGELLOTTI, J. This is an appeal by plaintiff from a portion of the same judgment as is involved in Engebretsen v. Gay et al. (L. A. 2,478) 109 Pac. 879, this day decided, a judgment sustaining plaintiff's claim of a lien on property of defendant to secure payment of the amount of an assessment for street improvements and directing a sale of such property to satisfy such assessment with interest and costs. While otherwise in favor of plaintiff, this judgment denied his right to recover the sum of $15 in addition to the taxable costs, as an attorney fee, and disallowed the same. Plaintiff's appeal is from so much of the judgment as denies him a recovery of such attorney fee.

Section 12 of the act relating to street improvements, the act of March 18, 1885 (St. 1885, c. 153), as amended by St. 1889, c. 151, § 8, in terms provides that, "in all cases of recovery under the provisions of this act, the plaintiff shall recover the sum of $15 in addition to the taxable costs as attorneys' fees." The theory upon which the lower court disallowed plaintiff's claim was that this provision is invalid under the doctrine of Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 Pac. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193. In that case it was held, in regard to liens of mechanics and others on real property for labor or materials furnished in improving the same (sections 1183–1203a, Code Civ. Proc.), that the statutory provision for the allowance of reasonable attorney's fees to each lien claimant whose lien is established (section 1195, Code Civ. Proc.) is void as violative of the provision of the federal Constitution which guarantees to every person the equal protection of the law, and of the provisions of our own Constitution "which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing and protecting property." That ruling has been followed in Mannix v. Tryon, 152 Cal. 31, 41, 91 Pac. 983, and Merced Lumber Co. v. Bruschi, 152 Cal. 372, 375, 92 Pac. 844, and must now be taken as settled law in this state. The reasoning upon which this conclusion is based in the first case cited (Builders' Supply Depot v. O'Connor, supra) was that of the United States Supreme Court in Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, wherein a statute of the state of Texas gave an attorney fee of $10 to any person having a valid bona fide claim against a railroad corporation not exceeding $50, for personal services rendered or labor done, or for damages, etc. The court said that the effect of this statute was simply to impose a penalty upon railroad corporations for failure to pay certain debts, while individuals or other corporations guilty of similar delinquencies were not thus punished. It was declared that under this statute the railroad corporations were not treated as other debtors "or equally with other debtors," that they could not appeal to the courts as other litigants under like conditions and with like protection, that if the litigation terminated adversely to them they were mulcted in the attorney's fees of the successful plaintiff, while if successful they recovered no attorney's fees, that they are therefore discriminated against and do not stand equal before the law. The Texas statute was therefore held invalid. This court said, in Builders' Supply Depot v. O'Connor, supra: "A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed." There is, however, nothing in the opinion in Gulf, etc., Ry. Co. v. Ellis, supra, or in our own Builders' Supply Depot v. O'Connor, supra, to suggest that attorney's fees may not be allowed a successful plaintiff in certain classes of cases, even though no such allowance be made to the defendant in the event that he prevails. The right to classify in this respect, as long as the classification is "based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted," was conceded by the opinion in Gulf, etc., Ry. Co. v. Ellis, supra (see Atchison, etc., R. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909), and is recognized by all the authorities. The difficulty in the Texas case was that there was no such difference, and the same was held to be true by this court in regard to our mechanic's lien law provision. In Atchison, etc., R. R. Co. v. Matthews, supra, the United States Supreme Court upheld a statute of the state of Kansas allowing a reasonable attorney's fee to a successful plaintiff in an action against a railroad company for damages by fire caused by the operating of the railroad, on the ground that the same was a reasonable regulation in the nature of a police regulation to secure the utmost care on the part of railroad companies to prevent the escape of fire, and not simply a provision to secure the payment of debts. Upon the same principle, the United States Supreme Court has sustained a statute imposing a penalty on railroad corporations of $1.25 per day for failure to pay a laborer what is due him upon discharge, the statute being held to be a reasonable regulation for the protection of servants and employés of railroads (St. Louis, etc., Ry. Co. v. Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746), and a statute imposing a penalty of $50 on a common carrier who failed to adjust and pay a valid claim for damages for loss of property within a stated time, it being held that the design was not to penalize the carrier for the nonpayment of a debt, but that the statute was a reasonable regulation to bring about prompt settlement of such claims (Seaboard, etc., Ry. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108). Decisions of state courts along the same lines are numerous. In Railroad v. Crider, 91 Tenn. 489, 19 S. W. 618, an act imposing on unfenced railroads absolute liability for injuries done to live stock by their moving trains, and making them liable for a reasonable attorney's fee in any action brought to recover the amount appraised as due the plaintiff therefor, where the plaintiff recovers the amount of the appraisement, was upheld. The act was held to be a valid exercise of the police power of the state; the object thereof being to compel the inclosure of the track in such manner as to prevent live stock going on the road. As to the provision for an attorney's fee objection was made that it was the imposition of a burden upon one class of litigants in favor of another, and a violation of the constitutional rule requiring equality of right, privilege, and exemption. To these objections the court said, through Judge Lurton, that they overlooked the fact that the legislation is intended to compel railroad companies to fence in their tracks, and that the state having the right, in the exercise of its police powers, to compel all railroad companies to fence in their tracks, might enforce such policy, not only by making the offending company liable to all sustaining injury by reason of their neglect, but, blending public and private interests, by permitting a recovery in excess of actual damages by way of punitive damages and reasonable attorney's fees. In Terre Haute, etc., R. Co. v. Salmon, 161 Ind. 131, 67 N. E. 918, a statute allowed an owner to fence a railroad right of way where the railroad company refused on proper notice to do so, and to recover the cost, with reasonable attorney fee. It was held that the Legislature had the right, in the exercise of its police powers, to prescribe this duty and impose penalties for failure to perform, in shape of double actual damages, double costs, attorney fee, and absolute liability in case of injury to animals. The court said that the attorney fee was in the nature of a penalty for damages imposed by the Legislature as a punishment for the neglect and willful failure of the railroad company to erect said fence as required by the statute and to compel it to construct the same. See, also, Humes v. Railway Co., 82 Mo. 221, 52 Am. Rep. 369; Perkins v. St. Louis, etc., Ry. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; Peoria, etc., Ry. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718, in which the attorney fee provision was upheld as a part of the penalty imposed for noncompliance with the duty imposed; Jacksonville, etc., Ry. Co. v. Prior, 34 Fla. 271, 15 South. 760; note to Dell v. Marvin, 79 Am. St. Rep. 178.

More closely in point, but depending on the same general principle, are decisions upholding provisions for attorney's fees in actions to recover taxes, the validity of which has apparently never been doubted by the courts. In People v. Seymour, 16 Cal. 332, 76 Am. Dec. 521, an action for the recovery of taxes, it was held that a provision of a statute compelling a party delinquent in payment of taxes, if sued, to pay costs and a percentage by way of an attorney fee in addition to the tax, was not unconstitutional. In State v. Kerr, 8 Mo. App. 125, such a provision was upheld; the court saying that it was purely remedial, and stands upon a like footing with any other provision for compelling the delinquent to bear the expenses incident to an enforcement of the state's claim for taxes. See, also, U. S. Electric, etc., Co. v. State, 79 Md. 63, 72, 28 Atl. 768. It is the legal duty of every person liable for taxes to pay the same when due, and the power of the state to impose upon the tax payer penalties for noncompliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, including reasonable attorney's fees, cannot be doubted.

There is no distinction in principle in this regard between ordinary taxes and local assessments for improvements under such statutes as our street improvement act. The assessment, it is true, is one in favor of the contractor to whom the contract for the improvement has been let by the public authorities, but it is one laid by virtue of the power of the state to tax, and the contractor may properly be regarded as the agent of the state in the matter of the enforcement of the tax against the assessed property. The obligation resting on the property assessed to answer for this tax is as clear and positive as is the duty of a taxpayer to pay the ordinary tax. The nature of the proceedings is such that the expense of collecting the tax on property delinquent, if not recoverable against such property in the proceeding to enforce the tax, would fall in part on those who voluntarily pay their assessments, since contractors in bidding upon street work would be compelled to include in their estimates an additional amount sufficient to indemnify them against the probable further expense in this regard. Such expense should equitably be borne only by the property as to which such proceedings are rendered necessary by the delinquency of the owners. It would seem that the Legislature should have the power to provide for the payment of such additional expense by the property whose owners are responsible therefor. While the precise question has not been presented for determination many times, such rulings as have been made sustain the validity of such a provision. It is declared in Page & Jones, Taxation by Assessment, that if the statute so provides a penalty may be charged for failure to pay an assessment when due, and an attorney fee may be recovered in a suit to enforce an assessment. Sections 108, 1109, and 1110. The question was determined by the Supreme Court of Indiana in favor of such a provision for attorney's fees in Brown v. Central Bermudez Co., 162 Ind. 452, 69 N. E. 150; the court saying in reply to a claim that the provision was unconstitutional: "A street assessment is laid by virtue of the power of the state to tax, and we think that a statute providing for the allowance of an attorney's fee on foreclosure in such case can be upheld on the ground that the state may provide for a penalty if the delay of the property owner to discharge such obligation renders it necessary to commence suit. The enactment upon the subject may be compared to the provisions of statutes made for the benefit of purchasers at tax sales." See, also, Pittsburgh, etc., R. Co. v. Taber, 168 Ind. 419, 422, 77 N. E. 741.

We are of the opinion that the provision for an attorney fee in this class of cases is not in violation of any constitutional provision, federal or state, and that the judgment is erroneous in not including the allowance of $15 asked by plaintiff thereunder.

So much of the judgment of the court below as refuses plaintiff an allowance for attorney fee is reversed, with directions to the court below to modify its judgment by incorporating a provision allowing such a fee as provided by the statute.

We concur: SHAW, J; SLOSS, J.

(158 Cal. 37)

ROSS v. BARBER ASPHALT PAVING CO.

(L. A. 2,488.)

(Supreme Court of California. June 13, 1910.)

MUNICIPAL CORPORATIONS (§ 469*)—STREET IMPROVEMENTS — INTERSECTIONS — ASSESSMENT OF CORNER LOTS—VALIDITY.

The Vrooman act (St. 1885, c. 153, § 7, subd. 3), authorizing assessment of the cost of street intersections on corner lots in accordance with their frontage on both streets, is constitutional and valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1113–1117; Dec. Dig. § 469.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by A. L. Ross against the Barber Asphalt Paving Company. Judgment for defendant, and plaintiff appeals. Affirmed.

L. L. Boone, for appellant. H. E. Doolittle and E. S. Torrance, for respondent.

SLOSS, J. The plaintiff appeals from a judgment in favor of defendant in an action for the cancellation of a street assessment. The judgment was entered upon the sustaining of a demurrer to the complaint.

Two of the appellant's objections to the proceedings are answered by a reference to Gay v. Engebretsen (L. A. No. 2,455) 109 Pac. 876, where we held the same points to be without merit.

An additional question is here presented. The court, on motion of the defendant, struck from the complaint certain allegations relative to the method of computing the assessments. The work covered by the contract consisted of paving Seventh street from the south line of B street to the north line of L street. In this distance there were various intersections of cross-streets, among others I street. Plaintiff was the owner of a corner lot, having a frontage of 50 feet on Seventh street, and 100 feet on I street. The matter stricken out consisted of averments that the superintendent, in making the assessments, had made the same in accordance with the frontage of the lots on Seventh street, except in the case of intersections, for which he had assessed corner lots in accordance with their frontages on both Seventh street and the cross-street, while inside lots were assessed only on the basis of frontage on Seventh street.

That this method was the one prescribed by the Vrooman act (St. 1885, p. 152, § 7, subd. 3) is not disputed. It is claimed, however, that the statutory provision for assessing intersections is in violation of the Constitution. The contention does not appeal to us as tenable. There can no longer be, in this state, any question of the validity of the general method provided by the Vrooman act for assessing property for street improvements according to the frontage of the property on the line of the improvement. Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661. Where the work consists of an intersection of two main streets, the act assesses the cost "at a uniform rate per front foot of the quarter blocks * * * adjoining and cornering upon the crossings." There is neither inequality nor injustice in this. The result is, no doubt, to put a heavier burden upon corner lots than upon inside lots. But the burden is merely proportionate to the benefit resulting from the improvement. The Legislature has, in effect, declared that the improvement of the crossing of two streets benefits the property fronting on each of such streets for one-half of the distance from the intersection to the next main street. Section 34, subd. 12. There is thus created an assessment district, and every lot within this district is assessed in proportion to its frontage. A corner lot pays more because it is doubly benefited. The crossing may reasonably be regarded as a part of each of the intersecting streets. Its improvement is a benefit to the land fronting on each. The owner of the corner lot is, therefore, deprived of no constitutional right when the Legislature provides that his property shall be assessed according to its combined frontage on the two streets.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(158 Cal. 66)

ESTUDILLO et al. v. SECURITY LOAN & TRUST CO. OF SOUTHERN CALIFORNIA et al. (L. A. 2,550.)

(Supreme Court of California. June 22, 1910. Rehearing Denied July 18, 1910.)

1. JUDGES (§ 30*) — AUTHORITY — ACTS OF JUDGE OUT OF COUNTY.

A judgment rendered by a judge of another county, called in by a disqualified judge, is not invalid, because he signed his findings and conclusions and order for judgment at home and was not in the county of the trial when judgment was entered.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 143; Dec. Dig. § 30.*]

2. APPEAL AND ERROR (§ 1024*)—REVIEW—FINDINGS OF TRIAL JUDGE—CONCLUSIVENESS.

A trial judge's finding on conflicting affidavits is conclusive, though the issue be his own disqualification.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4020, 4028; Dec. Dig. § 1024.*]

3. VENUE (§ 49*)—CHANGE—GROUNDS — BIAS OF JUDGE.

Repeated error in rulings is insufficient to show bias of the trial judge, entitling the agreed party to a change of venue.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 71; Dec. Dig. § 49.*]

4. APPEAL AND ERROR (§ 9*)—MOTIONS—REMEDY TO SETTLE STATEMENT.

The remedy on a trial judge's refusal to settle a statement to be used on motion for a new trial is by proceedings to compel settlement, and not by appeal from the order refusing a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 25–33; Dec. Dig. § 9.*]

5. NEW TRIAL (§ 127*)—MOTION—REQUISITES.

Under the express terms of Code Civ. Proc. § 659, subd. 4, when motion for new trial is on the minutes of the court, the notice of motion must specify the particulars in which the evidence is insufficient, if such insufficiency is relied on, and must specify the particular errors of law upon which movant relies.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 256, 261; Dec. Dig. § 127.*]

6. JURY (§ 14*)—RIGHT TO JURY TRIAL—EQUITY PROCEEDINGS.

An attack upon judicial proceedings for fraud is an equity proceeding, in which the parties are not entitled of right to jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 81; Dec. Dig. § 14.*]

7. JURY (§ 13*)—RIGHT TO JURY TRIAL—LEGAL AND EQUITABLE ISSUES.

In a suit involving legal and equitable issues, the former are ordinarily triable by the court and the latter by the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 52; Dec. Dig. § 13.*]

8. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—FINDINGS ON LEGAL ISSUES.

Any error by the trial judge in disposing of legal issues in a suit to vacate a foreclosure sale was harmless, where plaintiffs were not entitled to relief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4128; Dec. Dig. § 1046.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by Francisco Estudillo and another against Security Loan & Trust Company of Southern California and another. From orders made after judgment for defendants, plaintiffs appeal. Affirmed.

J. F. Conroy, for appellants. E. W. Freeman and John G. North, for respondents.

SLOSS, J. A judgment in favor of defendants, entered upon the sustaining of their demurrer to the complaint, was reversed by this court. Estudillo v. Security L. & T. Co., 149 Cal. 556, 87 Pac. 19. Upon the return of the cause to the lower court an answer was filed and a trial had, resulting in a second judgment for the defendants. The plaintiffs appeal from three orders made after this judgment.

The respondents make a preliminary objection to a consideration of the appeals on the ground of the alleged insufficiency of the record on appeal. An examination of this point is unnecessary, as we have reached the conclusion that the orders appealed from may be sustained on the merits.

The nature of the case is set forth, in substance, in our opinion on the former appeal. The action was pending in Riverside county. After the issues had been framed the plaintiffs employed, as one of their attorneys, a gentleman related to the judge of that county in such manner as to disqualify the latter. Code Civ. Proc. § 170, subd. 2. Said judge thereupon requested Hon. Frank F. Oster, judge of the superior court of San Bernardino county, to try the action. Judge Oster came to Riverside on February 5, 1907, called the case for trial, heard the testimony offered by the respective parties, and, after ordering the cause submitted on briefs to be filed, returned to his home in San Bernardino. On April 9, 1907, he signed, at San Bernardino, written findings of fact and conclusions of law, with an order that judgment be entered in accordance therewith. These papers he sent to the clerk of the superior court of Riverside county, with directions to file the same. The clerk followed such directions, and, on April 19, 1907, entered judgment in favor of defendants, in accordance with the conclusions of law. Judge Oster was not within the county of Riverside on the 9th day of April, when he signed the findings, nor on the 19th day of April, when judgment was entered. Subsequently the plaintiffs moved to strike from the files the findings of fact and conclusions of law, and to vacate the judgment entered thereon. The motion was denied. One of the appeals now before us is an appeal from this order denying the motion to vacate the judgment. (There appears to be no appeal from that part of the order refusing to strike the findings and conclusions from the files.)

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The argument in support of this appeal is that the rendition of judgment is a judicial act; that such judgment must be rendered by a court, and not by a judge acting out of court, and more particularly outside of the territorial jurisdiction for which the court is organized. It would be of little avail to analyze these propositions, or to undertake to decide, as an original question, how far they are applicable to the facts before us. This court has, on two occasions, upheld the validity of judgments ordered and entered under circumstances precisely like those here presented. In Comstock Q. M. Co. v. Superior Court, 57 Cal. 625, a judge of the superior court of Monterey county, having been called in by a disqualified judge to hear and determine an action pending in the superior court of Santa Cruz county, heard the cause in said Santa Cruz county. He then returned to his own county of Monterey, and there prepared and signed findings of fact and conclusions of law, and ordered judgment to be entered thereon against the defendant. Said findings and order were transmitted to the clerk of the superior court of Santa Cruz county, who filed them and entered judgment accordingly. On defendant's application to this court for a writ of certiorari to review and annul the judgment, the court said: "The jurisdiction of the court to hear and determine the case is not doubted, but it is claimed that the hearing and determination should have been in the county in which the action was pending. This may and must be conceded, we think, but the cause was not determined until the findings and order for judgment were filed with the clerk of the superior court of Santa Cruz county. It was not the signing, but filing of the findings and order for judgment that determined the action. We are quite confident that there is no law that requires a judge to deliberate upon a case or to prepare his findings and order for judgment in the county in which the cause is pending. If there is not, it follows that the proceedings of the court below should be affirmed." In Walter v. Merced Academy Ass'n, 126 Cal. 582, 59 Pac. 136, there was an appeal from a judgment entered under conditions identical with those existing in the Comstock Case and here. The judgment was affirmed, the court saying that "there was no irregularity in the trial judge making and signing the decision and decree in Stanislaus county. Until the decision and decree were filed by the clerk in Merced county they were not in force."

In the first of these cases it was held that a judgment like the one here under consideration was not void, as being without or beyond the jurisdiction of the court in which the action was pending. In the second, the holding was that the judgment was not even erroneous or irregular, and could not be successfully assailed on direct appeal. It follows that the trial court did not err in refusing to vacate the judgment in the case at bar.

Another of the appeals is from an order refusing a change of venue. The motion to this end was made after the trial and judgment, and pending proceedings on motion for a new trial. It was based upon the alleged bias and prejudice of Judge Oster. We do not deem it necessary to set forth the averments of the affidavits upon which plaintiffs relied to support this motion. If they contained any statements tending to show bias on the part of the judge, these statements were fully met by counteraffidavits. The finding of the trial judge on conflicting affidavits is conclusive on appeal, even though the question in controversy be the disqualification of the judge himself. Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066. The uncontradicted matter consisted merely of a recital of the proceedings prior to and during the trial, in the course of which Judge Oster made a number of rulings adversely to the plaintiff's contentions. We are not prepared to concede that all or any of these rulings were erroneous. But if it be assumed that in each of them the trial court committed error, that fact alone would not be sufficient to show bias on his part. The record is devoid of the slightest indication that Judge Oster had any relations, outside of the trial, with any of the parties, that he entertained any feelings of hostility or friendship toward any of them, or that he had, except in the course of orderly judicial procedure, given utterance to any expressions concerning the merits of the case. The showing was entirely insufficient to require the granting of the motion.

The third appeal is from the order denying a new trial. It appears from the bill of exceptions (which was apparently intended to set forth all the proceedings subsequent to judgment in the court below), that the plaintiffs prepared a proposed statement to be used on motion for new trial, and that the trial court, sustaining the objection of the defendants, refused to settle the statement. The appellants argue that this was error. But if it was, the remedy obviously is by proper proceedings to compel the settlement, not by appeal from the order denying the motion for new trial.

The notice of intention to move for a new trial stated that the motion would be made "upon a statement of the case, upon the minutes of the court, upon the pleadings and papers filed in said cause, and upon affidavits hereafter to be prepared and filed." If the motion, notwithstanding the attempt to prepare a statement in advance, be regarded as made on the minutes of the court, the bill of exceptions may, perhaps, be treated as a statement "subsequently prepared," as provided by section 661 of the Code of Civil Procedure. But where the motion is on the minutes of the court, the notice of motion must specify the particulars in which the evidence is insufficient, if such insufficiency be a ground of motion, and must specify the particular errors of law upon which the moving party will rely. Code Civ. Proc. § 659, subd. 4. The notice given by the plaintiffs here contained no specification of insufficiency of evidence. The only error of law assigned in the notice was the refusal of the court to grant plaintiffs' demand for a trial by jury. The complaint sought to set aside a foreclosure sale for fraud. The answer denied the allegations of fraud. At the trial the court announced that both legal and equitable issues were involved, and denied the demand for a jury trial so far as the equitable issues were concerned, declaring, at the same time, that the denial was without prejudice to the right of plaintiffs to have a trial by jury of the legal issues, if there appeared to be any occasion for a trial of such issues after decision of the equitable issues. It then proceeded to try, without a jury, the issues of fraud raised by the pleadings, and found in favor of defendants on these issues. We see no error in this. It is not disputed that an attack upon judicial proceedings for fraud presents a case appealing to the equity side of the court. Such a case is not one which the parties are, of right, entitled to have tried by a jury. Where an action involves both legal and equitable issues, "the former are ordinarily triable by the court and the latter by the jury." 24 Cyc. 113. The court below proceeded in accordance with this rule.

The record does not sustain the contention that the court, in making its findings, disposed of legal issues. A reading of the findings, in connection with the pleadings, the conclusions of law, and the decree, shows clearly that the court undertook to dispose of the equitable issues alone. But if there were findings on other issues, the error, assuming it to have been one that could be raised on the specifications of the notice, was not prejudicial. The plaintiffs, having failed to establish their equitable grounds for setting the sale aside, were not entitled to any relief, and judgment in favor of the defendants necessarily followed, regardless of any legal issues presented. The motion for new trial was therefore properly denied.

The orders appealed from are affirmed.

I concur: ANGELLOTTI, J.

SHAW, J. I concur. I think, however, that the opinion in Comstock v. Superior Court, 57 Cal. 625, evades the main point of the proposition involved in the case, and that it would be difficult to meet the objection on logical grounds. The objection to a judgment entered by the clerk upon findings prepared and signed by the judge of another county, while absent from the county in which it is entered, and by him sent by mail to such clerk without such judge being in bodily presence in that county is not that such judge has deliberated upon the case, has prepared and signed his findings and his order for judgment, while absent from the county, for all this could undoubtedly be done anywhere without affecting the validity of the judgment, if the judgment was afterwards lawfully rendered in the county in which the court has its situs. The objection is that there can be no court unless there is a judge; that there is no court present in the county when such judgment is rendered; that there can be no judgment rendered where there is no court to render it; and that, in effect, the decision in that case holds that a valid judgment, in a case where evidence has been received by a judge, may be given by the clerk, who is not invested with judicial power. But, inasmuch as the question is largely technical and formal, as no mischiefs appear to have resulted from the rule, now established for nearly 30 years, and as the decision has been followed ever since, I deem it unnecessary and unwise to disturb or overrule it.

158 Cal. 62

PEOPLE v. MACHUCA. (Cr. 1,551.)

(Supreme Court of California. June 21, 1910.)

1. HOMICIDE (§ 332*)—APPEAL—DEGREE OF CRIME.

The jury's determination of the degree of homicide of which accused is guilty will not be disturbed on appeal, when there is any evidence to support it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699–704; Dec. Dig. § 332.*]

2. HOMICIDE (§ 230*)—FIRST DEGREE MURDER—DELIBERATION—CIRCUMSTANTIAL EVIDENCE.

The deliberate intent to take life, essential to murder in the first degree, may be proven by circumstantial evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 478; Dec. Dig. § 230.*]

3. HOMICIDE (§ 22*)—FIRST DEGREE MURDER—DELIBERATION.

The deliberation essential to establish murder in the first degree need not have existed for any particular length of time before the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 37, 38; Dec. Dig. § 22.*]

4. HOMICIDE (§ 253*)—FIRST DEGREE MURDER—DELIBERATION—EVIDENCE.

In a prosecution for murder in the first degree, evidence *held* to sustain a finding of premeditation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 525; Dec. Dig. § 253.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. CRIMINAL LAW (§ 829*) — REQUESTED CHARGE—INSTRUCTION GIVEN.

A request to charge that the jury in determining the weight to be given the testimony of any witness might consider, among other things, "the motive actuating the witness in testifying," was substantially covered by a charge that the jury should take into consideration the character of any witness, his relation to the case, his interest in the case, if any, and his bias or prejudice, if any, against either of the parties.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—NECESSITY—CREDIBILITY OF WITNESS—EFFECT OF MOTIVE TO FALSIFY—REFUSAL.

A request to charge that the value of testimony may be affected by evidence of a motive, which would naturally tend to induce the statement of an untruth, was the statement of such a "commonplace" that the refusal thereof furnished no ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1780; Dec. Dig. § 785.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. H. Jamison, Judge.

Fabronio Machuca was convicted of murder in the first degree, and he appeals. Affirmed.

S. M. Smyser and O. S. Williams, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy, for the People.

SLOSS, J. The defendant appeals from a judgment imposing upon him a sentence of death after a conviction of murder of the first degree, and from an order denying his motion for a new trial.

Appellant's principal point is that the evidence is insufficient, in that it fails to show the premeditation which is an essential element of the first degree of the crime charged. A very brief summary of some of the testimony introduced by the people will show the contention to be without merit.

The appellant was charged with the murder of Mrs. Refuga Yorba. Mrs. Yorba, together with her son, John, and other members of her family, was living in a five-room cottage. She occupied a room in the front of the cottage, and John a room in the rear. At about midnight on the 18th day of August, 1908, John Varela, who had retired, was awakened by hearing his mother cry "Help, help, they are killing me." He jumped out of bed, and, taking a revolver, ran out of the house at the rear and around to the front. There he saw the defendant, Machuca. John Varela then walked into the house and entered his mother's room. According to his testimony, "she had cuts all over her and full of blood. * * * She was telling me that Fabronio Machuca had cut her up and tried to kill her." Leaving his mother, John came out of the house and struck Machuca. A desperate fight ensued, Machuca coming at Varela with a knife and the latter firing a shot from his revolver, and then continuing the combat with his fists. While the two were struggling, Mrs. Yorba came out, and the defendant cut her with his knife. At this point Willie Varela, another son of deceased, came upon the scene. He seized Machuca, and helped Mrs. Yorba and John to their feet. Machuca broke away and, running after Mrs. Yorba, commenced cutting her again. Willie shot him, but he continued using his knife on Mrs. Yorba "until he killed her." Willie shot again, and overpowered Machuca. The testimony of Willie Varela corroborated that of John in many of its main features. There was also evidence that the defendant had, on the day prior to the killing, made a statement that the jury might fairly have interpreted as constituting a threat against the life of the deceased. This court has repeatedly declared that the question of the degree of crime is exclusively for the jury, and that their determination will not be disturbed when there is any evidence to support it. People v. Bowman, 81 Cal. 566, 22 Pac. 917; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; People v. Worthington, 122 Cal. 583, 55 Pac. 396; People v. Mahatch, 148 Cal. 200, 82 Pac. 779. Even if we discard all consideration of what may have occurred in the house before the arrival of John Varela, the jury had a perfect right to conclude that the later acts of the defendant showed a fixed and deliberate intent on his part to take the life of the deceased. It is not necessary that there should be express evidence of a deliberate purpose to kill. "It could be inferred from proof of such facts and circumstances in the case as would reasonably warrant an inference of its existence." People v. Mahatch, supra. That the deliberation which must precede the killing in order to make the murder one of the first degree need not have existed for any given length of time is thoroughly settled. People v. Bealoba, 17 Cal. 389; People v. Sanchez, 24 Cal. 17; People v. Hunt, 59 Cal. 430; People v. Mahatch, supra. This being so, it cannot be doubted that the evidence here introduced fully justified the jury in finding the killing to have been deliberate and premeditated. There was, to be sure, the testimony of the defendant and other witnesses contradicting the showing made by the prosecution, but it cannot be necessary to cite any authority to the effect that the action of the jury in accepting as true either of two conflicting statements presents no ground for the reviewing power of the appellate court.

Complaint is made of the refusal of the court to give a requested instruction telling the jury that they had the right, in determining the weight to be given to the testimony of any witness, to consider, among other things, "the motive actuating the witness in testifying." We think the substance of the desired direction was covered by the charge of the court that the jury should take into consideration the character of any witness,

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his relation to the case, his interest in the case, if any, his bias or prejudice, if any, against either of the parties. While the word "motive" was not used, a fair consideration of testimony in the light of a witness' character, his relation to or interest in the case, and his bias as between the parties, could hardly exclude from view any motive affecting the credibility of the testimony. The difference between the instruction requested and the one given is verbal, rather than real. Besides, we think the declaration that the value of testimony may be affected by evidence of a motive which would naturally tend to induce the statement of an untruth (Code Civ. Proc. § 1487) is the enunciation of a proposition which must be apparent to every person of common intelligence and experience. The refusal to give to the jury a charge embodying such a "commonplace" furnishes no ground for reversal. People v. Newcomer, 118 Cal. 263, 50 Pac. 405; People v. Benc, 130 Cal. 159, 62 Pac. 404; People v. Wong Bin, 139 Cal. 65, 72 Pac. 505.

These are the only points urged by appellant. An examination of the record discloses no error affecting his rights.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

ANGELLOTTI, J. In concurring in the judgment, I deem it proper to say that the evidence contained in the record, upon which the finding as to premeditation essential to sustain a verdict of guilty of murder in the first degree must depend, is exceedingly unsatisfactory to my mind. But, as shown in the opinion, there was some substantial evidence which, if believed by the jury and trial judge, would warrant the verdict, and that being the case an appellate court is not warranted in setting aside the verdict. The evidence opposed to the theory sustained by the verdict is, of course, not set forth in the opinion, but to my mind it is of such a nature as to render the evidence relied on by the prosecution very unsatisfactory, and to give rise to the most serious doubt of the guilt of the defendant of murder in the first degree.

I concur: BEATTY, C. J.

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158 Cal. 107

WOEHRLE v. CANCLINI. (Sac. 1,816.)

(Supreme Court of California. June 29, 1910.)

1. BANKRUPTCY (§ 424*)—DISCHARGE IN BANKRUPTCY—JUDGMENT FOR WILLFUL AND MALICIOUS INJURIES.

A judgment for willful and malicious injuries inflicted by defendant on plaintiff is a debt constituting a liability within Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1310]), providing that a discharge in bankruptcy does not release a bankrupt from liabilities for willful and malicious injuries to the person or property of another, and defendant's discharge in bankruptcy does not release him from liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. § 424.*]

2. JUDGMENT (§ 582*)—MERGER OF LIABILITY IN JUDGMENT.

A judgment for damages for willful and malicious injuries is but the original liability in a new form.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 582.*]

3. BANKRUPTCY (§§ 423, 424*)—DISCHARGE IN BANKRUPTCY—EFFECT—"LIABILITY."

The term "liability" generally includes every kind of legal obligation and is used in Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1310]), providing that a discharge in bankruptcy releases a bankrupt from his debts, except such as are liabilities for obtaining property by false pretenses or representations or for willful and malicious injuries to the person or property of another, as including every obligation to pay money whether evidenced by judgment or not, and every unsatisfied judgment is a liability.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 423, 424.*

For other definitions, see Words and Phrases, vol. 5, pp. 4111-4116.]

4. BANKRUPTCY (§§ 423, 424*)—DISCHARGE IN BANKRUPTCY—EFFECT—LIABILITY.

The purpose of the amendment of Act Feb. 5, 1903, c. 487, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1310) to Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), providing that a discharge in bankruptcy releases the bankrupt from his provable debts, except such as are liabilities for obtaining property by false pretenses or misrepresentations or for willful and malicious injuries to the person or property of another, is not to remove liabilities evidenced by judgment from the excepted classes, but to add thereto liabilities so arising that had not been put into the form of judgments.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 423, 424.*]

Department 1. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by George Woehrle against Carlo Canclini. From an order denying a motion to recall and perpetually stay an execution issued on the judgment for plaintiff and dissolving a restraining order previously made, defendant appeals. Affirmed.

Webster & Webster, for appellant. C. W. Miller, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion to recall and perpetually stay an execution issued on the judgment in the above-entitled action, and dissolving a restraining order theretofore made.

On October 28, 1908, plaintiff recovered a judgment against defendant in the sum of $800 and costs for "willful and malicious injuries inflicted by the defendant upon the plaintiff." On March 18, 1909, defendant was adjudicated a bankrupt in proceedings instituted in the United States district court for the Northern district of California, and thereafter, on June 12, 1909, an order was made by said court discharging defendant from all his debts. The judgment remaining unsatisfied, on November 9, 1909, the execution in question was issued and levy made thereunder. The question is whether the effect of the discharge in bankruptcy was to release defendant from this judgment. Section 17 of the Bankrupt Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1310]), enumerating debts not affected by a discharge given thereunder, provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax * * *; (2) are *liabilities* for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another. * * *" The sole question presented by appellant is whether a *judgment* for damages for willful and malicious injuries inflicted by the judgment debtor is a debt constituting a *liability* for such injuries within the meaning of that word as used in the second subdivision of section 17, quoted above.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Clearly this question must be answered in the affirmative. A judgment is but the original debt or liability in a new form (see Carit v. Williams, 74 Cal. 183, 185, 15 Pac. 751). In Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985, the question was presented whether a debt existing and provable in a bankruptcy proceeding is the same debt when evidenced by a judgment thereafter obtained thereon, and, the court said: "Notwithstanding the change in the form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court and the existence of which was provable in bankruptcy." See also Carit v. Williams, supra. Although the liability for a willful and malicious injury has been reduced to judgment, we have the same liability in a new form, judicially declared and defined. The term "liability" is one of the broadest import, generally including every kind of legal obligation, and was undoubtedly used in the bankrupt act as including every obligation to pay money, whether evidenced by judgment or not. While all liabilities are not evidenced by judgment, every unsatisfied judgment is necessarily a liability. That there may be a liability within the meaning of the act so evidenced by judgment is shown by the enumeration therein of the classes of debts which may be proved, one of which is "a fixed liability as evidenced by a judgment," subdivision 1, § 63. It certainly would be a somewhat absurd situation if the person having a claim for such willful and malicious injuries who had procured a legal adjudication thereof occupied a worse position under the bankrupt act, than one who had not procured such a judgment. The act is susceptible of no such construction.

Prior to the amendment of 1903, subdivision 2 of section 17 embraced only such provable debts as "are *judgments* in actions for frauds * * * or * * * for willful and malicious injuries to the property and person of another." Under this, such liabilities as were not evidenced by judgment were not excepted from the effect of a discharge, while those evidenced by judgment were excepted. The purpose of the amendment of 1903 was clearly not to remove the liabilities so evidenced from the excepted classes, but to add thereto the liabilities so arising that had not been put into the form of judgments. The effect of the amendment is stated in Collier on Bankruptcy (6th Ed.) at page 223, substantially as follows: Before the amendment, a bankrupt might have been released from such a liability, unless a judgment therefor had been rendered. Under the present law he will not be released simply because no judgment has been rendered.

The order is affirmed.

We concur: SLOSS, J.; SHAW, J.

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13 Cal. App. 373

HOWARD v. GALBRAITH. (Civ. 765.)

(Court of Appeal, Second District, California. May 9, 1910. Rehearing Denied June 8, 1910; denied by Supreme Court July 7, 1910.)

1. Sales (§ 91*)—Contracts—"Offer and Refusal."

A statement by a seller contracting to repurchase at the expiration of one year on the buyer desiring it, made before the expiration of the year in response to the buyer's demand to repurchase that he could not do it, is the legal equivalent of an "offer and refusal" within Civ. Code, § 1515, providing that a refusal to accept performance made before an offer thereof is equivalent to an offer and refusal, unless before performance is actually due he gives notice of his willingness to accept it, and the seller desiring to hold plaintiff to performance must show that prior to the expiration of the year he expressed a willingness to repurchase, and, unless the statement is withdrawn before the expiration of the year, the buyer need not make demand and offer at the exact expiration of the year.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 254-256; Dec. Dig. § 91.*]

2. Sales (§ 91*)—Contracts—Burden of Proof.

Under Civ. Code, §§ 1515, 1440, providing that, where a party to an obligation gives notice to another before the latter's default that he will not perform, the latter may enforce the obligation without previously performing any conditions on his part, etc., a seller who contracting to repurchase at the expiration of one year if the buyer so desired, and who notified the buyer before the expiration of the year that he could not repurchase, had the burden of showing that before the expiration of the year he expressed a willingness to carry out the contract before he could hold the buyer to an exact performance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 254–256; Dec. Dig. § 91.*]

3. SALES (§ 91*) — CONTRACTS — RIGHTS OF BUYER.

Where such notice was given in response to the buyer's demand to repurchase, the buyer did not prejudice his right of action by renewing his demand and notifying the seller to repurchase after the expiration of the year, for the renewal of the notice and demand was but a further notice and demand after the seller was in default, and not an offer of performance within Civ. Code, § 1490, providing that, where an obligation fixes a time for its performance, an offer of performance must be made at that time, and not before or afterwards.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 254–256; Dec. Dig. § 91.*]

4. SALES (§ 91*)—CONTRACTS—PERFORMANCE.

The seller was not in default until the buyer notified him of his desire to sell after the year expired, and this he could do as authorized by Civ. Code, § 1491, within a reasonable time thereafter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 254–256; Dec. Dig. § 91.*]

Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by Henry W. Howard against W. J. Galbraith. From a judgment for plaintiff, defendant appeals. Affirmed.

Oscar C. Mueller, for appellant. Robert P. Jennings and Johnstone Jones, for respondent.

TAGGART, J. Action to recover on an agreement to purchase mining stock. Judgment was for plaintiff, and defendant appeals from judgment and order denying motion for a new trial.

On May 2, 1907, plaintiff purchased 550 shares of the capital stock of the Greene Gold Silver Company upon the guaranty and agreement of defendant that the latter would take said shares of stock off of plaintiff's hands at the expiration of one year from the date of said purchase at the price paid for them by plaintiff. Later, to wit, on May 6, 1907, defendant in a letter written to plaintiff confirmed this agreement in the following words: "Remember I guaranteed to take your stock off of your hands at the expiration of one year for the amount you paid for it, providing you desire to sell." Plaintiff paid $928.90 for the stock, and testified that he notified defendant on two or three occasions about one year after his purchase of the stock that he desired to sell and demanded that defendant perform his part of the agreement. The first occasion was by telephone a short time prior to the expiration of the year; the next time was by letter about the end of the year, to which plaintiff received no reply, and a letter under date of July 17, 1908, written by plaintiff's attorney, making the demand for him and tendering the certificates of stock representing the shares. The telephone demand prior to the expiration of the year and the reply thereto, as stated by plaintiff, were as follows: "Well, I told him my note was coming due and that I would expect him to take the stock and pay me what was agreed. He said in reply that he couldn't do it—wasn't in a position to do it. He made no other excuse or reason for not buying it at that time." The letter by which the second demand was made was not produced, and no copy thereof introduced; the contents of it were not proven, and defendant testified he never received it. Plaintiff failed to fix the date of its mailing any more definitely than that it was "just about the end of the year." The certificates of stock were deposited in court by plaintiff.

It is urged by appellant that the finding of the court to the effect that the plaintiff notified the defendant of his desire to dispose of the stock, demanded that the defendant perform his agreement, and offered to deliver the stock to defendant, at the expiration of one year from the date of said purchase, is not supported by the evidence. Invoking section 1490 of the Civil Code and Glock v. Howard, 123 Cal. 1, 20, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, he contends that the obligation relied on fixes a time for its performance, and that the testimony of plaintiff shows that he made the tender and demand both before and after, but not at, the expiration of the year. If the contract be one in which the exact time is to be considered, the words "at the expiration of one year" should be interpreted to mean one year from May 2, 1907, the date of the purchase of the stock, rather than from May 6, 1907, the date of the letter confirming the agreement, which is alleged in the complaint to be the date of demand and tender made. If we were to regard the exact limitation of one year as a proper construction of the agreement, this variance would be immaterial, as the evidence discloses a refusal to perform by the defendant by his answer to the telephone notice given by plaintiff. This was the legal equivalent of an offer and refusal, and it was not withdrawn by defendant prior to the date when performance was due. Section 1515, Civ. Code. This telephone conversation is located by plaintiff at "about," but "prior" to, the expiration of the year, and plaintiff notified defendant that he would expect him to take the stock as agreed, and defendant replied that he could not do it, and there is no evidence that he ever notified plaintiff that his inability or indisposition to comply with his agreement was removed at any time prior to the date of performance. Plaintiff was thereby released from the requirement that he make demand and offer at the exact date, if such demand and offer were otherwise necessary. This statement that he could not and would not be able to meet his obligation naturally tended to induce plaintiff to omit performance, as it notified him in advance that defendant could not take the stock at the expiration of the year, even though a tender was made and the plaintiff expected him to do so. After he had so stated, the burden was upon the defendant to show that prior to the time he expressed a willingness to carry out the contract, if he wished to hold plaintiff to an exact performance. Sections 1515, 1440, Civ. Code.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The decisions of the Supreme Court in Hanson v. Slaven, 98 Cal. 379, 33 Pac. 266, and Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, are not inconsistent with this view. Further than this, the contract here introduced shows upon its face that it was not one to deliver stock within a specified time or at a specified date at a price named. The plaintiff was induced by defendant to purchase the stock upon the representation that it would become valuable as an investment. The letter of May 6th stated: "The Greene Gold Silver is the largest mining proposition in the world and whatever report is signed by W. C. Greene is true. It is my opinion inside of three years that stock will be selling at not less than twenty-five dollars for share." While this letter was written after the purchase, it was in effect but a reaffirmance of the statements testified to by the plaintiff as made to him by defendant before the stock was bought. The plaintiff testified: "I knew nothing of this company until the defendant spoke of it. * * * Dr. Galbraith advised me to purchase stock in this company saying that he believed it to be a first-class investment. * * * He telegraphed me * * * to buy all the Greene Gold and Silver. I told him that if I bought stock I would have to borrow some money to buy it, and he said very well, he would advise me to do it, and, furthermore, that he would agree that after a year, if I was not satisfied with the stock, he would take it off my hands at exactly what I paid for it." In effect, the contract was that plaintiff was to purchase the stock as an investment, upon defendant's representations, and, if after a year had elapsed plaintiff was not satisfied with the investment, defendant would take the stock off his hands at the price paid. In other words, plaintiff had no cause of action against defendant until he awaited the passage of the year and then notified defendant that he desired to sell. Plaintiff did not prejudice his right of action by renewing his demand and notifying defendant that he desired to sell the stock after being told by defendant, before the year expired, that he could not—would not be in a position to take the stock at the exact expiration of the year. The renewal of the notice and demand was not an offer of performance after a specified time fixed therefor, within the meaning of section 1490 of the Civil Code, but a further notice and demand, after defendant was in default, upon which to predicate his action. The defendant was not in default until plaintiff notified him of his desire to sell after the year expired. This he might do within a reasonable time thereafter. Section 1491, Civ. Code.

While the trial court at one time, upon the objection of defendant, and the theory that the letter embodied the contract, somewhat curtailed the introduction of evidence by plaintiff as to the representations made by defendant to induce plaintiff to purchase the stock, nevertheless there is abundant evidence to sustain the findings of the court that representations were made by defendant for the purpose of inducing plaintiff to buy the stock, and, also, that the plaintiff relied upon the promise and agreement of defendant and was induced thereby to purchase the stock. There is no contention that appellant was in any way misled or surprised by this ruling of the court, and no prejudice to him therefrom can be presumed.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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13 Cal. App. 379

SHEAKLEY v. NELSON. (Civ. 679.)

(Court of Appeal, Third District, California. May 9, 1910. Rehearing Denied July 7, 1910.)

1. Appeal and Error (§ 356*)—Time to Take Appeal.

An appeal from a judgment taken more than two years after the entry thereof will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

2. Appeal and Error (§ 874*)—Order Denying New Trial—Questions Reviewable.

On an appeal from an order denying a new trial, neither the sufficiency of the pleadings nor the findings to support the judgment can be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3476; Dec. Dig. § 874.*]

3. Corporations (§ 121*)—Sale of Stock—Evidence.

Evidence *held* to justify a finding of a sale of corporate stock, and not a mere pledge thereof to secure the payment of money.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

4. Appeal and Error (§ 1002*)—Findings—Conclusiveness.

A verdict on sharply conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by A. M. Sheakley against T. A. Nelson. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Appeal from judgment dismissed, and order denying new trial affirmed.

Paul McDonald, H. E. Monroe, and A. H. Carpenter, for appellant. Clary & Louttit and Thos. S. Louttit, for respondent.

CHIPMAN, P. J. The complaint sets forth a written contract, relating to the transfer of certain shares of the capital stock of the Hercules Manufacturing Company, a corporation, by plaintiff to defendant, the plaintiff claiming that the shares were merely a pledge to secure the payment of money advanced by defendant to pay certain assessments on said shares, the defendant claiming in his answer that the intention of the contract was to effect a sale and praying its reformation so that it would correctly express such intention. The court found the facts to be in accordance with defendant's contention and rendered judgment against plaintiff. Judgment was made and entered March 23, 1907, and plaintiff appealed therefrom on April 6, 1909, more than two years after the entry thereof. The appeal from the judgment cannot be considered and may be dismissed. Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324.

On the appeal from the order denying plaintiff's motion for a new trial, neither the sufficiency of the pleadings nor the findings in support of the judgment can be considered. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954.

No errors of law are pointed out in appellant's brief and there remains only the inquiry, Did the evidence support the findings?

The transaction, as found by the court, briefly stated, was as follows: On April 8, 1903, plaintiff was the owner of 14,090 shares of the capital stock of the Hercules Manufacturing Company, and, on that day, plaintiff sold and transferred the same to defendant for the consideration of $1,500; that on said day plaintiff and defendant entered into a written agreement, the intention of which, through mutual mistake, was not truly expressed; "that it was the intention of said plaintiff and said defendant to enter into an agreement of sale of said 14,090 shares of the capital stock of the Hercules Manufacturing Company, a corporation, and it was the intention of said plaintiff and said defendant to enter into an agreement under the terms of which defendant, as an additional consideration to him moving from said plaintiff for the transfer and sale by plaintiff to defendant of said 14,090 shares of said stock, was to pay for said plaintiff to said Hercules Manufacturing Company, a corporation, in addition to said sum of $1,500, on account of any subsequent assessment that might be levied against the stock of said plaintiff, the sum of $1,000."

The agreement was reformed to express what the evidence tended to show was the intention of the parties. In the written contract the words "and sell" were inserted by the court after the word "transfer." After the provision, "and the said T. A. Nelson will pay such assessments as the stock of said A. M. Sheakley may be charged with, provided that the total sum so paid shall not exceed $2,500," there was added by the court, "including the sum of $1,500 agreed to be advanced for the payment of the assessment already advanced." These changes conformed to the evidence which was explanatory of what the parties meant by the language used in the contract, when first written, rather than as introducing any new feature. It was further found that said shares were not intended as security for the repayment by plaintiff to defendant of the sum of $1,500, or any other sum, as alleged in the complaint, and that defendant did not loan to plaintiff nor did plaintiff borrow from defendant said sum, or any other sum.

The evidence is in sharp conflict, but there is sufficient to support the findings. Our attention is called to certain phases of the transaction as disclosed by the testimony of the witnesses and the records of the corporation, from which it is contended by appellant that the findings of fact should have been favorable to his contention. But these matters rest chiefly upon the details of the transaction and subsequent happenings between the parties, and their mutual relation to the corporation, as given by witnesses whose credibility was a matter to be determined exclusively by the trial judge. Appellant points out no fact or circumstance, upon which the findings support respondent's view of the transaction, which can be said to be inherently or at all improbable or unreliable, or which would justify an appellate tribunal in reaching a conclusion from the facts different from that arrived at by the learned trial judge.

In a word, the evidence showed that plaintiff was owner of 37,544 shares of the corporation; an assessment had been made which called for a payment by plaintiff of $1,500 on plaintiff's shares; he found himself unable to meet the assessment and applied to defendant for relief; defendant agreed to purchase 14,090 of plaintiff's shares and pay this assessment; the shares were accordingly transferred to defendant; after this agreement was made plaintiff became fearful that another assessment would be made and defendant agreed to meet plaintiff's part of it, not to exceed $1,000 additional to the $1,500 already agreed to be paid by him. It appeared that defendant was secretary of the company and was familiar with its affairs and did not believe that another assessment would be made, but was willing, to allay plaintiff's fears, to take the chance. The explanation made by defendant and his account of the transaction, which was very fully given, was accepted by the court, and we find nothing in the record to discredit the defendant's narrative of the facts thus accepted.

The appeal from the judgment is dismissed, and the order denying new trial affirmed.

We concur: BURNETT, J.; HART, J.

13 Cal. App. 370

DAVILA v. HEATH (BERKELEY FARM CREAMERY CO., Intervener). (Civ. 594.)

(Court of Appeal, Third District, California. May 9, 1910.)

1. RECEIVERS (§ 42*)—EX PARTE APPLICATION —BOND OF APPLICANT.

Under Code Civ. Proc. § 566, as amended by St. 1907, c. 374, providing that the court before appointing a receiver on an ex parte application "must require from the applicant an undertaking," the court on an ex parte application for the appointment of a receiver must require the applicant to give an undertaking, and where that is not done the appointment is void.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 68; Dec. Dig. § 42.*]

2. APPEAL AND ERROR (§ 151*)—PARTIES AGGRIEVED.

A defendant shown by the complaint to be a necessary party may appeal from an order appointing a receiver on plaintiff's ex parte application, though the sworn answer avers that defendant was acting only as agent for an intervener.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947–952; Dec. Dig. § 151.*]

Appeal from Superior Court, Alameda County; Harry A. Melvin, Judge.

Action by John T. Davila against Frank E. Heath, in which the Berkeley Farm Creamery Company intervened. From an order appointing a receiver, defendant appeals. Reversed.

Dudley Kinsell, for appellant. E. H. Wakeman and Abe P. Leach, for respondent.

CHIPMAN, P. J. This is an action in which a partnership relation is averred in the complaint and an accounting is prayed for. Upon the filing of the complaint the court made and entered its order, ex parte, appointing a receiver "upon giving a bond * * * for the faithful performance of his duties as such receiver and upon taking his oath of office in the manner required by law." The complaint was filed August 27, 1908, the order appointing the receiver was made August 31, 1908, and on September 2, 1908, the receiver's bond was approved and filed and his oath of office duly taken. It appears from the clerk's certificate "that no other or further bond or undertaking was ever filed by the receiver in said action or on his behalf, and that no order was ever made by said court fixing the amount of, or requiring from said applicant or plaintiff an undertaking, and that no undertaking was ever filed by or on behalf of said applicant, and that no notice of the hearing of the application for a receiver is on file in this office." Defendant Heath appeals from the order.

Section 566 of the Code of Civil Procedure, among other things, provides as follows: "If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry upon his docket, in case such applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking." This section of the Code, as it then stood, was amended in 1907 (St. 1907, p. 710), and the word "may" was changed to "must," so that the statute now declares that, if a receiver is appointed upon an ex parte application, "the court, before making the order, must require from the applicant an undertaking," etc. In Fischer v. Superior Court, 110 Cal. 129, 139, 42 Pac. 561, 563, the Supreme Court, speaking through Mr. Justice McFarland, observed parenthetically: "We may remark, however, that the appointment of a receiver to take property and business out of the hands of persons in possession and claiming ownership thereof, without requiring a bond from the plaintiff in the action, would in most cases be a gross abuse of discretion." This was said before the statute was amended, and when the requirement that a bond should be given by the applicant before the appointment of a receiver at his instance was in some degree discretionary. The amendment, it seems to us, was intended to take from the court this discretion and make the requirement mandatory, and that noncompliance with the statute would render the appointment void.

Plaintiff has moved to dismiss the appeal on the ground that defendant is not an aggrieved party. In support of his motion he has attached thereto a copy of defendant's answer, and also the answer of intervener, Berkeley Farm Creamery Company; the latter having been filed September 12, 1908, and the former September 17, 1908, and both some days after the receiver was appointed. The point made by plaintiff is that the sworn answer of defendant avers that the transactions complained of by plaintiff were with the intervener in which defendant was acting only as manager and agent of the creamery company and had no personal interest therein. We cannot assume the truthfulness of the averments either of the complaint or the answer. The issues there presented must be tried. Upon plaintiff's showing defendant is a necessary party to his action. So far as we can now know, the trial may disclose the facts to be as plaintiff avers. Appellant cites Amory v. Amory, 26 Wis. 152, where the appeal was dismissed on the ground here alleged. But in that case the proof that appellant had no interest in the controversy was the decree of a court determining the fact.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It would be strange, indeed, if, in endeavoring to escape the consequences of a possible judgment against him, the defendant makes averments inconsistent with or contradictory of the averments of the complaint, he thereby ceases to be an aggrieved party and deprives himself of the right of appeal. There is no merit in the point.

The order appointing the receiver was unauthorized and is, therefore, reversed.

We concur: BURNETT, J., HART, J.

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13 Cal. App. 363

PEOPLE v. HOWLAND. (Cr. 159.)

(Court of Appeal, Second District, California. May 5, 1910.)

1. Homicide (§ 341*)—Appeal—Prejudicial Error Not Apparent.

In absence of evidence in the record, it cannot be presumed that it was prejudicial error to refuse an instruction as to the character of the deceased; it not being erroneous in every conceivable state of facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. § 341.*]

2. Homicide (§ 330*)—Appeal—Review—Presumptions.

In support of a ruling refusing an instruction as to the character of deceased, it must be presumed, in the absence of evidence in the record, that none was introduced in relation thereto.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 697; Dec. Dig. § 330.*]

3. Criminal Law (§ 1122*)—Appeal—Review—Instructions.

Without evidence in the record, the propriety of an instruction that defendant could not justify the killing of deceased under the plea of self-defense, if he himself was the aggressor and precipitated the conflict, cannot be determined.

[Ed. Note.—For other cases, see Criminal Law. Dec. Dig. § 1122.*]

4. Criminal Law (§§ 656, 761*)—Trial—Instructions — Assumption of Guilt — Expressing Opinion as to Facts.

The trial judge must not, in his charge, or during the trial, directly or indirectly assume the guilt of accused, nor use language from which the jury can legitimately infer what his views are on the issues of fact submitted to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524–1533, 1754–1764; Dec. Dig. §§ 656, 761.*]

5. Homicide (§ 330*)—Appeal—Review—Error Not Apparent—Assumption of Fact.

In the absence of evidence in the record, it cannot be presumed that the use of the word "murder" in a statement in an instruction that "no witness has been produced here who saw the act of murder committed, and hence it is urged for the prisoner that the evidence is only circumstantial," was prejudicial to defendant, as assuming that a murder had been committed, since his defense may have been an alibi, and it may have been admitted that a "murder" was committed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 697; Dec. Dig. § 330.*]

6. Criminal Law (§§ 763, 764*)—Trial—Instructions—Circumstantial Evidence.

The law declares nothing as to the relative probative force of direct and circumstantial evidence, and the court cannot state to the jury the relative importance of evidence, except as that is settled by some rule of law, and for it to do so is to violate the plain inhibition of Const. art. 6, § 19, that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1740; Dec. Dig. §§ 763, 764.*]

7. Criminal Law (§ 1172*)—Appeal—Harmless Error—Instructions.

An instruction that circumstantial evidence was not likely to be fabricated, and thus has a great advantage over direct evidence, cannot be accepted as the harmless statement of an inference that the jury was sure to draw.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3163; Dec. Dig. § 1172.*]

8. Criminal Law (§ 807*)—Trial—Argumentative Instructions — Circumstantial Evidence.

An instruction, arguing in support of the strength of a case which relies on circumstantial evidence to convict, was improper in any conceivable state of facts not negatived by the instruction itself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

9. Criminal Law (§ 1163*)—Appeal—Harmless Error—Instructions.

Where an instruction which improperly argued in support of the strength of circumstantial evidence also informed the jury there was no direct evidence, it cannot be assumed the prosecution was based on direct evidence, and the instruction is favorable, rather than prejudicial to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3096; Dec. Dig. § 1163.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

William P. Howland was convicted of murder, and he appeals from the judgment and from an order denying a new trial. Reversed.

David G. Taylor, for appellant. U. S. Webb, Atty. Gen., and George Bebee, Deputy Atty. Gen., for the People.

TAGGART, J. Appellant was informed against for the crime of murder, and upon a plea of "not guilty" was found guilty of murder in the second degree, and sentenced to imprisonment in the state's prison for a term of 18 years. He appealed in open court from the judgment of conviction and from an order denying his motion for a new trial.

The record on appeal consists of copies of the information, the minutes of the court, the motion for a new trial, the instructions given to the jury, and the instructions requested by the defendant which were refused by the court; but no evidence is brought up, and no application was made to the trial court to have the reporter's notes transcribed. The errors of the trial court which are presented in support of the appeal are the giving of two instructions by the court, on its own motion, relating to "self-defense" and "circumstantial evidence," and designated respectively as instructions E and K, and its refusal to give an instruction No. 20, relating to "the character of the deceased," at the request of the defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is apparent at once that, in the absence of any evidence, we cannot say that it was prejudicial error to refuse to give the latter instruction, as the propriety of giving or not giving an instruction is to be determined by the evidence in the case, except where it would be erroneous in every conceivable state of facts. People v. Mendenhall, 135 Cal. 347, 67 Pac. 325; People v. Wong Fook Sam, 146 Cal. 115, 79 Pac. 848. For the purpose of supporting the ruling of the court we must presume that no evidence was introduced relating to the character of the deceased.

Instruction E does not declare any rule of law, except that which may be deduced from the last clause, to wit, "that the defendant could not justify the killing of the deceased under the plea of self-defense, if he himself was the aggressor and had precipitated the conflict." The first element in the instruction, based upon the theory that "defendant had invited the deceased into the room or place where the killing occurred," was entirely immaterial. That "he had threatened to kill the deceased or do him some bodily harm" became material only as connected with the facts and circumstances of the killing. Whether or not the defendant was called upon in good faith to decline any further struggle, as contended by appellant, must be determined from the evidence, and there is no evidence before us.

Instruction K is a long, argumentative presentation of the reliable character of circumstantial evidence, when considered in comparison with direct evidence. It goes beyond the instructions considered in People v. O'Brien, 130 Cal. 1, 8, 62 Pac. 297, People v. Wilder, 134 Cal. 182, 66 Pac. 228, and People v. Simmons, 7 Cal. App. 559, 95 Pac. 48, cited by the Attorney General, and contains practically all the objectionable comments made by the trial judge in the instruction disapproved in People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111. Appellant contends that the instruction is not only erroneous for the reasons stated in the case last cited, but because of the statement therein that "no witness has been produced here who saw the act of *murder* committed, and hence it is urged for the prisoner that the evidence is only circumstantial," whereas, in fact, the defendant was himself sworn and testified to the circumstances of the killing, and because the court used the word "murder" instead of "killing" and thereby assumed as a matter of fact that a murder had been committed. The minutes disclose that the defendant was sworn as a witness in his own behalf, but, in the absence of a transcript of the evidence, there is nothing from which it can be ascertained whether or not he testified as to the facts of the killing, and the instruction itself says that there was no eyewitness thereto.

In People v. Besold, 154 Cal. 363, 97 Pac. 871, it was held that it could not be argued that the trial court, by the use of the words, "in determining the *intention of the defendant* at the time of the transaction," in an instruction given in a case in which the killing was denied by the accused, had assumed, as a fact, that the defendant had in fact done the killing; furthermore, if this language alone was open to such a construction that, taken with the rest of the charge of the court in that case, it could not be said the trial judge thereby conveyed any intimation to the jury that he believed the defendant had done such killing. We do not agree with the Attorney General that this case in any way modifies the rule that the trial judge must not in his charge, or during the trial, directly or indirectly assume the guilt of the accused, nor use any language from which the jury can legitimately infer what the views of the judge are upon the issues of fact submitted to them. People v. Williams, 17 Cal. 142; People v. Messersmith, 61 Cal. 246; People v. Matthai, 135 Cal. 442, 67 Pac. 694. In the case before us, owing to the absence of the evidence, we cannot say that the use of the word "murder" prejudiced the defendant, since his defense may have been an alibi, and it may have been admitted that a "murder" was committed.

Instruction K, however, as hereinabove stated, contains all the objectionable features of the instruction considered in People v. Vereneseneckockockhoff, supra It contains the following argumentative language criticised in that case: "Circumstantial evidence has this great advantage, that various circumstances from various sources are not likely to be fabricated. * * * Thanks to a beneficent Providence, the laws of nature and the relation of things to each other are so linked and combined together that a medium of proof is often furnished leading to inferences and conclusions as strong as those arising from direct testimony." The entire instruction of more than four pages, of 30 or more lines each of typewritten matter, when taken together, is an argument in support of the strength of a case which relies upon circumstantial evidence to sustain a conviction. The law declares nothing as to the relative probative force of direct and circumstantial evidence, and the court cannot argue to the jury the relative importance of evidence, except as that is settled by some rule of law. For it to do so is to violate the plain inhibition of section 19 of article 6 of the Constitution that, "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The rule adopted by the Supreme Court in dealing with instructions based upon various subdivisions of section 2061 of the Code of Civil Procedure, of which it is said that, even though unconstitutional, they "could not possibly have done any harm, for it was merely telling the jury to do certain things which jurors would do without being told" (People v. Newcomer, 118 Cal. 263, 50 Pac. 405; People v. Wardrip, 141 Cal. 232, 74 Pac. 744; People v. Ruiz, 144 Cal. 253, 77 Pac. 907; People v. Grill, 151 Cal. 597, 91 Pac. 515) has no application to this instruction. To tell a jury that circumstantial evidence is not likely to be fabricated and thus has a great advantage over direct evidence can hardly be accepted as the statement of an inference that the jury would be sure to draw. This instruction was improper in any conceivable state of facts not negatived by the instruction itself. By it the jury were informed that there was no direct evidence of the transaction, and it cannot therefore be assumed that the case for the prosecution was based upon direct evidence, and that the instruction was favorable, rather than prejudicial to the defendant.

Judgment reversed and cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J

13 Cal. App. 404

NORTHERN LIGHT & POWER CO. v. STACHER et al. (Civ. 628.)

(Court of Appeal, Third District, California. Dec. 17, 1909. On Petition for Rehearing, Jan. 15, 1910. On Rehearing May 14, 1910. Rehearing Denied July 13, 1910.)

1. EMINENT DOMAIN (§ 191*) — COMPLAINT — PROPERTY SOUGHT TO BE CONDEMNED—PURPOSE.

Where a complaint to condemn riparian rights definitely described defendants' land by legal subdivisions, and it was alleged that the waters of Old Cow creek flowed "over, along, and upon" the land which was wholly below the point of diversion, and between that point and the junction of the creek and South Cow creek as described, a charge that it was necessary that plaintiff appropriate, take, and use all riparian rights of defendants to and connected with the tract of land thereinbefore described in and to the waters of Old Cow creek, and setting forth specifically the nature and character of the riparian rights connected with the land, it alleged with sufficient certainty the property sought to be condemned, and the purpose for which condemnation was sought.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 512, 515; Dec. Dig. § 191.*]

2. EMINENT DOMAIN (§ 191*)—PLEADING—NECESSITY FOR TAKING.

Facts showing the necessity for taking property by eminent domain must be proved, but need not be pleaded.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 512; Dec. Dig. § 191.*]

3. EMINENT DOMAIN (§ 191*) — RIPARIAN RIGHTS—COMPLAINT.

Where a complaint to condemn riparian rights alleged that there was water flowing down the stream in addition to the 5,000 inches appropriated and owned by plaintiff, and it appeared that various defendants had certain riparian rights to all of the waters in the creek, and plaintiff averred the necessity for taking all the water, including that to which defendants were entitled as riparian owners, the complaint was not objectionable for failure to state the precise quantity flowing through defendants' land; plaintiff not being required to make an apportionment in its complaint of the riparian rights among the several owners.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 515; Dec. Dig. § 191.*]

4. CORPORATIONS (§ 391*)—LEGISLATIVE REGULATION—PUBLIC SERVICE CORPORATIONS—RATES.

The Legislature, in the exercise of its police power, may regulate the rate to be charged by a corporation doing business affected with a public interest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1573; Dec. Dig. § 391.*]

5. EMINENT DOMAIN (§ 191*) — COMPLAINT — OWNERSHIP OF PROPERTY.

Where a complaint to condemn certain riparian rights in a creek merely alleged that the creek flowed 5,000 miners' inches and over; that plaintiff was the owner of 5,000 inches flowing in the creek and the right to divert the same, except as to the riparian rights of the defendants therein, which rights as set forth in the complaint were sought to be condemned in the action, the complaint showed that defendants had a certain interest in the waters to be condemned, to wit, riparian rights therein, and hence was not objectionable as averring plaintiff's ownership of the property sought to be acquired.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 515, 517; Dec. Dig. § 191.*]

6. EMINENT DOMAIN (§ 191*)—COMPLAINT—PUBLIC USE.

A complaint to condemn property must show that the use for which it is to be taken is a use declared by the Legislature to be a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 512; Dec. Dig. § 191.*]

7. EMINENT DOMAIN (§ 61*)—CONDEMNATION PROCEEDINGS—NATURE OF USE.

Condemnation proceedings cannot be maintained to acquire property for a use which is private, or to accomplish some purpose which is not of a public character.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 51; Dec. Dig. § 61.*]

8. EMINENT DOMAIN (§ 45*)—RIGHTS SUBJECT TO CONDEMNATION—"PROPERTY"—WATER.

Under Civ. Code, § 14, providing that "property" includes property real and personal, and section 654, that anything of which there may be ownership is "property," water, and the right to its use as riparian to land, is "property," within Code Civ. Proc. § 1240, enumerating the classes of property which may be condemned, and section 1241 providing that before property can be taken, it must appear that the use is one authorized by law, etc.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 95; Dec. Dig. § 45.*

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On Rehearing.

9. EMINENT DOMAIN (§ 196*)—NECESSITY OF TAKING—BURDEN OF PROOF.

In a proceeding to condemn land for a public use, the burden of establishing the issue of necessity is on the plaintiff.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 530; Dec. Dig. § 196.*]

10. EMINENT DOMAIN (§ 45*)—PROPERTY SUBJECT TO CONDEMNATION — WATER RIGHTS — PURPOSE—ELECTRIC POWER—STATUTES.

Code Civ. Proc. § 1238 prescribes the public uses in behalf of which the right of eminent domain may be exercised, and subdivision 12 authorizes the condemnation of property for canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes, and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery to generate and transmit electricity to supply mines, quarries, railroads, tramways, mills, and factories with electric power, and to apply electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns, and to furnish electricity for lighting, heating, or power purposes to individuals or corporations, together with lands, buildings, and all improvements in or upon which to erect, install, place, use or operate machinery to generate and transmit electricity for any of the uses set forth. Subdivision 13 authorizes condemnation for electric light, heat, and power lines. *Held*, that such subdivisions authorize a corporation organized to furnish electric light, heat, and power to condemn the water in a stream, and the riparian rights of landowners, for its necessary requirements, and that such company is not limited to the acquisition of water by appropriation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 95; Dec. Dig. § 45.*]

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by the Northern Light & Power Company against Henry Stacher and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Geo. O. Perry and Perry & Kerrigan, for appellant. Francis Carr, for respondents Hunt and Atkins. Herzinger & Herzinger, for respondent Martha Sheridan.

CHIPMAN, P. J. This is an action to condemn certain riparian rights. A general and special demurrer to the third amended complaint was interposed by certain defendants and sustained by the court without leave to amend. Plaintiff appeals from the judgment. There are 25 separate causes of action involving the rights of as many different and separate riparian owners. Three appeared and had judgment, who will hereinafter be referred to as defendants. Each separate cause of action is couched in substantially the same language, and the attack upon one may be treated as an attack upon the other two.

From the complaint it appears that plaintiff was incorporated under the laws of this state in January, 1907, "for the term and duration of 50 years from the date of its incorporation, and is now in charge of the public use hereinafter mentioned, for which the property hereinafter described is sought to be taken." Defendants contend that the complaint fails to state facts showing that the use is a public use, or that plaintiff is in charge of a public use, or that the taking of the property is necessary to such use; also, that the allegation of the complaint that plaintiff is the owner of the property sought to be condemned is fatal to the pleading. The special demurrer is upon the grounds of uncertainty and ambiguity, in this, that the complaint "does not distinctly state the use or purpose to which plaintiff * * * seeks to apply the property," or "describe with sufficient certainty the property"; and does not "state the or any reasons or facts showing the necessity for taking the property." Furthermore, that it appears from the complaint that plaintiff owns 5,000 inches of the waters of said Old Cow creek, but it "does not definitely appear that there is any other or greater amount of water in said stream to be condemned," or "what amount or right if any to said stream the defendants hold or own which the plaintiff seeks to condemn." It becomes necessary to present somewhat fully the averments of the complaint:

"2. That plaintiff is incorporated for the purpose, among other things, to generate, make, and produce by water power, and to transmit and distribute for sale to and by the public generally in the county of Shasta, and elsewhere in the state of California, electric current (which words are used herein to designate all kinds and forms of electricity and electric energy) for light, power, and heat, and for other and all purposes and objects for which said current can now or may hereafter be used and applied by the public, and to acquire all kinds of property and do every act necessary or convenient to generate, make, produce, transmit, and distribute said electric current, and generally for the supplying and storing water for the operation of machinery for the purpose of generating and transmitting such electric current and electricity for the supplying of mines, quarries, railroads, tramways, mills, and factories with electric power, and also for the supplying electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages and towns; and said plaintiff owns and is now in possession, use, and enjoyment of a certain franchise granted by the county of Shasta, by ordinance of the board of supervisors thereof, for the erection of poles and the stringing of wires thereon during the period of plaintiff's corporate existence as hereinbefore set forth, for the transmission of electricity over, along, and upon the public roads and highways of said county of Shasta, and over, along, and upon the streets, avenues, and alleys of the unincorporated towns of said county of Shasta, for the supplying of inhabitants of the said county of Shasta with such electricity for light, power, and heat; and also owns and is in possession, use, and enjoyment of a certain franchise granted by the city of Redding, the only incorporated city in said county of Shasta, by ordinance of the board of trustees thereof, for the erection of poles and the stringing of wires thereon, for the transmission of electricity over, along, and upon the public streets, avenues, and alleys of said city of Redding, for the supplying of inhabitants of said city with such electricity for light, power, and heat.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"3. That plaintiff is by virtue of a location and appropriation made the —— day of September, 1904, and duly sold, assigned, transferred, and conveyed to this plaintiff thereafter and prior to the commencement of this action, the owner of and entitled to take, use, and divert 5,000 inches of the waters running and flowing in that certain creek in the eastern portion of said county of Shasta, commonly known and designated as 'Old Cow Creek' at a point in section 32, township 33 north, range 1 east, m. d. m., to be conveyed by means of ditches, flumes, aqueducts, and natural waterways from the said point of diversion to a point in section 6, township 31 north, range 1 west, m. d. m., where the same is to be used for the purpose of generating electricity as above set forth and is then to be permitted to return to and flow down a certain branch of said Old Cow creek known as South Cow creek down which branch, known as South Cow creek, said water will flow and return to and mingle with the waters flowing down Old Cow creek, its natural channel as aforesaid.

"4. That said Old Cow creek is not a navigable stream or water course. * * * The said Old Cow creek flows and runs over 5,000 inches of water, and said plaintiff is, as aforesaid, the owner of 5,000 inches of water running and flowing therein by virtue of appropriation as aforesaid, and entitled to take, divert, and use the same as against the said defendants, and as against all the world, except as to riparian rights of said defendants therein, which said riparian rights are, as herein set forth, sought to be condemned in this action.

"5. That the name of the sole owner and claimant of the only person in the use, occupation, and possession of or having any interest in the property described in this first cause of action in this complaint, or any damages for the taking thereof, so far as is known to or can be ascertained by this plaintiff, is as follows, to wit: Martha A. Sheridan is the owner and is in possession of a certain tract of land situated in said county of Shasta, over, along, and upon which said waters of said Old Cow creek flow and which is wholly below the point of diversion and between said point and the junction of said Old Cow creek and said South Cow creek as above described, which tract of land is particularly described as follows, to wit: The east half of the southeast quarter of section 6, township 32 north, range 1 east, m. d. m., together with the riparian rights connected therewith and appurtenant thereto, in and to the waters of said Old Cow creek, * * * (particularly describing the nature of said riparian rights). That not exceeding two acres of the said lands above described are capable of being irrigated, and the total amount of water required to irrigate such land does not exceed one-half of one miners' inch, measured under a four-inch pressure, as aforesaid.

"6. That for the purpose of the construction, operation, use, accommodation, and maintenance of plaintiff's proposed canals, flumes, ditches, aqueducts, pipe lines, electric power lines, and generally for the supplying according to the intent and purposes of its incorporation, said electricity and electric current for the public uses aforesaid, it is necessary that plaintiff appropriate, take, use, acquire, and hold all of said 5,000 inches of the running and flowing waters of said Old Cow creek passing through, over, upon, and along the several tracts of land herein particularly described, and all riparian rights appurtenant to and connected with said tract of land hereinbefore described in and to said waters of said Old Cow creek.

"7. That the use to which said waters are to be taken and applied by said plaintiff as aforesaid is a public use, and that plaintiff is in charge of such public use, and that the taking and acquiring of said waters and said riparian rights as aforesaid is necessary to said use in that it is necessary that plaintiff shall take said waters as aforesaid, as against said defendants, and as against said tracts of land, and use and hold the same for the use and purposes herein mentioned, and deprive the owners as aforesaid of the riparian rights hereinbefore mentioned and described, and divert, take, use, and hold the waters of said creek to the extent of plaintiff's claim thereto as aforesaid, as against the riparian rights of said defendants, at and from the point hereinbefore mentioned as the point of diversion to the point where the said waters are to be used and returned to the natural channel of said Old Cow creek as aforesaid, and by the means hereinbefore mentioned. That a large number of the inhabitants of said county of Shasta, and of the public generally in said county of Shasta, and elsewhere in the state of California, are without electricity or electric current for such purposes of light, power, and heat or for any other purpose, and it is necessary that plaintiff should take said waters and said riparian rights for the purpose of supplying said use.

"8. That plaintiff has acquired for said public use from the owners of said lands bordering on Old Cow creek, or through which said creek flows between said intended point of diversion and said point where the waters are to be returned to the natural channel of Old Cow creek, all riparian rights in and to the waters running therein through and over said lands, save and except from the above-named defendants in this action, the property hereby sought to be condemned."

We think the purpose for which the property is sought to be condemned appears with sufficient certainty. The land of defendants is definitely described by legal subdivisions, and it is alleged that the waters of Old Cow creek flow "over, along, and upon" said land "which is wholly below the point of diversion and between said point and the junction of said Old Cow creek and said South Cow creek as above described." The complaint also alleges that it is necessary that plaintiff appropriate, take, and use "all riparian rights of defendants to and connected with said tract of land hereinbefore described in and to said waters of said Old Cow creek." The prayer is for the condemnation of the riparian rights of defendants. The complaint also sets forth specifically the nature and character of the riparian rights connected with said land. This we think sufficient to show with reasonable certainty the property sought to be condemned. The point made that the facts should be stated, showing the necessity for taking the property, was made in Rialto Irrigating District v. Brandon, 103 Cal. 384, 37 Pac. 484, and it was there held that the rule contended for is not a rule of pleading, but of evidence.

It is stated in the complaint that there is water flowing down Old Cow creek in addition to the 5,000 inches appropriated and owned by plaintiff. The precise quantity flowing through defendants' land is not stated and need not be. It does appear that more water passes down the creek than has been appropriated by plaintiff, and that the various defendants have certain riparian rights to all of it, and plaintiff avers a necessity for taking all the water of the creek, including that to which the defendants are entitled as riparian owners. Plaintiff was not called upon to make an apportionment in its complaint of those riparian rights among their several owners. Whatever those rights may be, plaintiff seeks to condemn all of them, and it will be for the court or a jury to fix the compensation to be paid to each owner, as the facts may warrant.

The case of Shasta Power Co. v. Walker et al. (C. C.) 149 Fed. 568, was an action to condemn lands. In many of its features the case was not unlike the one here; the purpose of plaintiff being the same as here and stated in much the same form of pleading. The question whether the use was a public use came up on demurrer. The court said: "Taking the allegations of the complaint as a whole into consideration, and being mindful that the plaintiff has acquired franchises from the city of Redding and the county of Shasta for the purpose of serving the inhabitants of both such municipalities with light, heat, and power, I am of the opinion that the plaintiff is shown to be a public service corporation, and hence that the complaint is within itself sufficient. The objection that the contemplated use is vague, indefinite, and uncertain cannot be maintained." The case was later tried on its merits and plaintiff had judgment, and is reported in Walker v. Shasta Power Co., 160 Fed. 858, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725.

In the discussion of what is necessary to constitute a public use, and speaking with reference to subdivision 12 of section 1238, Code of Civil Procedure, the court said: "There can be no doubt that within this provision the furnishing of electricity as it is proposed to be furnished by the defendant in error is a use for which the Legislature intended that the right of eminent domain might be exercised. The purpose of the statute is to remove obstacles in the way of development and progress in the state, and it is in harmony with the Constitution and section 1001 of the Civil Code, which gives to any person, without further legislative action, the power to acquire property for any of the uses specified in section 1238, 'either by the consent of the owner or by proceedings had under the provisions of title 7, part 3, of the Code of Civil Procedure, and any person seeking to acquire property for any of the uses mentioned in said title is an agent of the state or person in charge of such use, within the meaning of these terms as used in said title.' * * * And it has generally been held by the courts that the generation of electric power for distribution and sale to the public on equal terms is a public enterprise, and that water used for that purpose is devoted to a public use." (Citing cases.) It is no longer a disputed proposition that the state, through its Legislature, in the exercise of its police power, may regulate the rate to be charged by corporations doing a business affected with a public interest. Says Mr. Thompson: "Property is clothed with a public interest within the meaning of this rule when it is used in a manner to make it of public consequence, and its use affects the community at large." 3 Thomp. on Corps. § 2950.

In support of the general demurrer it is urged that plaintiff has stated itself out of court by averring ownership of the property sought to be condemned—citing City of San Jose v. Freyschlag, 56 Cal. 8. Plaintiff does not allege ownership of any interest in the riparian rights of defendants. It is alleged that the creek flows 5,000 miners' inches and over; that plaintiff is the owner of 5,000 inches flowing in the creek and the right to divert the same "except as to the riparian rights of said defendants therein, which said riparian rights are, as set forth herein, sought to be condemned in this action." It appears from the complaint that defendants have a certain interest in the waters to be condemned, namely, riparian rights therein—and these are the rights put in issue.

We think the complaint states facts sufficient to show that the use is a public use, and that plaintiff is in charge of a public use. It is true, as claimed by defendants, that the complaint must show that the use for which the property is to be taken is a public use, so declared to be by the Legislature. It is also true that the courts will not condemn property for a use "which is evidently private or to accomplish some purpose which is not of a public character."

The right of the people or government to take private property for public use is given by section 1237, Code Civ. Proc., and may be exercised in the manner provided in the subsequent sections, part 3, title 7, of the same Code. Section 1238 sets forth the public uses in behalf of which this right may be exercised, "subject to the provisions of this title." Among those public uses are found in subdivisions 12 and 13 the following:

"12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings, and all other improvements in or upon which to erect, install, place, or use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

"13. Electric power lines, electric heat lines, and electric light, heat and power lines."

Section 1239 divides the estates and rights in lands subject to be taken for public use, into three classes: 1. A fee simple when taken for certain purposes not here involved. 2. An easement, when taken for any other purpose. 3. The right to occupy land, to remove therefrom such earth, etc., as may be necessary for some public purpose. Section 1240 classifies and enumerates the private property which may be taken under this title: "1. All real property belonging to any person. * * * 6. All classes of private property not enumerated may be taken for public use when authorized by law." And section 1241 provides that "before any property can be taken, it must appear: 1. That the use to which it is to be applied is authorized by law. 2. That the taking is necessary to such use."

The act of March 22, 1905 (St. 1905, p. 777), provides for the sale of franchises by counties and municipalities, among others, "to erect poles or wires for transmitting electric heat and power over or upon any public street or highway," and provides for the payment of 2 per cent. of the gross annual receipts for the enjoyment of such franchise. Section 629 et seq. of the Civil Code are regulatory, to some extent, of corporations engaged in supplying electricity. The statute relating to eminent domain, however, seems to clearly recognize the object in which plaintiff is engaged and for which it was incorporated as a public use.

The proposition principally discussed and upon which defendants mainly rely is as follows: "The statute does not authorize the condemnation of water or riparian rights for creating power, for generating electricity, for power lines, heat lines, or electric heat, light, or power." The contention is that section 1240, Code Civ. Proc., "fails to provide expressly for the condemnation of water or the riparian right of the landowners to the flow of water over their lands, thereby leaving a doubt as to the intention of the Legislature as to what property should be condemned," and there being a doubt, it must be resolved against the right to condemn. Attention is invited to subdivision 7 of section 1240 as showing that the "classes of property not enumerated" may be taken only "when such taking is authorized by law." But this latter clause adds nothing to the statute, for section 1241 provides that "before property can be taken, it must appear that the use to which it is to be applied is a use authorized by law." This condition applies to all the classes of property enumerated in section 1240. The question, then, is, Is water, or the riparian right to water, property, and does it come within any of the classes enumerated as the subject of condemnation? The word "property" includes property real and personal. Civ. Code, § 14. Anything of which there may be ownership is called property. Civ. Code, § 654. Clearly, water, and the right to its use, as riparian to land, is property. If it is to be regarded as real property it falls within subdivision 1 of section 1240, and if it is to be regarded as property other than such as is enumerated in the eight other classes, it falls within subdivision 7.

The Supreme Court said, in Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140: "The right to water must be treated in this state as it always has been treated, as running with the land, and as a corporeal privilege bestowed upon the occupier or proprietor of the soil; and as such has none of the characteristics of mere personalty." In Lux v. Haggin, 69 Cal. 392, 10 Pac. 754, the court said: "The right to running water is defined to be a corporeal right or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes." (Citing cases.) It would seem to be too plain for argument that if land may be condemned its incidents may also be taken; and, whatever doubt there may be of the intention of the Legislature in using the term "land," such doubt is cleared away by the declaration that "all classes of private property not enumerated may be taken for public use when authorized by law." These provisions would seem to invite but a single further inquiry, Is the taking authorized by law? The answer here is equally clear and free from doubt and is given in section 1238, which authorizes the exercise of the right of eminent domain in behalf of the uses mentioned in subdivisions 12 and 13 of that section. We have, then, the clearly expressed authority to take property for the use in question and we also have a clearly expressed description of the property which may be taken. The fact that the statute does not specifically mention water and riparian rights to water suggests no doubt to our minds as to the intention of the Legislature.

Mr. Lewis says: "Land and all estates, rights, interests, and easements in, or appurtenant thereto, may be taken under the power of eminent domain. There may be a question whether the taking of a particular property, right, or easement has been authorized, but if the intention of the Legislature is clear, its power is beyond question. The right of a corporation to maintain one or more bridges across a street may be condemned. The rights of riparian and abutting owners may be condemned without taking any estate in the land to which they pertain." 1 Lewis' Em. Dom. § 262a. The same author says: "All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain." Id., sec. 262. We cannot doubt that the Legislature meant, by subdivision 7, section 1240, to include every class of private property not specifically enumerated, and that the language is not to be interpreted as excluding water and riparian rights simply because they are not distinctly mentioned. Defendants would have the court engraft upon the statute an exception so that it would read, "all classes of private property not enumerated *except water and riparian rights* may be taken for public use." This the court cannot do. There is no element of sacredness peculiar to water that should exempt it from bearing the burden placed upon other property, when necessary to be taken for the public good.

In the case of St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659, the proceeding was "to condemn the waters of the creek (York creek) for the purpose of supplying the inhabitants of the town with water," and the court stated the principal question to be "whether or not, under the laws of this state, the right of a private individual to enjoy the flow of water in its natural channel, upon or along his land, can be taken from him for such purpose." Sections 1239 and 1240 were under review, and the court decided that the right claimed by defendant could be condemned. The court, in Alta Land, etc., Co. v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217, referred to the riparian right of Hancock (to the extent that it existed) "as an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or condemnation, or extinguished by prescription." While the question was not directly involved, the opinion is not without value. In Gould v. Stafford, 91 Cal. 146, 155, 27 Pac. 543, 546, the court said: "The right of a riparian proprietor to the flow of a stream of water over his land is an incident of his property in the land, is annexed to the land, and considered part and parcel of it (citing St. Helena Water Co. v. Forbes), but may be 'segregated' from the land by grant, condemnation, or by prescription," and, resulting from this doctrine, it was held that the grantors of plaintiff might grant their riparian rights, and hence a subsequent deed of the land would not convey riparian rights. In Lux v. Haggin, 69 Cal. 300, 10 Pac. 697, the court stated that in St. Helena Water Co. v. Forbes, supra, "the main question was whether the Code provides for a condemnation of that species of property (riparian right) to public uses. The question was answered in the affirmative." City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197, was an action to condemn the right to the waters of a certain creek. Enright claimed that there was neither authority nor necessity for the exercise of the power, but if there was such power he was entitled to compensation not only as a riparian proprietor, but as an appropriator. The distinct question now here was not before the court, but the waters of the creek were condemned and the judgment was affirmed. Hercules Water Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. 401, was an action to condemn riparian rights. The judgment of condemnation was reversed, but the right to condemn was not questioned. In both the cases last above cited eminent counsel appeared and it is not probable that both they and the court would have failed to observe so vital a matter as is now being urged, had the point been deemed to possess merit.

Subdivision 7, section 1240, of our Code of Civil Procedure, is the same as subdivision 6 of section 5958, Revised Codes of North Dakota. In the case of Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570, it was held that riparian rights of a landowner may be condemned—citing St. Helena Water Co. v. Forbes, supra, and other cases. There a railroad corporation condemned the right to a strip of land across the bend of a creek by which to divert the water of the creek and to extinguish the riparian rights to the stream in the bend of the creek thus cut off. The court said, among other things: "It was not necessary to condemn the land through which flows the river to be diverted from its channel. There appears to be no necessity for the taking of the real estate itself; and it is a familiar principle of law that the wresting of private property from the hands of the owners for a public use should never be permitted to extend beyond such property or such interest in property as is reasonably required to subserve the interests of the public." The principle was followed in State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423, 17 L. R. A. (N. S.) 1005, 125 Am. St. Rep. 927, the court saying: "If riparian rights, right of access, right of light and air, and other kindred, intangible rights appurtenant to real estate, are property, they are certainly such property, and such an interest in real estate, as an owner would be entitled to alienate, thereby conveying an easement. If such rights may be conveyed, we see no reason why they may not, under the right of eminent domain, be condemned when necessary for public use, without an appropriation of the land itself." It was also held in Clear Creek Water Co. v. Gladeville Imp. Co., 107 Va. 278, 58 S. W. 586, that riparian rights could be condemned. Also in Watauga Water Co. v. Scott, 111 Tenn. 321, 76 S. W. 888, although in that case the law failed to provide for compensation, and the power was for that reason alone held not to have been given. In Crawford v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647, the court decided that riparian rights could be condemned under a statute authorizing condemnation of real property. The court said: "The right of riparian proprietors to the use of the waters flowing in the streams to which their lands are adjacent, when once attached, is in its nature a vested right in property, a corporeal hereditament, being a part and parcel of the riparian land which is annexed to the soil, and the use of it is an incident thereto, of which the owner cannot be rightfully divested except by grant, prescription, or condemnation. * * * This property right, like any other part of his realty, is subject to condemnation and appropriation for public use in the manner provided by law." In McGhee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398, it was held that a statute authorizing condemnation of land carried with it the authority to condemn riparian rights. These cases appear to treat such rights as land or as embraced within the term "land," as was the basis of the decision in St. Helena Water Co. v. Forbes, supra. We do not feel justified in attempting to test the question by a comparison of the advantages and value of irrigation with the benefits to the public that may be derived from the exercise of the power here invoked. Considerations looking to the value or necessity of the property to the private owner must give way to the requirements of the public at large, for the theory upon which all property is held and enjoyed is that whenever the state needs it as necessary to the welfare of the people thereof, it has the right to so declare by law and to take it in accordance therewith, the assumption being that the private owner is compensated in damages and in sharing with other citizens the benefits of the use to which his property is dedicated. And should this in a given case seem inadequate, there is the still further consideration that the rights of the public are paramount to those of the individual, and the welfare of society may rightfully demand unrequited sacrifices of its individual members. It seems to us that the right to condemn water and the riparian rights thereto, as a public use, is too well grounded in this state, under the law as it now exists, to justify us in setting it aside upon some new view that may now be urged.

The judgment is reversed, with directions to overrule the demurrer.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. In our decision it is possible that we failed to give due consideration to all the reasons which may be urged against the exercise of the right of eminent domain by electric power companies to obtain water for power. The case is one of far-reaching importance and we are disposed to receive all the light possible which may be thrown upon it.

The petition for a rehearing is granted. The case may by stipulation be resubmitted upon printed briefs or upon the petition and answer thereto, or the court will hear oral argument at such time as may suit the convenience of counsel and the court.

On Rehearing.

Geo. O. Perry and Perry & Kerrigan (Guy C. Earl, amicus curiæ), for appellant. Francis Carr and Herzinger & Herzinger (Reed & Dozier, amici curiæ), for respondents.

CHIPMAN, P. J. We still adhere to the conclusions reached in the former opinion for the reasons there given.

We invited further consideration of two questions: First, Does the complaint state sufficient facts upon the issue of the necessity for the taking? and, second, Does the statute authorize the taking of water for electric power, light, and heat purposes? In addition to what is said in the former opinion, it may not be amiss to make some further observations upon these two questions.

First, as to the question of necessity. Section 1241, Code Civ. Proc., provides, as we have seen, that "before any property can be taken, it must appear: (1) That the use to which it is to be applied is authorized by law; (2) that the taking is necessary to such use." The point urged is that the complaint does not allege facts sufficient to present the issue of necessity; that the averments do not meet the requirements of the law without showing: (1) That the wants and needs of the people require the production and supply of electricity in excess of the present supply; (2) that the present equipment controlled by appellant, is insufficient to meet such needs; (3) that the particular property sought is available and can be and will be used for the public purposes mentioned, and that it is necessary to take the property to meet the public needs.

It is alleged that a large number of people are without electricity whose needs in that regard appellant alleges its desire and purpose to supply and to this end that it is necessary to condemn the property sought. Electric light and power companies, like other public service corporations, have a right and it is their duty to anticipate future needs of the public. They cannot reasonably be required to limit their preparations for future demands by their ability to provide for them out of their present supply. New uses for electricity are constantly being discovered and applied. The supply which in the same community would at present be sufficient might be insufficient in a short time. Nor can public service corporations state with certainty to what extent their facilities to serve the public will be availed of. Neither can they determine, nor should they be required to determine in advance, and set forth in their complaint that their present equipment is insufficient to meet the needs of the people. It is, of course, required that the particular property sought be available and can be used for the purposes desired, and also that it is necessary to meet the public needs. But these are matters the particular facts in support of which are evidentiary, rather than subjects of pleading. In Spring Valley W. W. v. Drinkhouse, 92 Cal. 532, 28 Pac. 681, and in Central Pacific R. R. Co. v. Feldman, 152 Cal. 309, 92 Pac. 849, cited by respondent, it was the evidence necessary that was being considered, and not the pleadings. The complaint is set out quite fully in the original opinion and its averments need not be here repeated. They seem to us sufficient to present the issue of necessity for the taking. The burden of establishing this issue is upon plaintiff, and it was not required of plaintiff to set forth in its complaint the evidence on which it relies to prove the alleged necessity. This evidence may or may not be found sufficient when subjected to proper test at the trial, but we do not think that the burden is upon plaintiff to present all the facts in its complaint in order that this test may be fully and properly determined on demurrer.

The more serious question urged is, Does the statute authorize the condemnation of property by electric power, light, and heat companies, under any condition of facts? Respondent denies to such corporations such power. The claim is that while they may condemn property for "canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets, for storing and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines (and for many other specified purposes) with electric power," as set forth in subdivisions 12 and 13, § 1238, Code Civ. Proc., they cannot condemn water, without which the canals, reservoirs, etc., would be useless, but must acquire the water by appropriation or purchase; that they may condemn the *means* whereby water may be used, but not the *water itself*. This denial, of course, extends to all persons or corporations, municipal or otherwise, to acquire water in any other method than by appropriation or purchase for such purposes, however imperative the need of the public. In our former opinion we endeavor to show that water is property and may be taken like other property. It is conceded now that water is property and may be taken for purposes authorized by law, but the claim is that it is not so authorized in terms or by implication in subdivisions 12 and 13 above referred to; that in neither one of these subdivisions is water expressly mentioned "for power purposes or for generating electricity as one of the uses of the power company for which condemnation may be made."

Section 1238 provides that, "subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following uses." Then follows an enumeration of the uses, among them the uses mentioned in subdivisions 12 and 13. The property which may be taken is classified and enumerated in section 1240, and, as we have held, includes water and riparian rights to water. Section 1238 declares: "The right of eminent domain may be exercised *in behalf* of the following uses," and among them are canals, reservoirs, etc., "from sources other than a navigable lake," for "supplying, storing, and discharging water for or in connection with the operation of machinery, for the purposes of generating and transmitting electricity," etc. If water may be taken and canals, reservoirs, etc., may be taken for supplying, storing, and discharging water, it seems to us that water may be taken to be used in canals, ditches, pipes, etc., or stored in reservoirs for the uses enumerated. The limitation upon the taking of water is found in section 1238 and the taking must be for one of the uses authorized by that section; and if water is sought under eminent domain the power may "be exercised *in behalf* of the" uses enumerated. When the statute says that land may be condemned (section 1240) the right to take it for canals, reservoirs, etc., i. e., "in behalf of the following uses," is found in section 1238. Water is as necessary for the uses and purposes mentioned in subdivisions 12 and 13 as is land. And land is therein mentioned only in connection with the site on which to erect the machinery to generate electricity. When the statute declares canals, reservoirs, etc., to be public uses, it does not mean completed or already constructed canals, reservoirs, flumes, pipes, etc.; it means the right to take land to be used for the purpose of constructing these agencies or instrumentalities "for supplying, storing, and discharging water" for the purposes named. Respondents' contention, carried to its logical conclusion would deprive the corporation of the right to condemn land for canals, reservoirs, ditches, etc., because land is not expressly mentioned, and would confine the right to condemn only completed canals, reservoirs, etc. Obviously this cannot be the true construction to be given the statute. Yet water is as essential to the use of canals, reservoirs, etc., as is land; each is useless without the other. Reading sections 1238 and 1240 together, they mean to say this: Water may be taken by the right of eminent domain in behalf of the following public uses, namely, canals, reservoirs, etc., in connection with the operation of machinery, for the purpose of generating and transmitting electricity.

The case is quite supposable where certain land is susceptible of being utilized as a reservoir, and may be indispensable to the success of plans for furnishing power with which to generate electricity for the purposes mentioned in the statute. The owner of this land may have it in a high state of cultivation under irrigation from a stream of water flowing through it which he has appropriated for such use. To convert this land into a reservoir must necessarily deprive the owner of both land and water and in assessing the damage in taking the land, the damage would be enhanced by the water appropriated with it. In such case the water is appurtenant to the land and would be taken with it. The statute gives the right to take the land for a reservoir and this right would not be affected because it also involved the taking of water with it.

Somewhat similar provision is made by subdivision 3 of section 1238, for the exercise of eminent domain "in behalf of * * * ponds, lakes, canals, aqueducts, reservoirs * * * for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town." Respondents' contention would prohibit the taking of water "in behalf of" these objects, which it seems to us would be no less violative of the intention of the statute than that sought to be given subdivisions 12 and 13.

In St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659, where sections 1238 and 1240 were under review, and where it was held that water might be taken for the purpose of supplying the inhabitants of a town, Mr. Justice Myrick very clearly elucidates the question. He said: "The land through, over, and upon which pipes, aqueducts, flumes, and ditches may be constructed or laid is not used by the public; the corporation uses the land for the conveying of water; the water after having been conveyed, is taken by the public, and at that point, strictly speaking, is where the public use commences; but both the water and the land are taken, to the end that the public may be supplied with the one by the use of the other. In this case the plaintiff has already acquired the one, viz., places for its pipes, etc. (which are worthless and serve no purpose without water), and now seeks to acquire the necessary water; such water, when acquired, to be used in behalf of, for the benefit of, to the interest of, for the behoof of, ditches, etc., for conducting water for the use of the inhabitants of a village. (See Worcester's Dictionary, 'Behalf'.)" In the same case Mr. Justice Ross said: "There can be no sort of doubt that the supplying of the inhabitants of a town with pure, fresh water is one of the 'public uses,' in behalf of which the Legislature has declared the right of eminent domain may be exercised. Code Civ. Proc. § 1238." Following this declaration that the supplying of water to the inhabitants of a town is a public use (subd. 3, § 1238, Code Civ. Proc.), the court further says: "It is equally clear that the plaintiff is authorized to exercise the right of eminent domain *in behalf* of such use. Section 1001 of the Civil Code provides: 'Any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of title 7, pt. 3, of the Code of Civil Procedure (relating to eminent domain); and any person seeking to acquire property for any of the uses mentioned in such title is an agent of the state, or a person in charge of such use, within the meaning of those terms, as used in such title.'" The opinion then proceeds to show that water, which was the property in question, "comes within the category of real property."

In Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, it was held, under section 1001 of the Civil Code, that private property might be taken for any use specified in section 1238, Code Civ. Proc. So held in Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197, both of which cases are referred to approvingly in City of Los Angeles v. Leavis, 119 Cal. 164, 51 Pac. 34. We confess our inability to escape the simple logic of these cases, which is, when reduced to the simplest statement, that water is property and may be taken "in behalf of" any of the uses specified in section 1238, Code Civ. Proc., and that the objects and purposes of plaintiff constitute a public use under that section. See Shasta Power Co. v. Walker et al. (C. C.) 149 Fed. 568; later, after trial, as reported in 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725. Paragraphs quoted in our first opinion.

The judgment is reversed, with directions to overrule the demurrer.

We concur: BURNETT, J.; HART, J.

13 Cal. App. 521

PEOPLE v. HATCH. (Cr. 217.)

(Court of Appeal, First District, California. May 31, 1910. Rehearing Denied July 28, 1910.)

1. Indictment and Information (§ 137*)—Motion to Quash—Grounds—Irregularity in Formation of Grand Jury.

Under Pen. Code, § 995, providing that an indictment may be set aside where it is not found indorsed and presented as prescribed in the Code, when the names of the witnesses examined before the grand jury or whose depositions were read before them are not indorsed on the indictment, when a person is permitted to be present during the grand jury session when the charge in the indictment is under consideration, with certain exceptions, and when accused has not been held to answer before finding of the indictment on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror, no mere irregularities in the formation and impanelment of the grand jury, other than such as are grounds of challenge, either to the panel or to an individual juror, are grounds for setting aside the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480–487; Dec. Dig. § 137.*]

2. Criminal Law (§ 1144*)—Appeal—Presumptions.

Where the bill of exceptions does not show that accused was not held to answer before finding of the indictment, the appellate court cannot presume that he was not so held, since appellant must affirmatively show error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3016; Dec. Dig. § 1144.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. Criminal Law (§ 1088*)—Appeal—Record—Affidavits.

An affidavit of accused, filed in the appellate court on appeal, is no part of the record on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2789; Dec. Dig. § 1088.*]

4. Criminal Law (§ 1158*)—Appeal—Review.

In passing upon the trial court's action, the evidence must be viewed in the light most favorable to supporting the action of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3074; Dec. Dig. § 1158.*]

5. Indictment and Information (§ 137*)—Motion to Quash—Grounds—Excusing Grand Jurors.

That the district attorney after ascertaining from questioning the grand jurors that three of them may have entertained opinions upon the case, and that such opinions were probably unfavorable to accused, and suggested that it would be better that such jurors retire, so that they take no part in the proceedings resulting in the indictment, was not ground for setting aside the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480, 481; Dec. Dig. § 137.*]

6. Indictment and Information (§ 137*)—Motion to Quash—Grounds—Misconduct of District Attorney.

That the district attorney advised the grand jury that the evidence was sufficient to warrant an indictment was not ground for setting aside the indictment, not being included in the grounds specified by Pen. Code, § 995, declaring the causes for which an indictment may be set aside.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 480; Dec. Dig. § 137.*]

7. Indictment and Information (§ 144*)—Nature of "Indictment."

An "indictment" is but an accusatory paper, and on motion to dismiss, irregularities in the proceedings before the grand jury cannot be reviewed, except as expressly provided by statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*

For other definitions, see Words and Phrases, vol. 4, pp. 3551–3555.]

8. Indictment and Information (§ 137*)—Motion to Quash—Hearing—Admissibility of Evidence.

The court cannot inquire into the sufficiency of proof or the mode of examining witnesses by motion to set aside an indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 848; Dec. Dig. § 137.*]

9. Indictment and Information (§ 148*)—Demurrer—General or Specific.

Where a demurrer to an indictment does not specifically point out a certain defect therein, it can only be considered under the general demurrer that the indictment does not state facts sufficient to constitute a public offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 495; Dec. Dig. § 148.*]

10. Indictment and Information (§ 147*)—Sufficiency of Accusation—Participial Form—Demurrer.

While the use of the participial form in alleging facts necessary to the statement of an offense is not to be commended, it will not render the indictment bad, as against a general demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 490–494; Dec. Dig. § 147.*]

11. Indictment and Information (§ 125*)—Duplicity.

Where several acts are prohibited and made punishable, accused may be charged conjunctively with doing two or more of the prohibited acts without rendering the indictment duplicitous, and hence an indictment under Pen. Code, § 506, making it embezzlement for an agent intrusted with or having control of property for use of another to fraudulently appropriate it to any use not in the lawful execution of his trust, or to secrete it with a fraudulent intent to so appropriate it, which alleges both that accused secreted the money with the fraudulent intent to appropriate it, and that he did fraudulently appropriate it, is not duplicitous.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.*]

12. Criminal Law (§ 409*)—Evidence—Admissions by Accused—Preliminary Evidence.

While there must be some proof of the body of the crime before extrajudicial statements or admissions of accused may be considered, it is not required that such proof establish the crime beyond all reasonable doubt; and hence in an embezzlement case a requested charge that, in determining whether a crime had been committed, apart from who committed it, the jury should not consider any admission or statement of accused, and should look exclusively to the other evidence in the case, and if such other evidence did not show the commission of the crime charged beyond a reasonable doubt, accused should be acquitted, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919; Dec. Dig. § 409.*]

13. Embezzlement (§ 48*)—Instructions.

In an embezzlement case where the only controverted matter was whether accused had embezzled the money of his principal, and it appeared that accused had handled the money as an agent and while insolvent had taken or borrowed the money for his own use without disclosing his financial condition to his principal, a charge that the essential element of embezzlement is the fraudulent conversion by accused of property received by him in a trust capacity, and that in all matters connected with trust relations an agent is bound to act in the highest good faith towards his principal, and cannot obtain any advantage therein over the principal by the slightest misrepresentation or concealment, was misleading, as giving the jury to understand that though the money had been lent by the principal to accused, yet if such loans were obtained without full disclosure of his condition by him to her, he would be guilty of embezzlement of the money thus lent.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72–75; Dec. Dig. § 48.*]

14. Criminal Law (§ 30*)—Distinct Offenses.

Where an agent had at different times made loans to himself of his principal's money in different amounts, if such loans amounted to embezzlement he was guilty of a distinct offense for each appropriation, and a demand by the principal for payment of the general balance would not consolidate into one offense the several embezzlements previously committed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 32–34; Dec. Dig. § 30.*]

15. Criminal Law (§ 678*)—Election Between Acts.

Where several substantive offenses have been proved, either one of which would support a verdict of guilty under the indictment charging one offense, the district attorney should elect as to which offense he will rely upon for a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580–1583; Dec. Dig. § 678;* Indictment and Information, Cent. Dig. §§ 425–437.]

16. Criminal Law (§ 678*)—Election Between Acts.

Where in an embezzlement case a statement furnished by accused as agent to his principal, whose money he was alleged to have embezzled, was introduced in evidence early in the trial, showing the receipt of various sums during the period covered by the statement, at which time no offense had been proved, and it did not appear that more than one offense would be proved, a request that the district attorney be required to indicate which item he relied upon as supporting the charge in the indictment was properly denied, since before a fraudulent appropriation can be shown it must appear that money has been received, and it might happen that an aggregate amount was finally appropriated by one act which was received in many items.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580–1583; Dec. Dig. § 678;* Indictment and Information, Cent. Dig. §§ 425–437.]

17. Criminal Law (§ 814*)—Instructions—Applicability to Case.

In an embezzlement case, where under one charge in the indictment several distinct fraudulent appropriations had been proved and no election had been made as to which was the substantive offense upon which the indictment was predicated, a charge that if accused as agent received his principal's money as charged in the indictment, and fraudulently appropriated it to an amount above $50 not in the due execution of his trust, but to his own use, he should be found guilty as charged, was erroneous, since under it the jury could convict of the offense charged, though the jurors founded their verdict upon different offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1987; Dec. Dig. § 814.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Jackson Hatch was convicted of embezzlement, and appeals from the judgment and an order denying a new trial. Reversed and remanded.

Walter H. Linforth, Frank Freeman, E. M. Rosenthal, and Owen D. Richardson, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. The defendant was charged by indictment under section 506 of the Penal Code with having embezzled on the 17th day of February, 1908, the sum of $37,075.42 of the money of Sarah E. Sage, intrusted to him and in his control and custody as the agent, attorney, and trustee of said Sarah E. Sage. He was found guilty as charged, and made a motion for a new trial, which was denied, and judgment pronounced. From the judgment and order denying his motion for a new trial he in due time appealed to this court.

Defendant at the proper time made a motion to set aside the indictment on various grounds specified in the motion. The motion was denied, and the proceedings thereon are set forth in the bill of exceptions.

The grounds upon which an indictment may be set aside are set forth in section 995 of the Penal Code, which is as follows: "The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases. If it be an indictment: 1. Where it is not found, indorsed, and presented as prescribed in this Code. 2. When the names of the witnesses, examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon. 3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section 925. 4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror."

It is well settled in this state that under this section no mere irregularities in the formation and impanelment of the grand jury, other than such as are grounds of challenge, either to the panel or to an individual juror, are grounds for setting aside the indictment. People v. Southwell, 46 Cal. 142; People v. Welch, 49 Cal. 174; People v. Colby, 54 Cal. 37; People v. Hunter, 54 Cal. 65; People v. Schmidt, 64 Cal. 260, 30 Pac. 814; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Bruner v. Superior Court, 92 Cal. 267, 28 Pac. 341. Most of the grounds relied upon by appellant are clearly of this character. Others are grounds of challenge, and can only be relied upon by a defendant who has not been held to answer before the finding of the indictment. Pen. Code, § 995, subd. 4. The bill of exceptions does not show that this defendant was not held to answer before the finding of the indictment. In the absence of such showing we cannot presume that he was not. The appellant must affirmatively show error, and as his right to rely upon grounds that would have been grounds of challenge either to the panel or to an individual juror depended upon his not having been held to answer before the finding of the indictment, the record on appeal must show it. People v. Holmes, 118 Cal. 444, 50 Pac. 675; People v. Douglass, 100 Cal. 1, 34 Pac. 490; People v. McAuslan, 43 Cal. 55; People v. Russell, 156 Cal. 450, 105 Pac. 416. True, as one of the grounds of defendant's motion, it is stated, "that this defendant had not been held to answer before the finding of said indictment," but such recital in the motion is not evidence of the fact. Appellant in this connection has called our attention to a copy of an affidavit of defendant filed in this court. But this is no part of the record on appeal, and on its face does not appear to have been read or used on the hearing of the motion to set aside the indictment, but upon a motion for a continuance of the hearing thereon. So far as defendant now relies upon grounds that are cause for challenge, either to the panel or to an individual juror, the record does not show that he was in a position to raise such objections upon his motion to dismiss the indictment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is urged that the indictment was invalid and the motion to dismiss should have been granted because, as it is claimed, the district attorney excluded three grand jurors from participation in the proceedings resulting in the finding of the indictment. Presumably this is urged as showing that the indictment was "not found, indorsed, and presented as prescribed in" the Penal Code § 995, subd. 1. Whether or not the facts claimed to exist are grounds for a dismissal of the indictment is at least questionable. But in passing upon the action of the trial court we must view the evidence in the light most favorable to supporting the action of the trial court. The district attorney's evidence upon this point is to the effect that after ascertaining from questioning the grand jurors that three of them may have entertained opinions upon the case to be submitted, and that such opinions were probably unfavorable to the defendant, he suggested that it would be better that such jurors retire and take no part in the investigation of the charges against Mr. Hatch. The three doubtful jurors accordingly took no part in the proceedings resulting in the indictment. The action of the district attorney was for the purpose of preventing disqualified jurors from acting upon the indictment. By reducing the number of jurors it reduced the chance for obtaining 12 affirmative votes for an indictment, and the defendant could not have been injured thereby. We have been cited to no case which holds that such action invalidates an indictment.

It is also urged that the indictment should have been set aside because, as it is claimed, the district attorney advised the grand jury that the evidence was sufficient to warrant an indictment. Unlike the preceding point, it cannot be claimed that this conduct affected the validity of the grand jury itself. It is presented simply as misconduct on the part of the district attorney. The authorities seem to be agreed that a district attorney should refrain from expressing an opinion to the grand jury as to the effect of evidence or the sufficiency thereof. But the only grounds for which an indictment found and returned by a valid grand jury may be set aside are those specified in section 995 of the Penal Code, and we do not think that this comes within any of the provisions of said section. The law contemplates that only competent evidence be received by the grand jury, yet if it should receive incompetent evidence and found an indictment thereon, there is no method of reviewing its action in so doing. An indictment is but an accusatory paper, and it was never intended that on a motion to dismiss, irregularities in the proceedings before the grand jury should be reviewed, except as expressly provided in the statute. "An indictment is a record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for reviewing it." In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117.

The court refused to allow the defendant to introduce evidence as to the sufficiency and competency of the evidence heard by the grand jury. In this the court committed no error. "The court cannot inquire into the sufficiency of proof, or the mode of examining witnesses, to invalidate an indictment." In re Kennedy, supra.

We have examined all the contentions of appellant as to the action of the court in denying his motion to set aside the indictment, and are unable to say that the court committed any error in its ruling. Neither did the court err in denying appellant's motion to strike the indictment from the files. This motion was in substance and effect a motion to set aside the indictment, and was properly denied.

It is urged by the appellant that the court erred in overruling his demurrer to the indictment, which is drawn under section 506 of the Penal Code, defining embezzlement by an agent, attorney, and trustee. The fact that the defendant was the agent, attorney, and trustee of Mrs. Sage, and that he had possession and was intrusted with her money as such agent, attorney, and trustee, is not alleged in direct and positive terms, but only in participial form. Thus it is alleged that the defendant * * * "being then and there the agent, attorney, and trustee of one Sarah E. Sage, and being then and there intrusted with and having in his control and custody * * * as such attorney, agent, and trustee, etc., etc." This defect is not specifically pointed out in the demurrer, and under the rule laid down in People v. Bradbury, 155 Cal. 808, 103 Pac. 215, can only be considered under the general demurrer that the indictment does not state facts sufficient to constitute a public offense. That the use of the participial form in alleging facts necessary to the statement of an offense is not to be commended we do not doubt, but it is sufficient in the face of a general demurrer under the liberal system of pleading allowed in this state. In People v. Ennis, 137 Cal. 263, 70 Pac. 84, the defendant was charged with perjury, and the fact that he had been sworn was only alleged in the participial form, thus: "Having taken an oath then and there before, etc., etc." It was held sufficient. The court said: "The participial form of the averment is not the best method of stating a fact; but it is sufficient under our liberal system of pleading." In People v. Hamilton, 97 Cal. xvii, 32 Pac. 526, defendant was charged with embezzling money that he had received as county clerk. The method of charging the official character of the defendant and his possession of the money was substantially the same as in the case at bar. The trial court ordered an arrest of judgment, and this order was reversed by the Supreme Court of this state. The court expressly held that the use of the past participle in alleging the official character of the defendant and his receipt and possession of the money did not render the indictment defective. The indictment in People v. Page, 116 Cal. 386, 48 Pac. 326, was drawn under the same section and in the same form as is the indictment in the case at bar, and it was held sufficient as against demurrer. See, also, to similar effect, People v. Piggott, 126 Cal. 511, 59 Pac. 31; People v. Carpenter, 136 Cal., 392, 68 Pac. 1027.

Neither does the indictment charge two offenses in alleging both that the defendant secreted the money with the fraudulent intent to appropriate it and that he did fraudulently appropriate it. Where, as in section 506, Pen. Code, several acts are prohibited and made punishable, the defendant may be charged conjunctively with doing two or more of the prohibited acts, and the indictment will not be open to attack for duplicity. People v. Thompson, 111 Cal. 242, 43 Pac. 748. The demurrer was properly overruled.

Many exceptions were taken during the course of the trial to rulings of the court, but we do not deem it necessary to notice any considerable number of them. As the cause must be remanded for a new trial for errors committed by which defendant was prevented from having that fair trial to which under the law he was entitled, we shall only notice such errors and such other matters as we deem important for the guidance of the court upon the retrial.

The defendant was the agent and attorney of Sarah E. Sage for a period extending from the latter part of 1900 to about the close of 1907. During this time he attended to her business affairs, and received large sums of money for her as her agent and attorney, so that when a demand was finally made upon him for a settlement and the payment of the amount of money in his hands belonging to Mrs. Sage, according to the theory of the prosecution he should have had in his hands money belonging to her to the amount of upwards of $31,000. During the period covered by his employment defendant had from time to time rendered to Mrs. Sage written statements, showing the receipt and disbursement of moneys for her and balances on hand. When demand was made upon him for a final accounting and settlement, he furnished a statement of the condition of his account with Mrs. Sage, and, as witnesses for the prosecution testified, made certain oral statements or admissions concerning the money that should have been in his hands.

The defendant requested the court to charge the jury as follows: "In determining whether or not a crime has been committed in this case, apart from who committed it, you must not consider any admission or statement of the defendant; you must carefully exclude from your minds any and every statement made or alleged to be made by the defendant, when you come to consider whether a crime has been committed; and on that question you must look exclusively to the other evidence in the case. If the other evidence in the case does not show the commission of the crime charged beyond a reasonable doubt, then the defendant must be acquitted, notwithstanding his statements or admissions, if any. In other words, the law prohibits a conviction of crime solely upon the statements or admissions of the defendant." The court refused to give this instruction, and was justified in so doing. The vice of the instruction is that it requires that the *corpus delicti be proved beyond any reasonable doubt* before extrajudicial statements or admissions of defendant may be considered at all. This is not the law. The correct rule is laid down in People v. Jones, 123 Cal. 65, 55 Pac. 698. While it is true that there must be some proof of the body of the crime before extrajudicial statements or admissions of the defendant may be considered, it is not required that such proof shall go to the extent of establishing the crime *beyond all reasonable doubt.*

The evidence of the people tended to prove that the defendant had used for his own purposes from time to time money that had come into his hands as the agent and attorney of Mrs. Sage in the aggregate of between $30,000 and $32,000. Defendant claimed, and so testified, that of this amount he had borrowed from Mrs. Sage at different times sums of money aggregating about $30,000, and was and always had been able and ready to pay to her the balance. Mrs. Sage testified that she had never authorized or knew of any of the so-called "loans" to defendant. The evidence also tends to show substantially without dispute that at the times that defendant claimed to have borrowed such sums of money from Mrs. Sage he was her agent and attorney, and was in a very bad way financially; that he was in fact insolvent; but made no disclosure to her of his condition, and took or made the loans to himself without giving any security to Mrs. Sage therefor. Much prominence had been given in the cross-examination of defendant as to his want of good faith in his dealings with Mrs. Sage in negotiating the alleged loans from her. In this connection, although the court charged the jury that defendant had a legal right to borrow money from Mrs. Sage, it further charged the jury as follows: "You will observe that the essential element of the offense of embezzlement of which the defendant is charged is the fraudulent conversion or misappropriation by the defendant of property received by him in a trust capacity. In all matters connected with trust relations an agent, attorney, or trustee is bound to act in the highest good faith toward his principal, client, or beneficiary, and cannot obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

Under this instruction the jury would probably understand that though the money had been loaned by Mrs. Sage to defendant, yet if such loan or loans were obtained without a full disclosure of his condition by him to her, he would be guilty of embezzlement of the money thus loaned. If there could be any doubt about this construction being placed upon this instruction by the jury, such doubt is removed by the fact that after deliberating upon their verdict the jury returned into court and asked for the reading of this instruction. It and others were read, and they subsequently returned the verdict of guilty as charged. The only controverted matter before them was as to whether or not defendant had embezzled the money of Mrs. Sage. They naturally would suppose that this instruction was intended to guide them in determining that issue, and that it was intended to inform them that if he obtained the loan of her money from her by the slightest concealment he was guilty of embezzlement in so doing. While the latter part of the instruction was a correct statement of the law governing the relations of an agent, or attorney, and his principal concerning their respective duties and rights in their civil relations, it was misleading and incorrect as a rule for the guidance of a jury in determining whether or not the agent was guilty of embezzlement. Under the condition of the evidence as above indicated, and in the connection in which the latter part of the instruction was given, it was erroneous, and, we think, clearly prejudicial to the rights of the defendant.

We now come to a matter that must be discussed in several aspects. As we have already stated, the defendant was charged with the embezzlement of $37,075.42. The evidence given by the people proved that he should have had on hand when a final settlement was demanded of him about $32,000 in money belonging to Mrs. Sage. This amount includes the moneys that he claimed had been loaned to him, and which Mrs. Sage testified she had never loaned or consented should be loaned to defendant, or knew that he had loaned to himself. When the prosecution had closed its case in chief it was quite clear that if defendant was guilty at all, he was guilty of several distinct embezzlements. The statements that he rendered to Mrs. Sage from time to time indicated that he had from time to time loaned the money of Mrs. Sage, claimed to have been embezzled, in various amounts. Upon these statements the so-called loans were indicated by numbers only, although bona fide loans to other people were indicated by the name of the borrower. Mrs. Sage testified that she did not authorize these loans to defendant, and had never consented that he should loan such moneys to himself. There is abundant evidence in the writings to support her testimony. No reasonable person can read the record in this case without being convinced that if defendant is guilty at all, he is guilty of several distinct embezzlements. The money appropriated by him was not appropriated at one time, but at different times and in different amounts. It is perfectly clear from the record that when the demand was made upon defendant for a final settlement he did not have on hand $30,000 or any considerable portion thereof, but had used upwards of $30,000 of Mrs. Sage's money for his own purposes, but the appropriations had been made at various times and in various amounts. Under such circumstances each appropriation is a distinct offense. Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627. Under such circumstances a demand for payment of a general balance does not consolidate into one offense the several embezzlements previously committed.

Where several substantive offenses have been proved, either one of which would support a verdict of guilty under the indictment charging one offense, the district attorney should elect as to which offense he will rely upon for a conviction. People v. Castro, 133 Cal. 11, 65 Pac. 13; People v. Williams, 133 Cal. 165, 65 Pac. 323; Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627; Goodhue v. People, 94 Ill. 37; West v. People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254; State v. Crimmins, 31 Kan. 376, 2 Pac. 574; Mayo v. State, 30 Ala. 32; Stockwell v. State, 27 Ohio St. 563; Bainbridge v. State, 30 Ohio St. 264. In the case at bar a statement furnished by defendant to Mrs. Sage was introduced in evidence early in the trial. This statement showed the receipt of various sums of money during the period covered by the statement. Defendant asked the court to direct the district attorney to indicate which item he relied upon as supporting the charge set forth in the indictment. To this the district attorney replied in effect that he would connect all with the charge made in the indictment, and the request of the defendant was denied. In this the court committed no error. At this stage of the trial no offense at all had been proved, and it did not appear that more than one offense would be proved. Although the evidence at this point showed the receipt of several items or different sums of money, the embezzlement does not consist in the receipt of the money, but in its fraudulent appropriation. Before a fraudulent appropriation can be supported it must of course be shown that money has been received. It may happen that an aggregate amount may finally be appropriated by one act which was received in many items and at different times.

The defendant at several stages renewed his motion, and at different times objected to the admission of evidence upon the theory that the proof of the first item of receipts was in law an election to predicate the charge upon that item. Appellant is mistaken in this. The mere receipt of any item of money was not an embezzlement of such item, and when the motion for an election was renewed it is not at all clear that any embezzlement had been proved. No such motion was made at the close of the people's case or afterwards. Nevertheless the course pursued by the district attorney has resulted in an error prejudicial to the defendant in a vital right. The court instructed the jury that "if you should find that the defendant was the agent, attorney, or trustee of Sarah E. Sage, and as such agent, attorney, or trustee he received her money as charged in the indictment, and within three years prior to March 23, 1908, fraudulently appropriated it to an amount above $50 not in the due and lawful execution of his trust, but to his own use and benefit, you must find the defendant guilty as charged in the indictment." If there had been but one offense of embezzlement proven by the evidence this charge would have been correct; or if the court had limited the jury in clear and explicit language to the consideration of but one of the offenses proven. But in the case at bar, under the one charge set forth in the indictment several distinct and separate fraudulent appropriations had been proven, and no election had been made as to which was the substantive offense upon which the indictment was predicated. Under this instruction, in the condition of the evidence in the record, the jury could bring in a verdict of guilty as charged, although each juror founded his verdict upon a different offense from that considered proven by every other juror in the box. Under this instruction, the several jurors could range over the evidence at will, and pick out any one of the dozen or more offenses proven, and found his verdict thereon. No court can say from this record of which offense proven under this indictment the jury found the defendant guilty.

In the case of Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627, the defendant was charged with the embezzlement of $208, which was the aggregate of 18 months' rentals collected by him for his employers. The evidence showed that each month's rental had been converted as collected. The case was reversed, the court saying: "No man should be tried or convicted of several offenses when he is charged with but one."

But we need not go out of our own state for authority that such an instruction as we are now considering under the facts of the case is prejudicially erroneous. In People v. Williams, 133 Cal. 165, 65 Pac. 323, the evidence showed that defendant had been guilty of several offenses, to wit, several rapes upon the same person, and the court gave an instruction to the effect that if the jury found that defendant had had sexual intercourse with the prosecutrix at any time within three years before the finding of the indictment, she being under 16 years of age, etc., they must find him guilty. It does not appear that in the Williams Case any attempt had been made to secure an election by the prosecution, or that any objection had been made to the evidence proving the several offenses; yet the court held such an instruction erroneous. The court said: "A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge as to any one of these separate offenses. * * * Such a trial, upon a charge so indefinite as to circumstances of time or place, or any particular, except by the general designation, would be a judicial farce, if it were not something a great deal worse." The court concluded by saying that when a charge may be supported by proof of one of several distinct offenses the district attorney should indicate at the commencement of the trial what particular offense he intends to prove in support of the indictment. Such should be the rule in the case at bar, and no instruction should be given which will permit the jurors to found their verdict upon more than one offense.

In what we have said concerning the several offenses proven in this case we do not wish to be understood as indicating that only one offense can be proven by the district attorney. In embezzlement cases, as in some others, the proof is not always confined to proof of one offense. For the purpose of proving intent, system, or knowledge and the like, it is often proper to prove offenses other than the substantive offense upon which the indictment is predicated. People v. Gray, 66 Cal. 271, 5 Pac. 240; Edelhoff v. State, supra.

As the cause must be remanded for a new trial for the errors above discussed we do not deem it necessary to pass upon the other points raised by appellant.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

13 Cal. App. 429

GRIGGS v. HARTZOKE. (Civ. 548.)

(Court of Appeal, First District, California. May 16, 1910. Rehearing Denied July 14, 1910.)

1. Municipal Corporations (§ 978*)—Taxes—Collection by County—Statutes.

St. 1895, p. 219, and San Jose City Charter (St. 1897, p. 603) art. 4, provide that the city may by ordinance avail itself of the privilege of having its taxes assessed and collected by the county officers. *Held* that, reading the entire act of 1895, there was a clear intent to make provision for the collection of municipal taxes under the ordinary machinery employed in collecting taxes for county and state purposes, as established in chapter 7, tit. 9, pt. 3, of the Political Code (§§ 3746-3819), and hence the sale of property by county officers for delinquent city taxes is valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2104-2119; Dec. Dig. § 978.*]

2. Pleading (§ 129*)—Admissions by Failure to Deny.

In an action to quiet title in which the cross-complaint set up a tax title, plaintiff cannot assert that the levy was void, where she failed to deny in her answer the allegations of the cross-complaint of such levy; since plaintiff thereby admitted it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

3. Taxation (§ 773*)—Recitals in Tax Deed—Evidence.

Under Pol. Code, § 3786, a recital in a tax deed that a levy was made is prima facie evidence of its truth.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1541; Dec. Dig. § 773.*]

4. Taxation (§ 762*)—Certificates — Deeds—Amount of Taxes—Variance.

Pol. Code, § 3786, requires that tax deeds recite the matters recited in the certificate of sale, and by section 3776 the matters to be set forth in the certificate are enumerated and no mention is made of the total tax or the amount which goes to make it up. *Held*, that a variance between the tax deed and the certificate, in that the certificate recited that the tax levied for county purposes was $26.07, and the deed recited $20.04, did not affect the deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1515; Dec. Dig. § 762.*]

5. Taxation (§ 679*)—Sale of Property to State—Resale—Sale in Excess of Tax.

Under Pol. Code, § 3787, property deeded to the state for delinquent taxes belongs wholly to the state. Pol. Code, § 3817, requires that notice of sale by a state shall contain a statement of all taxes, penalties, costs, and expenses up to date of sale. *Held*, that where a notice erroneously computed the interest so that a deed from the state to a purchaser was for little more than the amount of the taxes, the deed was not void, since the state, as owner of the property, could sell it in excess of that amount.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

6. Taxation (§ 734*)—Sale of Property—Failure to Redeem—Rights of Owner.

Where an owner of property could have redeemed his land from a tax sale at which a deed thereof was given to the state before the state sold the land to a purchaser, the fact that the state thereafter sold the land for a little more than the amount of the taxes, expenses, etc., because of the erroneous computation of interest in the notice required to contain the amount of taxes, will not avoid the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Eveline A. Griggs against John Hartzoke. By judgment for defendant and from an order denying a motion for a new trial and to vacate a judgment, plaintiff appeals. Judgment and orders affirmed.

A. H. Jarman and Will M. Beggs, for appellant. Nicholas Bowden, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from the judgment in favor of defendant, also from an order denying her motion for a new trial and from an order denying her motion to vacate the judgment, amend the conclusions of law, and enter a different judgment; the last-mentioned motion being made under sections 663 and 663a of the Code of Civil Procedure.

The complaint in this action is so framed as to cover both the elements of an action in ejectment and an action to quiet title to the land described in the complaint, which is situated within the city of San Jose. Defendant answered, and also filed a cross-complaint, setting up title in himself by virtue of a tax deed.

The facts presented by the record are briefly as follows: On July 26, 1897, plaintiff purchased the property, and on March 1, 1898, it was assessed to her at $4,260. According to the assessment the amount of taxes on said property for the year 1898 was, for county purposes $26.07, for city purposes $54.74, and for state purposes $20.79. Said taxes were not paid, but became delinquent, and costs, penalties, and charges accrued thereon in the further sum of $13.17. Nearly five months after plaintiff purchased the property, to wit, December 21, 1897, she delivered to Eveline Dubois a mortgage thereon as security for the payment of $8,000, which was not recorded until March 12, 1898. The mortgage being for more than the assessed value of the property, it may be supposed that plaintiff assumed that the mortgagee would have the mortgage assessed and pay taxes thereon, and that there would be no assessment against the land as distinct from the mortgage. However that may be, taxes on the property for the year 1898 were not paid, nor were they paid for any year thereafter up to and including the year 1904. The taxes for the year 1898, as mentioned above, having become delinquent, the county tax collector on June 27, 1899, duly executed a certificate of sale of said property for nonpayment of city, county, and state taxes for that year to the state of California. Subsequently on July 25, 1904, he made and executed a deed to the state for the nonpayment of such taxes. Thereafter the tax collector, pursuant to an authorization from the controller, advertised the property for sale and sold the same to the defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The first question raised by the appellant is, Has the state, through the county tax collector, authority to sell property for delinquent municipal taxes due the city of San Jose? The city of San Jose is governed by charter (St. 1897, p. 592). Article 4 thereof deals with the subject of revenue and taxation, and in substance provides that the mayor and common council shall have full power and authority to assess, levy, and collect taxes, and that the city may by ordinance avail itself of the privilege of having its taxes assessed and collected by the county officers. It is also the duty of the mayor and common council, under section 4 of said article, in providing for levying and collecting city taxes, to be governed by state laws relating to the levying and collecting of state and county taxes, as far as applicable. This section further provides that "all sales and conveyances of property made and executed for the nonpayment of delinquent taxes shall have the same force and effect as when made and executed for the nonpayment of taxes levied for state and county purposes." By general law (St. 1895, p. 219) the Legislature provided that the governing body of any municipal corporation, such as the city, by ordinance might avail itself of the privilege of having its taxes assessed and collected by county officers. The common council of San Jose, pursuant to section 3 of article 4 of said charter, did pass such an ordinance, and thereby brought itself within the provisions of the said general law. Section 1 of the act of 1895 among other things provides that after a city, by ordinance, has availed itself of this act "all assessments shall be made and taxes collected by the assessor and tax collector of such county." Section 5 provides for the adding of a separate column for the city tax to the general county assessment book. It provides further that "such taxes so levied shall be collected at the same time and in the same manner as state and county taxes; and when collected the net amount ascertained by sections 6 and 7 of this act shall be paid to the * * * municipal corporation or city to which it respectively belongs, under the general requirements and penalties provided by law for the settlement of other taxes." Section 9 provides that "whenever any real property situate in any city or municipal corporation which has availed itself of the provisions of this act has been sold for taxes and has been redeemed, the money paid for such redemption shall be apportioned by the county treasurer to such city or municipal corporation, in the proportion which the tax due to such city or municipal corporation bears to the total tax for which such real property was sold."

In brief, a reading of the entire act of 1895 shows a clear intent on the part of the Legislature to make provision for the collection of municipal taxes under the ordinary machinery employed in collecting taxes for county and state purposes. The manner and time for the collection of state and county taxes are established in chapter 7, tit. 9, pt. 3, of the Political Code (sections 3746–3819, inclusive). And so far as the state and county taxes are concerned it is not disputed that the proceedings in the case under consideration were regular. Proceeding under the act of 1895 and the ordinance passed under the authority of the charter, the city taxes for which the land in controversy was sold were collected at the same time and in the same manner as the state and county taxes by the county tax collector, and in view of the circumstances related this official not only had the power, but it was his plain duty to make the collection in this way.

Plaintiff next contends that there is no evidence that the city of San Jose ever authorized or levied a tax for the year 1898, and that therefore the deed made by the county tax collector to defendant is void. By failure to deny in her answer the allegation in the cross-complaint of such levy the plaintiff admitted it. Moreover the deed of the property to the state recited that such a levy was made, and under the provisions of section 3786 of the Political Code such recital is prima facie evidence of its truth. Rollins v. Wright, 93 Cal. 395, 29 Pac. 58.

The deed from William A. January, tax collector, to the defendant was executed in the usual form, and it was sufficient in form to divest the title of the state. Section 3898, Pol. Code; Chapman v. Zoberlein, 152 Cal. 216, 92 Pac. 188; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936. Section 3786 of the Political Code requires that the tax deed recite the matters recited in the certificate of sale, and by section 3776 of the same Code the matters to be set forth in the certificate of sale are enumerated. In this case the certificate of sale recited that the tax levied for county purposes was $26.07. The deed recited that the tax for county purposes was $26.04. Plaintiff claims that these recitals being different, the deed to the state is void; but neither the total tax nor the amounts which go to make it up are required to be stated. It is the amount of the assessment which must be recited, and that is the same in both documents.

The notice of sale by the state is required to contain a detailed statement of all delinquent taxes, penalties, costs, and expenses up to the date of sale. Pol. Code, § 3897. The notice under which the sale was made in this case incorrectly computed the interest, and accordingly the property was sold for an amount slightly in excess of the amount of taxes, penalties, interest, and costs; and plaintiff claims that on this account the deed from the state to the defendant is void. Under the statute as it formerly read, when the property was sold to the person who would take the least quantity of land for the amount of the tax, a sale for more than the tax was void. But under the present law this property belonged to the state, and it might sell it for a sum in excess of the amount of the tax. Fox v. Wright, 152 Cal. 59, 62, 91 Pac. 1005. And while it may be that if the state failed to publish, post, or mail the required notice of sale, or improperly described the property in such notice, a sale made thereunder might be void as to plaintiff, still in this case, as the plaintiff before the sale could have tendered the true amount due and redeemed the property, the mere fact that it was sold for a little more than the exact amount due does not render the sale void.

The judgment and orders are affirmed.

I concur: COOPER, P. J.

HALL, J. I concur in the judgment, but in addition to what is said in the opinion prepared by Justice KERRIGAN concerning the regularity of the sale of the property in suit by the state to the defendant, I am of the opinion that plaintiff is in no position to attack the title or possession of defendant, who is in possession claiming title under the sale by the state and the deed thereunder. By the deed to the state, under the sale for unpaid taxes, the plaintiff was divested of all title to the property in suit. "Such deed conveys to the state the absolute title to the property described therein." * * * Pol. Code, § 3787. Her only right was a right to redeem or repurchase from the state, by complying with the provisions of section 3817, Pol. Code. This she has not done or offered to do. The owner of real property sold and conveyed to the state for unpaid taxes has no title thereto until he has redeemed under the provisions of section 3817, Pol. Code. Such redemption is in effect a repurchase. Not only is it expressly provided by section 3787 that the deed to the state conveys the absolute title to the state, but it is provided by section 3817 that the recordation of the controller's receipt for the redemption money shall have the effect of a reconveyance of the interest conveyed by the deed to the state. It is thus clear that the delinquent property owner has no title intermediate the sale and deed to the state, and the redemption from the state. Having neither redeemed nor offered to redeem under the provisions of section 3817, Pol. Code, plaintiff is in no position to attack either the possession or title of defendant, claiming under the sale by the state and the deed thereunder.

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13 Cal. App. 382

RECLAMATION DIST. NO. 765 v. McPHEE.

(Civ. 639.)

(Court of Appeal, Third District, California. May 9, 1910. Rehearing Denied July 8, 1910.)

1. Drains (§ 14*)—Reclamation Districts—Publication of Petition.

Pol. Code, § 3447, provides that a petition for the formation of a reclamation district "must be published for four weeks next preceding the hearing thereof." The affidavit of publication of a petition for the formation of a district showed its publication on March 11, for the first time, and that the publication ended on April 3d, in the regular issue of a newspaper named therein. The hearing as fixed by the notice was set down for April 4th. *Held*, that the publication did not conform to the requirements of the statute.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

2. Drains (§ 14*)—Reclamation Districts—Jurisdiction to Form District.

Under Pol. Code, § 3447, the due publication of the petition and notice of hearing is jurisdictional.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

3. Drains (§ 13*)—Reclamation Districts—Organization—"De Facto Corporations."

Where the proceedings to organize a reclamation district were entirely regular in form, except for the insufficiency of the publication of the petition for its formation, under the rule defining a de facto corporation as one which exists where a number of persons have organized and acted as a corporation, have conducted their affairs to some extent by the methods and through the officers usually employed by corporations, and have assumed the appearance, at least, of a legal corporate body, the reclamation district had a de facto existence.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 4; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 2, pp. 1841–1843.]

4. Drains (§ 14*)—Reclamation District—Organization—"De Facto Corporations"—Collateral Attack.

The validity of a "de facto reclamation" district cannot be attacked collaterally in proceedings to foreclose a lien of an assessment, levied by the district upon land.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

Appeal from Superior Court; Yolo County; K. S. Mahon, Judge.

Action by Reclamation District No. 765, against Anna McPhee. Judgment for plaintiff, and defendant appeals. Affirmed.

Rehearing denied; Beatty, C. J., and Angellotti and Sloss, JJ., dissenting.

Hudson Grant, for appellant. A. L. Shinn and Arthur Huston, for respondent.

CHIPMAN, P. J. The judgment in this case was reversed, after a careful and somewhat extended discussion of the points involved, by Justice Burnett. Upon the petition of plaintiff a rehearing was ordered and the cause is again before us for consideration.

In our former opinion we held that the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

board of supervisors was without jurisdiction to create the district, for the reason that there was a failure to publish the petition for its organization for the statutory period; and, further, that the validity of the organization could be attacked in this action. Since the opinion was filed the decision of the Supreme Court in Keech v. Joplin, 106 Pac. 222, has been called to our attention, which, it is claimed, holds that the organization of the district can only be questioned by quo warranto. Upon this point as well as upon the sufficiency of the publication of the petition the rehearing was particularly urged.

The action is to foreclose the lien of an assessment levied by the complaining district upon the lands of the defendant, Anna McPhee.

1. If the case were to turn wholly upon the sufficiency of the publication of the petition and notice of hearing thereof, as required by section 3447 of the Political Code, we should still incline to adhere to our former opinion. The statute reads: "The petition must be verified by the affidavit of one of the petitioners and must be published for four weeks next preceding the hearing thereof in some newspaper published in the county in which the lands are situated, * * * and an affidavit of publication must be filed with such petition."

Plaintiff at the trial introduced the proof of publication which was admitted over defendant's objection as insufficient to show compliance with the statute. No other proof was offered on that question. The hearing, as fixed by the notice published with the petition, was set down for April 4, 1905, at 10 o'clock a. m., as the time also for hearing the petition, and the order purporting to form the reclamation district was made and entered on that day. The affidavit of publication showed the following: "That the notice of petition, a true and correct copy of which is hereto annexed, * * * has been printed and published four weeks in said newspaper, commencing on March 11, 1905, and ending on April 3, 1905, both days inclusive, and in the regular and entire issue thereof, as follows." Then follow the days in March and April on which the notice was published, commencing March 11th and ending April 3d. Did this satisfy the statute which required the petition to be "published for four weeks next preceding the hearing thereof"? "A week consists of seven consecutive days." Pol. Code, § 3258. The Code rule of computation (Code Civ. Proc. § 12) excludes March 11th and includes all of April 3d which would make the earliest day for the hearing April 8th, if the publication must continue for four weeks next preceding the hearing. That due publication of the petition and notice of the hearing is jurisdictional cannot be doubted. Williams v. Sacramento Co., 58 Cal. 239; In Matter of Central Irr. Dist., 117 Cal. 390, 49 Pac. 354. In Williams v. Board of Supervisors, 58 Cal. 237, which was a case similar to the one here, the day fixed for the hearing was June 17th and the publication was made May 20th, 27th, June 4th and 12th, but was held insufficient. The court said: "It is obvious that the petition could not be published for four weeks *next preceding* its hearing, unless it was published for four *consecutive* weeks. And inasmuch as the petition could not be published *at least once* a week for that period, and since the statute defines a week to be seven consecutive days, it necessarily results that it could not be published for four weeks next preceding its hearing, unless it was published at least once every seven days for the period of four weeks next preceding the hearing." See, also, S. & L. Soc. v. Thompson, 32 Cal. 347; Misch v. Mayhew, 51 Cal. 514; Hagenmeyer v. Mendocino Co., 82 Cal. 214, 23 Pac. 14; Derby v. City of Modesto, 104 Cal. 515, 38 Pac. 900. In Sherwood v. Wallin, 154 Cal. 735, 99 Pac. 191, the statute required the publication to be "at least two weeks before such action in some newspaper," etc. The meeting was set for March 4th. The publication of notice was made on February 10th and February 17th, one insertion on each date, in a daily newspaper, which was held sufficient, for the court said: "It may be assumed (thus implying) that the language of the statute is such as to require a publication once a week for two weeks before the day noticed for the meeting," and this was done.

2. Could the validity of the corporation be attacked in this proceeding? The position of respondent is that section 803 of the Code of Civil Procedure has prescribed a remedy for usurpation of corporate functions by quo warranto, and that "such remedy is exclusive of all other remedies, except in those special cases where another remedy is also given by statute, such as election contests." Our attention is also called to section 358 of the Civil Code, which provides as follows: "The due incorporation of any company claiming in good faith to be a corporation *under this part*, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the Attorney General." As to this latter point it might be answered that the plaintiff is not claiming to be a corporation "under this part," i. e., part 4 of the Civil Code. But whether applicable or not, we are still confronted with the claim made that a de facto corporation was shown, and that the existence of such a corporation cannot be collaterally questioned, where it is in good faith exercising the functions of a corporation. Apart from section 358 of the Civil Code we understand that the

rule contended for by respondent is the same where either a de jure or a de facto corporation is shown. Here "due incorporation" was averred in the complaint and denied in the answer. In our former opinion it was held that the "due" incorporation, i. e., a de jure corporation, was not shown, and that as there was no evidence introduced specifically addressed to the establishment of a de facto corporation, there was a failure of proof of any corporation. It did appear, however, that a petition for the formation of the district was signed and notice of its hearing given, though insufficient as to time of publication; at the appointed time it was heard and upon the hearing the board of supervisors made and entered its order "purporting to form the said reclamation district," and "ordered that the said petition and application hereto (i. e., to the order) attached be, and the same is hereby approved." The record further shows: "Thereupon the plaintiff offered in evidence (over objection of defendant to the jurisdiction of the board of supervisors) the papers filed in the matter of said reclamation district, showing the appointment of trustees, and other proceedings, regular in form, terminating with the assessment list, which showed an assessment of $1,709.90 against the lands above described as tracts 5 and 6." In Martin v. Deetz, 102 Cal. 55, 65, 36 Pac. 368, 371, 41 Am. St. Rep. 151, the court said: "An averment of the existence of a de facto corporation is as issuable as an averment of the existence of a corporation de jure; and its existence does not consist in the mere assertion of its existence in a pleading. What is a corporation de facto? It exists where a number of persons have *organized and acted* as a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body." In the case here no claim is made that the proceedings were not taken in good faith; no objection was made to the evidence showing what the corporation had done in pursuance of the purposes of its organization, except that the proof of publication of notice was insufficient. The answer denied that the district "was or is duly, or at all, organized as a reclamation district; deny that it constitutes a public corporation, or public agency, under, pursuant to, or in accordance with, the statutes of California, or any state; or under the by-laws adopted by said reclamation district, or at all." No objection having been made to evidence tending to prove a de facto corporation upon the ground that it was not within the issues, we may consider it under the averments and denials. It is not necessary that some particular period of time should elapse in order to show a de facto existence. Such existence depends rather upon what has been done under and by virtue of the organization, rather than upon the length of time which may elapse after its inception. The definition of a de facto corporation, given in Martin v. Deetz, supra, would seem to have been met in the present case.

We have then the question: "Can the validity of a de facto reclamation district be attacked collaterally?" In answering this question the fact that the petition was not published as required by law seems to me to be a negligible quantity. That infirmity goes to the de jure organization and does not preclude the idea of an existence de facto. De facto organizations are upheld upon grounds distinct from those upon which a de jure organization rests. It was held in Martin v. Deetz, supra, that where it appeared that the corporation has no de facto existence its right to exist may be attacked collaterally in a private action. But where de facto existence is shown we understand the rule as enunciated in that case to be otherwise, and its right to exist can be determined only upon quo warranto proceedings. It has been so held in several cases as to private corporations under section 358 of the Civil Code. Martin v. Deetz, supra; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. 60; People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50. In People v. La Rue, 67 Cal. 526, 530, 8 Pac. 84, 87, which was the case of a swamp land district, the court said: "A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514, 777, was an action to enjoin the sale of lands for assessments levied under an irrigation district organization. Said the court: "An irrigation district of this character is a public corporation, formed under a general law, and its object is the promotion of the general welfare. People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. 1047, and cases there cited. Corporations organized under the act of the Legislature, popularly known as the 'Wright Act' [Stat. 1887, c. 34] being public corporations, it is immaterial whether they be corporations de jure or de facto. That is a matter which cannot be inquired into upon collateral attack; and in a case like the present, where the validity of an assessment levied by such a corporation is the subject of litigation, the validity of such assessment does in no way rest upon the fact of the de jure character of the corporation. This principle must be considered settled law in this state.

Dean v. Davis, 51 Cal. 411; Reclamation Dist. v. Gray, 95 Cal. 601 [30 Pac. 779]; Swamp L. Dist. No. 150 v. Silver, 98 Cal. 53 [32 Pac. 866]." See People v. Linda Vista Irr. Dist., 128 Cal. 477, 484, 61 Pac. 86. The principle laid down in Quint v. Hoffman, supra, and Reclamation Dist. v. Turner, 104 Cal. 335, 37 Pac. 1038, was approved in Keech v. Joplin, 106 Pac. 222. Said the court: "The evidence abundantly shows that the district has been organized and that it has been acting as a district. In other words, that it is a de facto district. It is a public corporation of a similar character to irrigation districts and reclamation districts. The law is well settled that the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in quo warranto at the suit of the state."

At the former hearing the stress of the argument was placed upon the question whether a de jure district had been created, and our decision rested mainly upon the right of defendant to call in question its validity where it clearly appeared, upon plaintiff's own showing, that the supervisors were without jurisdiction. It was assumed that plaintiff had not shown de facto existence. Inasmuch, however, as this fact now appears to us to have been established, we think that the decisions of our Supreme Court compel a conclusion favorable to plaintiff's contention.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

MEMORANDUM DECISIONS

13 Cal. App. 300

PEOPLE v. DUNNING. (Cr. 113.) (Court of Appeal, Third District, California. April 25, 1910.) Appeal from Superior Court, Solano County; A. J. Buckles, Judge. W. H. Dunning was convicted of lewd and lascivious conduct with a child, and he appeals. Affirmed. Carl E. Lindsay, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. Defendant was convicted of the crime of lewd and lascivious conduct with a child, as provided in section 288 of the Penal Code, and he appealed from the judgment and the order denying his motion for a new trial. No brief has been filed by appellant, and no appearance was made on his behalf when the cause was called for oral argument. The record, however, has been carefully examined and we find that the evidence abundantly supports the verdict, the instructions fully and accurately presented the questions of law involved, and no error prejudicial to the substantial rights of appellant appears to have been committed. The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 298

PEOPLE v. HOFFMAN. (Cr. 116.) (Court of Appeal, Third District, California. April 25, 1910.) Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge. O. E. Hoffman was convicted of arson in the second degree, and he appeals. Affirmed. Charles H. Crocker, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. The case was submitted without oral or written argument on the part of appellant. Since our attention has not been called to any alleged error, we would be justified in sustaining the action of the court below without any examination of the record. We have, however, carefully read the transcript, and we find therein nothing to demand a reversal of the judgment. The evidence against the defendant was circumstantial in its nature; but we are not prepared to say that it was insufficient to warrant the verdict of guilty of arson in the second degree. The instructions were fair and complete, and in the trial of the case all the rights of the defendant seem to have been scrupulously regarded and protected by the learned trial judge. No error appearing, the judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 299

PEOPLE v. STANLEY. (Cr. 125.) (Court of Appeal, Third District, California. April 25, 1910.) Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge. James R. Stanley was convicted of forgery, and appeals. Affirmed. Beard & Beard and I. R. Wells, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. The defendant was convicted of forgery, and sentenced to the penitentiary for the period of five years. A motion for a new trial was made and denied, and a notice of appeal from this order, and also from the judgment, was given as provided by section 1239 of the Penal Code. No further proceeding seems to have been taken by appellant, probably for the reason that his counsel were satisfied after deliberation that no error was committed during the trial that would justify a reversal of the judgment. At any rate, an examination of the record convinces us that no reason exists for an interference with the action of the trial court, and the judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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